Approved: May 31, 2002
Date

MINUTES OF THE HOUSE JUDICIARY COMMITTEE.

The meeting was called to order by Chairperson Michael R. O'Neal at 3:30 p.m. on March 25, 2002 in Room 313-S of the Capitol.

All members were present except:
Representative Andrew Howell - Excused
Representative Tom Klein - Excused
Representative Doug Patterson - Excused

Committee staff present:
Jerry Ann Donaldson, Department of Legislative Research
Jill Wolters, Department of Revisor of Statutes
Sherman Parks, Department of Revisor of Statutes
Cindy O'Neal, Committee Secretary

Conferees appearing before the committee:
Barbara Tombs, Executive Director, Kansas Sentencing Commission
Paul Morrison, Kansas Sentencing Commission
Ed Collister, Kansas Bar Association
John Parisi, Kansas Trial Lawyers Association
John Reinhart, AARP
Tim Madden, Kansas Department of Corrections
Mark Stafford, Kansas State Board of Healing Arts
Jerry Slaughter, Kansas Medical Society
Gail Edson, Kansas Hospital Association
Jim Sergeant, Wesley Medical Center
Chip Wheelen, Kansas Association of Osteopathic Medicine
Bud Burke, Association Health Information Outsourcing Services

Hearing on **SB 521 - Departure sentencing procedure under sentencing guidelines act**, was opened.

Barbara Tombs, Executive Director, Kansas Sentencing Commission, reminded the committee that the United States Supreme Court held that in *Apprendi v. New Jersey* "other than the fact of a prior conviction, any fact that increases the penalty for that crime beyond the statutory maximum, must be submitted to the jury and proved beyond a reasonable doubt ." The decision of the U.S. Supreme Court raises questions of constitutionality in all upward departures under the Kansas Sentencing Guidelines. (Attachment 1) A subcommittee was appointed by the Kansas Sentencing Commission to address this issue and proposed the current bill.

Paul Morrison, Kansas Sentencing Commission, explained that the proposed bill would enact a bifurcated jury proceeding which would first determine the innocence or guilt and then in the event of a guilty verdict the same jury would determine in a separate proceeding if any aggravating circumstance were present that would serve to enhance a maximum sentence. (Attachment 2)

Ed Collister, Kansas Bar Association, was concerned that the proposed legislation would place additional work on the courts that are already under funded. He opposed the bifurcated jury system and proposed simply increasing the grid boxes so the sentences could be doubled if the judge sees fit to do so. (Attachment 3)

Written testimony was provided in by Representative Jim Garner. (Attachment 4)

Hearing on **SB 521** was closed.

Hearing on **SB 377 - Access to health care records by patients and authorized representatives** , was opened.

John Parisi, Kansas Trial Lawyers Association, appeared before the committee as a proponent of the bill. He stated that currently 32 states have statutes that set rates for coping medical records. Health Insurance

MINUTES OF THE HOUSE JUDICIARY COMMITTEE at 3:30 p.m. on March 25, 2002 in Room 313-S of the Capitol.

Portability and Accountability Act (HIPPA) does not become fully enacted until next year and that the proposed bill would take care of Kansas citizens today. He suggested that the problem with HIPPA is that it does not specify what a "reasonable" charge is. (Attachment 5)

Mark Stafford, Kansas State Board of Healing Arts, proposed amendments to their regulations that would be consistent with HIPPA regarding a patient's right to access records containing health information. He stated that in 2000 the Board received only thirty complaints about not receiving medical records that were requested and all except one of those complaints have been resolved. (Attachment 6)

Tim Madden, Kansas Department of Corrections, requested the committee amend the proposed bill to include access exemptions provided for by federal law in regard to inmate health care records as well as information obtained from confidential sources. (Attachment 7)

John Reinhart, AARP, preferred that Kansas adopt similar legislation as Arizona, Kentucky and Montana who do not allow charges to consumers for obtaining a copy of their own medical records. (Attachment 8)

Jerry Slaughter, Kansas Medical Society, had concerns with the proposed bill, specifically the costs. It would be confusing to Kansas providers as to which law they follow if Kansas statute sets a fee and HIPPA allows for a reasonable fee. He proposed the following amendments: requiring a good faith effort to meet the request before the filing of a suit, allowing providers to get reasonably reimbursed for the costs of providing such medical required; use the term "costs of supplies and labor" and sunset the bill to April 14, 2003, which is when HIPPA will take effect. (Attachment 9)

Gail Edson, Kansas Hospital Association, informed the committee that HIPPA actually became effective April 14, 2001 but won't be enforceable until April 14, 2003. **SB 377** does not require anything different than HIPPA does and therefore is not needed. By passing the proposed bill there would be the potential for confusion. (Attachment 10)

Jim Sergeant, Wesley Medical Center, stated that the largest costs in making copies is the actual labor it takes to review, make copies and mail. In 2001 they had 1,800 requests for copies of medical records. He suggested an amendment to the cost so it would be a $20 fee for costs of supplies and labor and $.50 per page for copies. (Attachment 11)

Chip Wheelen, Kansas Association of Osteopathic Medicine, appeared in opposition to the proposed bill as currently worded. He proposed a $15 fee for service fees and $.35 per page for copies. (Attachment 12)

Bud Burke, Association Health Information Outsourcing Services, was opposed to the proposed bill and requested that it be amended to provide for an escalator for costs in the future so the legislature would not have to visit the issue every several years. (Attachment 13)

Written testimony was provided by:

- Keys for Networking (Attachment 14)
- Kansas Association for Medically Underserved (Attachment 15)
- American Cancer Society (Attachment 16)
- Kansas AFL-CIO (Attachment 17)
- Kansas Retired Teachers Association (Attachment 18)
- CASA of Shawnee County (Attachment 19)
- Internal Medicine Associates (Attachment 20)
- Kansas Academy of Family Physicians (Attachment 21)
- Kansas Optometric Association (Attachment 22)
- Kansas Bar Association (Attachment 23)

Hearing on **SB 377** was closed.

The committee meeting adjourned at 6:30 p.m.

State of Kansas

KANSAS SENTENCING COMMISSION

House Judiciary Committee
Testimony on SB 521
Barbara Tombs, Executive Director
March 25, 2002

The Kansas Sentencing Commission introduced Senate Bill 521 to address the constitutionality issue relating to upward departures under the Kansas Sentencing Guidelines Act that was raised in the recent U.S. Supreme Court decision *Apprendi v. New Jersey* and the subsequent Kansas Supreme Court decision *State v. Gould.*

UNITED STATES SUPREME COURT DECISION – *APPRENDI v. NEW JERSEY*

On June 26, 2000, the United States Supreme Court issued a decision in the case of *Apprendi v. New Jersey*, which reversed *Apprendi's* sentence and held that the right to a jury trial under the Sixth Amendment as applied to a state under the Fourteenth Amendment due process clause, requires that "any fact (other than prior convictions) that increases the maximum penalty for a crime must be submitted to a jury and proven beyond a reasonable doubt." *Apprendi* was originally charged with 23 criminal counts stemming from numerous incidents involving unlawful possession of firearms and violent acts. At least one of the unlawful possession of weapons charges was connected to an incident in which *Apprendi* fired several bullets into the home of an African-American family who had recently moved into a previously all white neighborhood. *Apprendi* subsequently told police officers that he fired at the house because the occupants were "black in color and he didn't want them in the neighborhood." *Apprendi* eventually entered into a plea agreement in which he pled guilty to three counts in return for a dismissal of the other twenty counts. One of the charges he pled guilty to was an unlawful possession of a weapon related to the shooting incident involving the home of the African-American family.

Under a New Jersey "hate crime" law, the penalty for an offense may be extended if the judge finds, by a preponderance of the evidence, that "the defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity." Under New Jersey law, the penalty for the crime of unlawful possession of a weapon is five to ten years in prison. When sentencing *Apprendi* on the unlawful possession of a weapon count the judge made a finding that *Apprendi* had committed the crime with the intent to intimidate individuals on the basis of race or color and sentenced *Apprendi* to twelve years in prison on that count, utilizing the sentence extension provision of the hate crime statute.

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Apprendi appealed his sentence, claiming that the provision of the New Jersey hate crime statute allowing the judge to determine that a crime was committed with the purpose to intimidate an individual based on race, color etc., was unconstitutional. In the appeal, *Apprendi* argued that only a jury had the constitutional authority to decide a fact that could increase the length of a sentence and that the jury would have to make the finding "beyond a reasonable doubt" instead of the judge making the finding based on a "preponderance of the evidence."

Upon review of this case, the U.S. Supreme Court reversed the *Apprendi* decision and held that "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum, must be submitted to the jury and proved beyond a reasonable doubt." Further in its opinion, the Court explains that the "relevant inquiry" in the case is "does the required finding by the sentencing judge expose the defendant to a greater punishment than authorized by the jury's guilty verdict?" The Court stated that "when a judge's finding based on a mere preponderance of the evidence authorizes an increase in the maximum punishment, it is appropriately characterized as a tail which wags the dog of the substantive offense" and thus is impermissible.

The *Apprendi* decision by the U.S. Supreme Court raises questions of the constitutionality of all upward departures under the Kansas Sentencing Guidelines Act (KSGA). Under the KSGA, in order for a sentencing judge to impose an upward departure sentence the judge must find "substantial and compelling reasons to impose a departure" and the judge shall "state on the record at the time of sentencing the substantial and compelling reasons for the departure" - K.S.A. 2000 Supp. 21-4716(a). The sentencing judge reviews the information before the court, including information that has not been provided to the jury, and determines whether to impose an upward departure sentence utilizing a preponderance of the evidence standard. If the judge finds and sets forth "substantial and compelling reasons for a departure" the judge may extend the length of a presumptive prison sentence up to double the "aggravated" presumptive prison term, or the judge may order an upward dispositional departure to send an offender who otherwise would receive a presumptive nonprison sentence to serve a prison sentence or both. While the offender is provided with an opportunity for a hearing on any proposed departure sentence in which evidence may be presented opposing any upward departure sentence, the decision is left solely to the judge as to whether to impose a departure sentence.

Under the *Apprendi* decision, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proven beyond a reasonable doubt." However, under the KSGA, the sentencing judge makes the determination as to whether one or more of the statutorily listed aggravating factors or non-statutory departure reasons have been met and justifies imposing a departure sentence. Therefore, it appears that the procedure utilized by Kansas for imposing departure sentences is in conflict with the *Apprendi* constitutionality test. Secondly, the KSGA imposes the standard that a judge's reasons for departure must be by a preponderance of the evidence, which does not appear to fully meet the "beyond a reasonable doubt standard" required by *Apprendi.*

KANSAS SUPREME COURT DECISION - *STATE v. GOULD*

State v. Gould, decided May 25, 2001, was the case of first impression for the Kansas Supreme Court to address an application of the United States Supreme Court ruling in *Apprendi v. New Jersey*, to the "upward departure" statute of the Kansas Sentencing Guidelines Act. As noted earlier, in *Apprendi* the U.S. Supreme Court essentially ruled any fact that may enhance a maximum sentence must be decided by a jury, based upon proof beyond a reasonable doubt.

In *Gould* the offender was convicted of three counts of child abuse and her sentence was enhanced from a maximum of 34 months imprisonment for each of the first two counts (i.e., 68 months) to 136 months plus 36 months of postrelease supervision. This resulted from an "upward durational departure" as determined by the sentencing court which had decided that at least three aggravating factors were present to warrant an enhancement of the maximum sentence. The Kansas Supreme Court in applying *Apprendi* quoted directly from *Apprendi* in part, stating: "any fact that increases the penalty for a crime beyond the prescribed statutory maximum, must be submitted to a jury, and proved beyond a reasonable doubt." The Court then specifically ruled: "The Kansas scheme for imposing upward departure sentences, embodied in K.S.A. 2000 Supp. 21-4716 is unconstitutional on its face."

The Court also noted in *Gould* that although Kansas statutory law allowed an upward departure based upon the sentencing court finding one or more aggravating circumstances, "The statute is silent on a burden of proof to be utilized by the district judge to establish a substantial and compelling reason to depart..."

The Court declined to apply its ruling in *Gould* regarding "upward departure" sentences retroactively but the Court set a cutoff date of June 26, 2000 (the date *Apprendi* was decided) as the benchmark for the application of *Apprendi* to "upward departure" sentences in Kansas. The court recently affirmed its position on the issue of retroactivity in *Whisler v. State.* In *Gould,* the Court also noted that downward departures were not affected by the *Apprendi* ruling. Since the Kansas Supreme Court's decision in *Gould*, however, the Kansas Court of Appeals has released the *State v. Carr* decision, involving "upward dispositional departures" and has held that upward dispositional departure are not affected by the *Gould* decision. That decision was appealed to the Kansas Supreme Court and oral arguments were held on January 23, 2002. At the current time there are several *Apprendi* related cases pending at both the federal and state level.

SENTENCING COMMISSION RECOMMENDATIONS

Upon the U.S. Supreme Court decision regarding *Apprendi v. New Jersey,* the Sentencing Commission realized the potential constitutional issues surrounding the procedures for imposition of upward departure sentences under the KSGA. A Subcommittee was appointed in August of 2000 to review and develop potential remedies to issues raised in *Apprendi*. Members of the Subcommittee include: Judge Robert Lewis, Kansas Court of Appeals; Judge Paul Miller, District Court Judge; Paul Morrison, Johnson County District Attorney; Robert Clause, Kansas Attorney General's Office; Rick Kittel, Board of Indigents' Defense Services; Irving Shaw, Defense Attorney; and Representative Jan Pauls, Kansas House of Representatives. Paul Morrison serves as Chairman of the Subcommittee.

The Subcommittee initially met in October, 2000 to discuss various options that would address the violation of due process issue identified in *Apprendi.* The Subcommittee was also aware that both federal and state appeal cases involving upward departures would be filed and continued to meet to develop potential corrective options, although they decided to wait until the Kansas Supreme Court ruled on the upward departure issue before bringing forth any legislation. Upon the Court's ruling in *State v. Gould*, the Subcommittee drafted legislation intended to satisfy the constitutional issues raised in both *Apprendi* and *Gould.*

The proposed legislation would amend K.S.A. 21-4718, the statute that presently outlines the procedure for departure sentencing. The amendment would require service of a written notice within 5 days of the arraignment, if either the district court judge, or the prosecution intended to seek an upward durational departure sentence. A bifurcated jury proceeding would first determine the issue of innocence or guilt, then in the event of a guilty verdict the same jury would

next determine in a separate proceeding immediately following that verdict, if any aggravating circumstances were present that might serve to enhance a maximum sentence (other than proof of a prior conviction).

This jury determination of the aggravating circumstances would be based upon the proof beyond a "reasonable doubt" standard. A unanimous jury verdict would be required to determine if any aggravating circumstances were involved and a special jury verdict form would be used to reflect the jury's determinations.

The same procedures as are now required in a departure sentence hearing would be retained and the sentencing court would continue to determine whether or not an upward durational departure is warranted on a case-by-case basis. However, the sentencing court's decision would be based upon the jury's determinations regarding aggravating circumstances.

The bifurcated jury proceeding contained in the proposed legislation is based upon the Kansas capital murder statute, K.S.A. 21-4624, which the Kansas Supreme Court recently held constitutional in *State v. Kleypas*. This bifurcated jury procedure is presently being used in several Kansas Judicial Districts subsequent to the *Gould* decision, to address the application of upward durational departure sentences in the appropriate cases.

The proposed legislation would also amend K.S.A. 2001 Supp. 21-4716, the statute found to be "unconstitutional" on its face in *State v. Gould.* The amendment would add specific language to clarify the trial jury's role in determining aggravating circumstances, which could result in an upward durational departure. The sentencing court would still make the determination if any of the aggravating circumstances were substantial and compelling enough to warrant an upward durational departure.

The proposed legislation addresses upward *durational* departure sentences only at this time. However, the ruling of the Kansas Supreme Court in *State v. Carr* addressing the issue of whether or not the *Gould* decision should also apply to upward *dispositional* departures, in addition to upward *durational* departures, is still forthcoming and may required additional legislative action.

Testimony to the House Judiciary Committee

Regarding Senate Bill 521

Paul J. Morrison, District Attorney - Tenth Judicial District
March 25, 2002

I'm here today to testify in support of Senate Bill 521. In my opinion, it is one of the most important pieces of legislation for your consideration this year.

Sentencing Guidelines became effective in July, 1993. It was a culmination of four years of work by the Sentencing Commission, which had been created in 1989. As I'm sure most of you are aware, one of the biggest goals of the Guidelines was to promote public safety by incarcerating dangerous offenders. Other goals included reducing sentencing disparity and providing a mechanism for the legislature to be able to predict future prison needs. As such, felons' sentences fell into narrowly prescribed ranges. These ranges provided little deviation for sentencing judges.

These narrowly defined ranges were problematic. There needed to be a mechanism to allow for the judge to have discretion for the exceptional case. As such, the Commission recommended and the legislature passed a mechanism in K.S.A. 21-4716 to allow for departures. These departures allowed judges to either show mercy or impose harsher penalties, depending on the circumstances of the individual case. They are extremely important to our system and in the year 2000, were used in approximately 15% of felony sentences. Statutory criteria used in these departures was developed several years ago and has worked very well. It's interesting to note that the range of upward and downward departures is split almost evenly. Until recently judges have been allowed to use their discretion in imposing departures. Both prosecutors and defense attorneys believe these are absolutely necessary to the integrity of the system.

In April of 2000, the United States Supreme Court in Apprendi v. New Jersey ruled that a departure that increases a defendant's sentence must be determined by the trial jury. The Kansas Supreme Court soon followed in May of 2001 in State v. Gould, wherein the Kansas Supreme Court held the entire statutory framework for departures to be unconstitutional. As such, we have no mechanism for mitigating or aggravating departures. This is extremely significant in light of the fact that approximately 15% of felony cases in the year 2000 were departures. Much of this discretion was exercised in giving dangerous offenders tougher sentences when

appropriate under these laws. Much of it was exercised in showing mercy in situations where the presumptive sentence might be too tough.

Senate Bill 521 rectifies the problems with the old law by bringing it into conformance with the Apprendi v. New Jersey decision. Basically, it requires that the finding of aggravating circumstances which allow for an increased prison term (upward durational departure) be made by the trial jury after a finding of proved beyond a reasonable doubt. Other departures will continue to be made by the trial judge. A special subcommittee was put together in the fall of 2000 to study this problem and we have met regularly since that time. Over the last several months our committee has looked at various options which could address this problem. These options have included broadening the numbers in the grid boxes, putting a "departure number" in the corner of the grid box, etc. It is our considered opinion that the only way to address these issues legally and still maintain the purpose of the guidelines is to adopt the changes we recommend today.

The language used in the statute to implement this change uses the trial jury that will already be in place when a finding of guilt occurs. That same jury will simply be reinstructed to find the presence or absence of the aggravating factor beyond a reasonable doubt. In a few situations, evidence might be introduced at this stage by either party. However, the vast majority of time the jury will simply make the finding and mark a special verdict form, making the process very simple. It is my considered opinion that this process will be easier than the current process of presenting evidence at the sentencing hearing for the trial judge.

TESTIMONY CONCERNING
SENATE BILL 521
March 25, 2002

Thank you for allowing me to appear and present some comments concerning Senate Bill 521, a proposal to amend certain criminal procedural statutes to provide for a two-part bifurcated, jury trial, the second part of which is to exclusively concerning itself with upward departure sentencing in criminal cases.

Sentencing Guidelines were adopted in 1993. A mechanical sentencing process was set up using a bar graph for the imposition of sentences. A copy of the latest graph for nondrug crimes is attached. The two axes which were used to determine the presumptive sentence were criminal history score and severity level of the crime. Even though one of the functions of sentencing guidelines was to remove judicial discretion in sentencing, principally as a mechanism for controlling prison population, discretion to impose harsher or less severe sentences was added to the graph scheme. The procedure set out in K.S.A. 2001 Supp. 21-4716 and 4717 was called aggravating and mitigating departures. They required a court to, upon a proper request, consider whether exceptional circumstances were present to vary the sentence promulgated by the graph.

Now both the United States Supreme Court and the Kansas Supreme Court have declared unconstitutional any system which increases the sentence over the standard (the maximum) prescribed by the graph, unless factual determinations necessary to support a foundation for that conclusion are

determined by a jury beyond a reasonable doubt. The proposal before you establishes a bifurcated jury process, that is, two jury trials, one on guilt and one on sentencing in order to preserve the ability for aggravating departures. Please keep in mind that the proposal mandates a two-jury determination process to enable the use of an aggravating departure.

The Kansas Bar Association, through its Board of Governors has taken a position that a procedure such as this which places additional strain and demands upon a severely taxed judicial system in the form of additional hours of work for judges, clerks, court services officers, defense and prosecuting attorneys, and probably in some cases expert witnesses, should be avoided if at all possible, once the determination is made, to implement a method for constitutional process for aggravating departures.

Proponents minimize the impact of the second jury trial in terms of court hours taken and dollars spent; the Office of Judicial Administration predicts an expense which may be based on impractical assumptions; but the significance of both conclusions is that they are based on past history of aggravating departure cases which have reached the appellate court system. There can be no appeal from such a request that is denied. So, our statistical base is inadequate if based solely on the number of appeals taken. I have been unable to find any other method for counting the number of attempts at securing departures.

In my personal opinion, the long and short of the debate revolves around the question of whether we need to create, a system when is at best a

cumbersome, if not impossible, second trial on the issue of sentencing when a simplistic potential solution to the constitutional problem exists.

Please take a look at the second page exhibit attached to this testimony. It is a copy of the most recent version of K.S.A. 21-4704, the sentencing range for nondrug offenses. At random, and with no logical study, I have altered the sentence on the top number for a 3F grid box to increase it by twenty years and have lowered the number on the bottom number in the grid box to lower it by twenty years. One could do this for every grid box. One could then set out by statute that the maximum sentence is the top number and the minimum number is the lowest number in one of two ways; either leave it in the discretion of the judge based on information gathered at sentencing (which of necessity under current statute includes criminal history and criminal history score and anything else presented in a standard sentencing proceeding), or one might chose a different version which provided for a departure process which could be used to vary from the standard sentence the middle figure. Theoretically, if the restriction is the sentence cannot be more than the maximum for the crime unless it is determined by a jury, we have determined the maximum for the crime and allowed for it to be part of the information, complaint, or indictment, and there would be no need for determining any fact by a jury since the constitutional mandate of *Gould* would be inapplicable. Granted someone would have to do

work altering the grid box figures to reflect more serious and/or less serious maximums and minimums. But that is a one-time procedure.

We have not had the time resources to determine if an investigation that was made in the early fall of 2001 is still current, but at that time there was no other jurisdiction in the United States that had adopted a bifurcated jury trial system in response to a *Gould*-type decision.

The Judicial Council's Criminal Law Advisory Committee has recommended that no change be made immediately, but that various alternatives studied in depth to come up with alternative suggestions. As a temporary stop-gap method, if something has to be done immediately, that same committee has recommended altering the grid box numbers to provide the necessary remedy.

Further, Jim Garner co-sponsored a bill in the House to simply state the "maximum" sentence is the maximum limitation on departure sentences today, the double - double rule. It is maintained that simple statutory change will satisfy constitutional requirements.

If one is looking at the merits of the proposed bill, here are some of the problems that seem presented.

Proposed §1(c)(4) suggests that evidence may be used if it is found to be trustworthy and reliable. That is a different definition of admissible evidence than provided for in the Code of Civil Procedure which is the standard used in criminal trials.

Proposed §2(a)(3) suggests that a court may depart on its own volition which must be filed within five days of the date of the arraignment. It seems to me that it would be impossible for any judge who has made a determination to file a written notice potential court departure may not proceed to hear the case subsequent that time. Otherwise, there would seem to me to occur a violation of the Canons of Judicial Conduct and perhaps of constitutional rights of the defendant. And, under no circumstances could the jury at any point be informed that the person who is presiding over the trial and giving the instructions has filed a notice of the intention to seek an upward departure.

The Office of Judicial Administration has suggested using two senior judges to hear the bifurcated sentencing trial. I certainly hope that means that the schedule of trials and of the trials in criminal cases in which a sentencing trial were necessary would be coordinated statewide so that there would be no possibility of more than two occurring at the same time in any one of the 105 district courts of the state.

The problems presented by a jury at sentencing are difficult also. Is it constitutionally fair to tell the jury prior to the commencement of their service on the issue of guilt that for specified or unspecified reasons, the prosecutor or the judge has determined that an aggravation of the sentence will be sought. I suspect that is automatic prejudice. On the other hand, that means that during the indoctrination of the jury and voir dire, somehow the jury is going to be informed that its service will be one to two days longer than normal. In §(b)(2),

the legislation provides that evidence may be presented concerning any matter that the court deems relevant to the question of determining if an aggravation factor exists. If that is meant to alter the standard rules of evidence in an adversary trial which is constitutionally protected, more constitutional problems may exist.

In proposed §(b)(4), as written I assume the jury's recommendation need not be followed.

At the very least, it is our suggestion in view of the tremendous complicating feature of the proposed bifurcation process, and the cost and time burden to the courts, that whatever change be made, it be made in a simpler and more expedient manner such as altering the grid boxes. Thank you very much.

Yours very truly,

Edward G. Collister, Jr.
Collister & Kampschroeder
3311 Clinton Parkway Court
Lawrence, Kansas 66047-2631

SENTENCING RANGE - NONDRUG OFFENSES

Category	A	B	C	D	E	F	G	H	I
Severity Level	3 + Person Felonies	2 Person Felonies	1 Person & 1 Nonperson Felonies	1 Person Felony	3 + Nonperson Felonies	2 Nonperson Felonies	1 Nonperson Felony	2 + Misdemeanors	1 Misdemeanor No Record
I	653 620 554	618 586 554	285 272 258	247 253 240	246 234 221	226 214 203	203 195 186	186 176 166	165 155 143
II	493 467 442	460 438 414	216 205 194	200 190 181	184 174 165	168 160 152	154 146 138	138 131 123	123 117 102
III	287 233 221	228 216 206	107 102 96	100 94 89	92 88 81	83 79 74	77 72 68	71 66 61	61 59 55
IV	172 162 154	162 154 144	75 71 68	69 65 62	61 60 57	59 56 52	52 50 47	48 45 42	43 41 37
V	136 130 122	128 120 114	60 57 53	55 52 50	51 49 46	47 44 41	43 41 38	37 36 34	34 32 30
VI	46 41 40	41 38 37	38 36 34	36 34 32	33 30 28	29 27 25	26 24 23	25 20 18	19 18 17
VII	34 32 30	31 29 27	29 27 25	26 24 22	23 21 19	19 18 17	17 16 15	14 13 12	13 12 11
VIII	23 22 19	20 19 18	19 18 17	17 16 15	15 14 13	13 12 11	11 10 9	10 9 8	9 8 7
IX	17 16 15	15 14 13	13 12 11	13 12 11	11 10 9	10 9 8	9 8 7	8 7 6	7 6 5
X	13 12 11	12 11 10	11 10 9	10 9 8	9 8 7	8 7 6	7 6 5	7 6 5	7 6 5

LEGEND

Presumptive Probation

Border Box

Presumptive Imprisonment

SENTENCING RANGE - NONDRUG OFFENSES

A	B	C	D	E	F	G	H	I
3 + Person Felonies	2 Person Felonies	1 Person & 1 Nonperson Felonies	1 Person Felony	3 + Nonperson Felonies	2 Nonperson Felonies	1 Nonperson Felony	2 + Misdemeanors	1 Misdemeanor No Record
620 592	618 586 554	295 272 258	267 253 240	246 234 221	226 214 203	203 135 184	186 176 166	165 155 147
467 442	460 438 416	216 205 194	200 190 181	184 174 165	168 160 152	154 146 138	138 131 123	123 117 109
233 221	228 216 206	107 102 96	100 94 89	92 88 82	107 79 80	77 72 68	71 66 61	61 58 55
162 154	162 154 146	75 71 68	69 66 62	64 60 57	59 56 52	52 50 47	48 45 42	43 41 39
130 122	128 120 114	60 57 53	55 52 50	51 49 46	47 44 41	43 41 38	38 36 34	35 32 30
43 40	41 39 37	38 36 34	36 34 32	32 30 28	29 27 25	26 24 22	23 20 19	19 18 17
32 30	31 29 27	25 23 21	24 22 20	23 21 19	19 18 17	17 16 15	14 13 12	13 12 11
21 19	20 19 18	19 18 17	17 16 15	15 14 13	13 12 11	11 10 9	11 10 9	9 8 7
16 15	15 14 13	13 12 11	13 12 11	11 10 9	10 9 8	9 8 7	8 7 6	7 6 5
12 11	12 11 10	11 10 9	10 9 8	9 8 7	8 7 6	7 6 5	7 6 5	7 6 5

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State of Kansas

House of Representatives

JIM D. GARNER
House Democratic Leader

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Office of the Democratic Leader

TESTIMONY CONCERNING SB 521
HOUSE JUDICIARY COMMITTEE
25 MARCH 2002

Chairman O'Neal and Members of the Committee:

Thank you for the opportunity to share my views and concerns about Senate Bill 521.

The Legislature needs to respond to the actions of the Kansas Supreme Court in striking down our upward departure provisions in the sentencing guidelines law. I personally believe the Court went far beyond what was necessary to comply with Apprendi and did not need to reach and find the upward departure provision unconstitutional.

When the sentencing guidelines were developed and enacted in 1992, the legislature specifically provided for upward departures giving judges authority to impose more severe sentences in particularly egregious cases. The legislature also specifically stated that judges could impose a sentence up to twice the standard, presumed sentence in the sentencing grid box for the convicted person. K.S.A. 21-4719(b).

It is my belief and understanding that the legislature in 1992 intended this double rule limit to in fact set and serve as the maximum sentence for the crimes following on the sentencing guideline grid.

I would encourage members of the committee to review the proposal in House Bill 2923 when considering this legislation. HB 2923 simply attempts to clarify and state that the legislature intends for the double rule limit established in K.S.A. 21-4719 to be the maximum sentence allowed for a given crime. This would be a simple way to address the Gould decision and would not require the need for a bifurcated jury trial.

Thank you for your consideration of these suggestions.

House Judiciary
Attachment 4
3-25-02

KANSAS TRIAL LAWYERS ASSOCIATION

Lawyers Representing Consumers

TO: Members of the House Judiciary Committee

FROM: John Parisi, KTLA

DATE: March 25, 2002

RE: Support of SB 377

Representative O'Neal and members of the committee: I am John Parisi, and I am president-elect of the Kansas Trial Lawyer's Association (KTLA). On behalf of the members of KTLA and the Kansans they represent, thank you for the opportunity to present testimony in support of SB 377.

The purpose of SB 377 is very straightforward: To guarantee Kansans affordable and timely access to their own medical records. Currently, there is no statutory guarantee to access and health care providers set their own prices for providing copies of medical records. These costs can be high and can be a financial barrier between Kansans and the medical records they need to make health care decisions for themselves and their family.

Setting a maximum charge for copies of medical records is a central component of SB 377. Under this bill, health care providers may charge patients or their authorized representative no more than a $15 administrative fee plus 35 cents per page for copies of medical records. This is the same cost structure set in Missouri statute. For comparison purposes, that is higher than the rates charged by our neighbors in Oklahoma and Colorado and more reasonable than the high rates charged in Nebraska.

	Administrative Fee	10 pages (incl. adm. fee)
Nebraska	$20	$25.00
SB 377 Proposal	$15	$18.50
Missouri	$15	$18.50
Colorado	$14	$14.00
Oklahoma	$0	$2.50

Terry Humphrey, Executive Director

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House Judiciary
Attachment 5
3-25-02

After thorough deliberation, this fee structure was recommended to the full Legislature by the Special Interim Committee on Judiciary. The Senate Judiciary Committee made two adjustments to the bill. First, the committee deleted the recommended escalator (as contained in the Missouri statute) because no index could be identified to adequately measure the future cost of medical records. Instead, the Senate Judiciary Committee agreed that the recommended fee structure could be reviewed by the Legislature if, and when, the need arises. Ultimately, the Senate approved the Interim Committee's recommendation of $15 administrative fee plus 35 cents per page fee structure.

It is important to note that both the Special Committee on Judiciary and the Senate rejected amendments to increase these costs. They recognize that for many Kansans, "access" and "affordability" are synonymous: If they cannot *afford* their medical records, they cannot *access* them.

The second change made by the Senate Judiciary Committee was to add language which ensured the authority of The Kansas Board of Healing Arts remains valid and compliant with federal regulations. KTLA had no opposition to this amendment.

In addition to establishing a fair and equitable cost structure, SB 377 is compliant with federal regulations. It complies with both the Health Insurance Portability and Accountability Act (HIPAA) and Graham-Leach-Bliley. It also safeguards patient privacy by requiring the release of records **only** to a patient or their authorized representative. Again, the authorization criteria required in SB 377 complies with criteria required under HIPAA.

SB 377 is pro-consumer legislation supported by seven consumer and advocacy groups as well as the Kansas Bar Association and KTLA.

Thank you for opportunity to express our support on SB 377. **On behalf of Kansas consumers, I urge you to support the current fee structure in SB 377 and oppose any amendment that will increase the costs Kansans must pay for their own medical records.**

Give Kansans Affordable, Timely Access to Their Own Medical Records. Support SB 377 as Passed By the Senate.

Organizations Supporting SB 377:

Ernest Kutzley
AARP

Stephanie Sharp
American Cancer Society

James Germer
Kansas Advocacy and Protective Services

Joyce A. Volmut
Kansas Association for the Medically Underserved

Paul Davis
Kansas Bar Association

Terry Humphrey
Kansas Trial Lawyers Association

Dr. Jane Adams
Keys for Networking

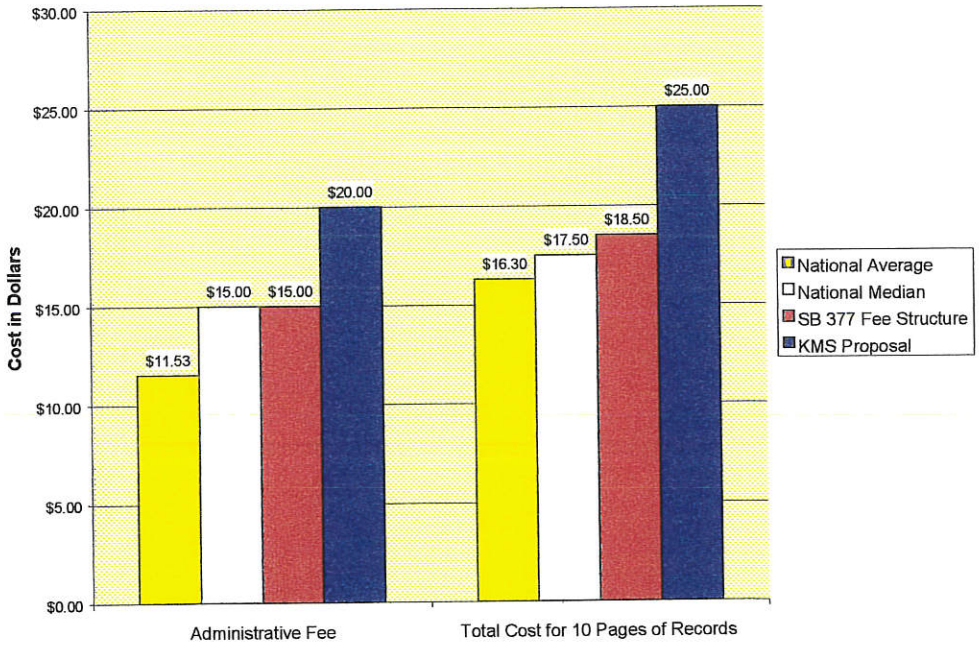
Elizabeth Adams
National Alliance for the Mentally Ill

Wayne Maichel
Kansas AFL-CIO

The Medical Industry Continues to Propose Unreasonably High Rates.

The $20.00 administrative fee being proposed by the Kansas Medical Society and representatives of the medical industry is higher than fees charged in most states which set fee structures for medical records.

Compare the proposals. The chart below shows that SB 377 specifies a fee that is fair when compared with the 32 states that statutorily regulate costs for copies of medical records. **KMS proposes rates that are significantly higher.**



The $.50 per page copying fee proposed by KMS is twice what is considered "reasonable" in existing Kansas Statute. The Public Records Act, specifically §45-219 (c) (5), states, "A fee for copies of public records which is equal to or less than $.25 per page shall be deemed a reasonable fee."

For many Kansans, such as the elderly and single parents, "access" and "affordability" are synonymous. Members of the Special Committee on Judiciary, the Senate Judiciary Committee and the full Senate have shown they believe SB 377 is equitable and reasonable.

We Urge You to Support SB 377 As Passed By the Senate.
Oppose Any Amendments to Increase Costs to Kansans.

KANSAS BOARD OF HEALING ARTS

BILL GRAVES
Governor

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Topeka, KS 66603-3068
(785) 296-7413
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(785) 368-7102

March 25, 2002

The Hon. Michael O'Neal
Chair, House Committee on Judiciary
State Capitol

Re: 2002 Senate Bill No. 377

Dear Representative O'Neal:

Thank you for the opportunity to appear before the committee on behalf of the State Board of Healing Arts regarding Senate Bill 377. The Board agrees that patients should have the right to obtain a copy of their medical record, and supports a legislative pronouncement of that right.

The common law in this country established long ago that the patient record is the property of the entity that created the record, though the patient has an interest in the information contained in the record. In the absence of a statute or regulation, courts in some states hold that there is a duty to allow a patient access to records, but with limitations. As stated in an opinion of the Council of Ethical and Judicial Affairs, the American Medical Association recognizes physicians' ethical duty to allow a patient access to the record. More recently, the federal Health Insurance Portability and Accountability Act (HIPAA) regulations, specifically appearing at 45 C.F.R. § 164.524, established a patient's right to access records containing health information. The HIPAA regulations preempt state law.

The Board of Healing Arts adopted an amendment to K.A.R. 100-22-1 in 1998, stating that the failure to provide records to the patient is dishonorable conduct. A copy of the regulation is attached. The Board has proposed amendments to make the regulation more consistent with HIPAA, though action on the proposed amendments has been delayed pending the outcome of S.B. 377. This regulation has been instrumental in resolving complaints alleging that licensees refuse to disclose records. Since July 2000, the Board has documented 30 of these complaints.

The Board requested that the Senate Judiciary Committee amend S.B. 377 to include the language now appearing in section four of the bill so that K.A.R. 100-22-1 would not be invalidated. Section four preserves the regulation, without which, patients might have to resort to court proceedings in order to gain access to their records.

House Judiciary
Attachment 6
3-25-02

Apprehension has been expressed that section four would allow the Board to adopt a regulation that conflicts with the statute unless the Board's authority is restricted by the Legislature. A further amendment might be suggested that would require that the Board's regulation not be in conflict with the proposed statute. There already are adequate safeguards in place to prevent conflict. As required by K.S.A. 77-420(b), before a proposed rule is adopted the attorney general must issue an opinion as to the legality of the regulation. This includes a review for direct conflicts between the regulation and the statutes.

If this committee does consider any further amendments to the bill, care should be taken to avoid invalidating any part of the Board's regulation. The Board's regulation and the HIPAA regulations include detail not found in Senate Bill 377. For example, K.A.R. 100-22-1(a) now includes language that allows a physician to withhold the record if disclosure would endanger the patient, which is consistent with the HIPAA regulation. Senate Bill 377 does not directly address this issue, though the proposed statute is "subject to applicable law". The regulatory language is not in conflict with prevailing law, but it is in addition to the statutory requirements.

Once again, thank you for the opportunity to comment on the proposed bill.

Very truly yours,

Mark W. Stafford
General Counsel

K.A.R. 100-22-1. Release of records. (a) Unless otherwise prohibited by law, each licensee shall, upon receipt of a signed release from a patient, furnish a copy of the patient record to the patient, to another licensee designated by the patient, or to a patient's legally designated representative. However, if the licensee reasonably determines that the information within the patient record is detrimental to the mental or physical health of the patient, then the licensee may withhold the record from the patient and furnish the record to another licensee designated by the patient.

(b) A licensee may charge a person or entity for reasonable costs to retrieve or reproduce a patient record. A licensee shall not condition the furnishing of a patient record to another licensee upon prepayment of these costs.

(c) Any departure from this regulation shall constitute prima facie evidence of dishonorable conduct pursuant to K.S.A. 65-2836(b), and any amendments thereto. (Authorized by K.S.A. 65-2865; implementing K.S.A. 1997 Supp. 65-2836, as amended by L. 1998, Ch. 142, Sec. 12; effective May 1, 1985; amended Nov. 13, 1998.)

STATE OF KANSAS

DEPARTMENT OF CORRECTIONS
OFFICE OF THE SECRETARY
Landon State Office Building
900 S.W. Jackson — Suite 400-N
Topeka, Kansas 66612-1284
(785) 296-3317

Bill Graves
Governor

Charles E. Simmons
Secretary

Memorandum

DATE: March 25, 2002

TO: House Judiciary Committee

FROM: Charles E. Simmons
Secretary of Corrections

RE: SB 377 as Amended by the Senate

SB 377 creates statutory requirements for providing health care records to a patient or a patient's authorized representative. SB 377 grants the access of patients to their records except as otherwise provided by law. The Department is concerned that the application of other legal exceptions as provided by SB 377 is limited to exceptions adopted by state law only and not those currently provided for by federal law.

SB 377 is designed to be consistent with the federal Health Insurance Portability and Accountability Act. (HIPAA). The Senate Judiciary Committee heard testimony from various individuals and entities regarding issues relative to the establishment of fees for producing copies of records and enforcement of the substantially similar provisions of HIPAA at the state level through adoption of SB 377. However, HIPAA and SB 377 are substantially different in regard to the exceptions provided for by HIPAA and those adopted by SB 377.

Kansas may adopt more stringent restrictions regarding the denial of a patient's access to medical records than is imposed by the federal Health Insurance Portability and Accountability Act. Thus, the Department is concerned that exceptions pertaining to inmate access to medical records currently provided for by federal law would not be

applicable to requests made pursuant to the provisions of SB 377 unless state law has codified those same restrictions.

The provisions of HIPAA have resulted in the promulgation of federal regulations that specifically address medical records pertaining to inmates and their access to those records. 45 C.F.R. § 164.524 restricts an inmate's access to medical records from:

> "a covered entity that is a correctional institution or a covered health care provider acting under the direction of the correctional institution.... if obtaining such copy would jeopardize the health, safety, security, custody, or rehabilitation of the individual or of other inmates, or the safety of any officer, employee, or other person at the correctional institution or responsible for the transporting of the inmate. [45 C.F.R. § 164.524 (a)(2)(ii)].

Additionally, federal regulation restricts access by a patient to information obtained from someone other than a health care provider under a promise of confidentiality and access to the record would be reasonably likely to reveal the source of the information. [45 C.F.R. § 164.524 (a)(2)(v)]. A copy of the federal regulation is attached. The records access exceptions recognized for purposes of HIPAA would not be applicable to requests made pursuant to SB 377 unless specifically provided for by state law.

The Department urges that SB 377 be amended to include access exemptions provided for by federal law in regard to inmate health care records as well information obtained from confidential sources. The Department has prepared the attached balloon amendment that would address these concerns.

The Department requests favorable consideration of the proposed amendment during the Committee's consideration of SB 377.

the individual. Provision of electronic notice by the covered entity will satisfy the provision requirements of paragraph (c) of this section when timely made in accordance with paragraph (c)(1) or (2) of this section.

(iii) For purposes of paragraph (c)(2)(i) of this section, if the first service delivery to an individual is delivered electronically, the covered health care provider must provide electronic notice automatically and contemporaneously in response to the individual's first request for service.

(iv) The individual who is the recipient of electronic notice retains the right to obtain a paper copy of the notice from a covered entity upon request.

(d) *Implementation specifications: Joint notice by separate covered entities.* Covered entities that participate in organized health care arrangements may comply with this section by a joint notice, provided that:

(1) The covered entities participating in the organized health care arrangement agree to abide by the terms of the notice with respect to protected health information created or received by the covered entity as part of its participation in the organized health care arrangement;

(2) The joint notice meets the implementation specifications in paragraph (b) of this section, except that the statements required by this section may be altered to reflect the fact that the notice covers more than one covered entity; and

(i) Describes with reasonable specificity the covered entities, or class of entities, to which the joint notice applies;

(ii) Describes with reasonable specificity the service delivery sites, or classes of service delivery sites, to which the joint notice applies; and

(iii) If applicable, states that the covered entities participating in the organized health care arrangement will share protected health information with each other, as necessary to carry out treatment, payment, or health care operations relating to the organized health care arrangement.

(3) The covered entities included in the joint notice must provide the notice to individuals in accordance with the applicable implementation specifications of paragraph (c) of this section. Provision of the joint notice to an individual by any one of the covered entities included in the joint notice will satisfy the provision requirement of paragraph (c) of this section with respect to all others covered by the joint notice.

(e) *Implementation specifications: Documentation.* A covered entity must document compliance with the notice requirements by retaining copies of the notices issued by the covered entity as required by § 164.530(j).

§ 164.522 Rights to request privacy protection for protected health information.

(a)(1) *Standard: Right of an individual to request restriction of uses and disclosures.* (i) A covered entity must permit an individual to request that the covered entity restrict:

(A) Uses or disclosures of protected health information about the individual to carry out treatment, payment, or health care operations; and

(B) Disclosures permitted under § 164.510(b).

(ii) A covered entity is not required to agree to a restriction.

(iii) A covered entity that agrees to a restriction under paragraph (a)(1)(i) of this section may not use or disclose protected health information in violation of such restriction, except that, if the individual who requested the restriction is in need of emergency treatment and the restricted protected health information is needed to provide the emergency treatment, the covered entity may use the restricted protected health information, or may disclose such information to a health care provider, to provide such treatment to the individual.

(iv) If restricted protected health information is disclosed to a health care provider for emergency treatment under paragraph (a)(1)(iii) of this section, the covered entity must request that such health care provider not further use or disclose the information.

(v) A restriction agreed to by a covered entity under paragraph (a) of this

section, is not effective under this subpart to prevent uses or disclosures permitted or required under §§ 164.502(a)(2)(i), 164.510(a) or 164.512.

(2) *Implementation specifications: Terminating a restriction.* A covered entity may terminate its agreement to a restriction, if :

(i) The individual agrees to or requests the termination in writing;

(ii) The individual orally agrees to the termination and the oral agreement is documented; or

(iii) The covered entity informs the individual that it is terminating its agreement to a restriction, except that such termination is only effective with respect to protected health information created or received after it has so informed the individual.

(3) *Implementation specification: Documentation.* A covered entity that agrees to a restriction must document the restriction in accordance with § 164.530(j).

(b)(1) *Standard: Confidential communications requirements.* (i) A covered health care provider must permit individuals to request and must accommodate reasonable requests by individuals to receive communications of protected health information from the covered health care provider by alternative means or at alternative locations.

(ii) A health plan must permit individuals to request and must accommodate reasonable requests by individuals to receive communications of protected health information from the health plan by alternative means or at alternative locations, if the individual clearly states that the disclosure of all or part of that information could endanger the individual.

(2) *Implementation specifications: Conditions on providing confidential communications.*

(i) A covered entity may require the individual to make a request for a confidential communication described in paragraph (b)(1) of this section in writing.

(ii) A covered entity may condition the provision of a reasonable accommodation on:

(A) When appropriate, information as to how payment, if any, will be handled; and

(B) Specification of an alternative address or other method of contact.

(iii) A covered health care prov may not require an explanation fr the individual as to the basis for the request as a condition of providing communications on a confidential basis.

(iv) A health plan may require that a request contain a statement that disclosure of all or part of the information to which the request pertains could endanger the individual.

§ 164.524 Access of individuals to protected health information.

(a) *Standard: Access to protected health information.* (1) *Right of access.* Except as otherwise provided in paragraph (a)(2) or (a)(3) of this section, an individual has a right of access to inspect and obtain a copy of protected health information about the individual in a designated record set, for as long as the protected health information is maintained in the designated record set, except for:

(i) Psychotherapy notes;

(ii) Information compiled in reasonable anticipation of, or for use in, a civil, criminal, or administrative action or proceeding; and

(iii) Protected health information maintained by a covered entity that is:

(A) Subject to the Clinical Laboratory Improvements Amendments of 1988, 42 U.S.C. 263a, to the extent the provision of access to the individual would be prohibited by law; or

(B) Exempt from the Clinical Laboratory Improvements Amendments of 1988, pursuant to 42 CFR 493.3(a)(2).

(2) *Unreviewable grounds for denial.* A covered entity may deny an individual access without providing the individual an opportunity for review, in the following circumstances.

(i) The protected health information is excepted from the right of access by paragraph (a)(1) of this section.

(ii) A covered entity that is a correctional institution or a covered health care provider acting under the direction of the correctional institution may deny, in whole or in part, an inmate's request to obtain a copy of protected health information, if obtaining such copy would jeopardize the health,

safety, security, custody, or rehabilitation of the individual or of other inmates, or the safety of any officer, employee, or other person at the correctional institution or responsible for the transporting of the inmate.

(iii) An individual's access to protected health information created or obtained by a covered health care provider in the course of research that includes treatment may be temporarily suspended for as long as the research is in progress, provided that the individual has agreed to the denial of access when consenting to participate in the research that includes treatment, and the covered health care provider has informed the individual that the right of access will be reinstated upon completion of the research.

(iv) An individual's access to protected health information that is contained in records that are subject to the Privacy Act, 5 U.S.C. 552a, may be denied, if the denial of access under the Privacy Act would meet the requirements of that law.

(v) An individual's access may be denied if the protected health information was obtained from someone other than a health care provider under a promise of confidentiality and the access requested would be reasonably likely to reveal the source of the information.

(3) *Reviewable grounds for denial.* A covered entity may deny an individual access, provided that the individual is given a right to have such denials reviewed, as required by paragraph (a)(4) of this section, in the following circumstances:

(i) A licensed health care professional has determined, in the exercise of professional judgment, that the access requested is reasonably likely to endanger the life or physical safety of the individual or another person;

(ii) The protected health information makes reference to another person (unless such other person is a health care provider) and a licensed health care professional has determined, in the exercise of professional judgment, that the access requested is reasonably likely to cause substantial harm to such other person; or

(iii) The request for access is made by the individual's personal representative and a licensed health care professional has determined, in the exercise of professional judgment, that the provision of access to such personal representative is reasonably likely to cause substantial harm to the individual or another person.

(4) *Review of a denial of access.* If access is denied on a ground permitted under paragraph (a)(3) of this section, the individual has the right to have the denial reviewed by a licensed health care professional who is designated by the covered entity to act as a reviewing official and who did not participate in the original decision to deny. The covered entity must provide or deny access in accordance with the determination of the reviewing official under paragraph (d)(4) of this section.

(b) *Implementation specifications: requests for access and timely action.* (1) *Individual's request for access.* The covered entity must permit an individual to request access to inspect or to obtain a copy of the protected health information about the individual that is maintained in a designated record set. The covered entity may require individuals to make requests for access in writing, provided that it informs individuals of such a requirement.

(2) *Timely action by the covered entity.* (i) Except as provided in paragraph (b)(2)(ii) of this section, the covered entity must act on a request for access no later than 30 days after receipt of the request as follows.

(A) If the covered entity grants the request, in whole or in part, it must inform the individual of the acceptance of the request and provide the access requested, in accordance with paragraph (c) of this section.

(B) If the covered entity denies the request, in whole or in part, it must provide the individual with a written denial, in accordance with paragraph (d) of this section.

(ii) If the request for access is for protected health information that is not maintained or accessible to the covered entity on-site, the covered entity must take an action required by paragraph (b)(2)(i) of this section by no later than 60 days from the receipt of such a request.

(iii) If the covered entity is unable to take an action required by paragraph

(b)(2)(i)(A) or (B) of this section within the time required by paragraph (b)(2)(i) or (ii) of this section, as applicable, the covered entity may extend the time for such actions by no more than 30 days, provided that:

(A) The covered entity, within the time limit set by paragraph (b)(2)(i) or (ii) of this section, as applicable, provides the individual with a written statement of the reasons for the delay and the date by which the covered entity will complete its action on the request; and

(B) The covered entity may have only one such extension of time for action on a request for access.

(c) *Implementation specifications: Provision of access.* If the covered entity provides an individual with access, in whole or in part, to protected health information, the covered entity must comply with the following requirements.

(1) *Providing the access requested.* The covered entity must provide the access requested by individuals, including inspection or obtaining a copy, or both, of the protected health information about them in designated record sets. If the same protected health information that is the subject of a request for access is maintained in more than one designated record set or at more than one location, the covered entity need only produce the protected health information once in response to a request for access.

(2) *Form of access requested.* (i) The covered entity must provide the individual with access to the protected health information in the form or format requested by the individual, if it is readily producible in such form or format; or, if not, in a readable hard copy form or such other form or format as agreed to by the covered entity and the individual.

(ii) The covered entity may provide the individual with a summary of the protected health information requested, in lieu of providing access to the protected health information or may provide an explanation of the protected health information to which access has been provided, if:

(A) The individual agrees in advance to such a summary or explanation; and

(B) The individual agrees in advance to the fees imposed, if any, by the covered entity for such summary or explanation.

(3) *Time and manner of access.* The covered entity must provide the access as requested by the individual in a timely manner as required by paragraph (b)(2) of this section, including arranging with the individual for a convenient time and place to inspect or obtain a copy of the protected health information, or mailing the copy of the protected health information at the individual's request. The covered entity may discuss the scope, format, and other aspects of the request for access with the individual as necessary to facilitate the timely provision of access.

(4) *Fees.* If the individual requests a copy of the protected health information or agrees to a summary or explanation of such information, the covered entity may impose a reasonable, cost-based fee, provided that the fee includes only the cost of:

(i) Copying, including the cost of supplies for and labor of copying, the protected health information requested by the individual;

(ii) Postage, when the individual has requested the copy, or the summary or explanation, be mailed; and

(iii) Preparing an explanation or summary of the protected health information, if agreed to by the individual as required by paragraph (c)(2)(ii) of this section.

(d) *Implementation specifications: Denial of access.* If the covered entity denies access, in whole or in part, to protected health information, the covered entity must comply with the following requirements.

(1) *Making other information accessible.* The covered entity must, to the extent possible, give the individual access to any other protected health information requested, after excluding the protected health information as to which the covered entity has a ground to deny access.

(2) *Denial.* The covered entity must provide a timely, written denial to the individual, in accordance with paragraph (b)(2) of this section. The denial must be in plain language and contain:

(i) The basis for the denial;

(ii) If applicable, a statement of the individual's review rights under paragraph (a)(4) of this section, including a description of how the individual may exercise such review rights; and

(iii) A description of how the individual may complain to the covered entity pursuant to the complaint procedures in §164.530(d) or to the Secretary pursuant to the procedures in §160.306. The description must include the name, or title, and telephone number of the contact person or office designated in §164.530(a)(1)(ii).

(3) *Other responsibility.* If the covered entity does not maintain the protected health information that is the subject of the individual's request for access, and the covered entity knows where the requested information is maintained, the covered entity must inform the individual where to direct the request for access.

(4) Review of denial requested. If the individual has requested a review of a denial under paragraph (a)(4) of this section, the covered entity must designate a licensed health care professional, who was not directly involved in the denial to review the decision to deny access. The covered entity must promptly refer a request for review to such designated reviewing official. The designated reviewing official must determine, within a reasonable period of time, whether or not to deny the access requested based on the standards in paragraph (a)(3) of this section. The covered entity must promptly provide written notice to the individual of the determination of the designated reviewing official and take other action as required by this section to carry out the designated reviewing official's determination.

(e) *Implementation specification: Documentation.* A covered entity must document the following and retain the documentation as required by §164.530(j):

(1) The designated record sets that are subject to access by individuals; and

(2) The titles of the persons or offices responsible for receiving and processing requests for access by individuals.

§ 164.526 Amendment of protected health information.

(a) *Standard: Right to amend.* (1) *Right to amend.* An individual has the right to have a covered entity amend protected health information or a record about the individual in a designated record set for as long as the protected health information is maintained in the designated record set.

(2) *Denial of amendment.* A covered entity may deny an individual's request for amendment, if it determines that the protected health information or record that is the subject of the request:

(i) Was not created by the covered entity, unless the individual provides a reasonable basis to believe that the originator of protected health information is no longer available to act on the requested amendment;

(ii) Is not part of the designated record set;

(iii) Would not be available for inspection under §164.524; or

(iv) Is accurate and complete.

(b) *Implementation specifications: requests for amendment and timely action.* (1) *Individual's request for amendment.* The covered entity must permit an individual to request that the covered entity amend the protected health information maintained in the designated record set. The covered entity may require individuals to make requests for amendment in writing and to provide a reason to support a requested amendment, provided that it informs individuals in advance of such requirements.

(2) *Timely action by the covered entity.* (i) The covered entity must act on the individual's request for an amendment no later than 60 days after receipt of such a request, as follows.

(A) If the covered entity grants the requested amendment, in whole or in part, it must take the actions required by paragraphs (c)(1) and (2) of this section.

(B) If the covered entity denies the requested amendment, in whole or in part, it must provide the individual with a written denial, in accordance with paragraph (d)(1) of this section.

(ii) If the covered entity is unable to act on the amendment within the time required by paragraph (b)(2)(i) of this section, the covered entity may extend

the time for such action by no more than 30 days, provided that:

(A) The covered entity, within the time limit set by paragraph (b)(2)(i) of this section, provides the individual with a written statement of the reasons for the delay and the date by which the covered entity will complete its action on the request; and

(B) The covered entity may have only one such extension of time for action on a request for an amendment.

(c) *Implementation specifications: Accepting the amendment.* If the covered entity accepts the requested amendment, in whole or in part, the covered entity must comply with the following requirements.

(1) *Making the amendment.* The covered entity must make the appropriate amendment to the protected health information or record that is the subject of the request for amendment by, at a minimum, identifying the records in the designated record set that are affected by the amendment and appending or otherwise providing a link to the location of the amendment.

(2) *Informing the individual.* In accordance with paragraph (b) of this section, the covered entity must timely inform the individual that the amendment is accepted and obtain the individual's identification of and agreement to have the covered entity notify the relevant persons with which the amendment needs to be shared in accordance with paragraph (c)(3) of this section.

(3) *Informing others.* The covered entity must make reasonable efforts to inform and provide the amendment within a reasonable time to:

(i) Persons identified by the individual as having received protected health information about the individual and needing the amendment; and

(ii) Persons, including business associates, that the covered entity knows have the protected health information that is the subject of the amendment and that may have relied, or could foreseeably rely, on such information to the detriment of the individual.

(d) *Implementation specifications: Denying the amendment.* If the covered entity denies the requested amendment, in whole or in part, the covered entity must comply with the following requirements.

(1) *Denial.* The covered entity must provide the individual with a timely, written denial, in accordance with paragraph (b)(2) of this section. The denial must use plain language and contain:

(i) The basis for the denial, in accordance with paragraph (a)(2) of this section;

(ii) The individual's right to submit a written statement disagreeing with the denial and how the individual may file such a statement;

(iii) A statement that, if the individual does not submit a statement of disagreement, the individual may request that the covered entity provide the individual's request for amendment and the denial with any future disclosures of the protected health information that is the subject of the amendment; and

(iv) A description of how the individual may complain to the covered entity pursuant to the complaint procedures established in §164.530(d) or to the Secretary pursuant to the procedures established in §160.306. The description must include the name, or title, and telephone number of the contact person or office designated in §164.530(a)(1)(ii).

(2) *Statement of disagreement.* The covered entity must permit the individual to submit to the covered entity a written statement disagreeing with the denial of all or part of a requested amendment and the basis of such disagreement. The covered entity may reasonably limit the length of a statement of disagreement.

(3) *Rebuttal statement.* The covered entity may prepare a written rebuttal to the individual's statement of disagreement. Whenever such a rebuttal is prepared, the covered entity must provide a copy to the individual who submitted the statement of disagreement.

(4) *Recordkeeping.* The covered entity must, as appropriate, identify the record or protected health information in the designated record set that is the subject of the disputed amendment and append or otherwise link the individual's request for an amendment, the covered entity's denial of the request,

As Amended by Senate Committee

Session of 2002

SENATE BILL No. 377

By Special Committee on Judiciary

1-8

AN ACT concerning access to health care records by patients and authorized representatives.

Be it enacted by the Legislature of the State of Kansas:

Section 1. As used in this act: (a) "Health care provider" means those persons and entities defined as a health care provider under K.S.A. 40-3401 and K.S.A. 7-121b, and amendments thereto, except that "health care provider" shall not include a health maintenance organization.

(b) "Authorized representative" means the person designated in writing by the patient to obtain the health care records of the patient or the person otherwise authorized by law to obtain the health care records of the patient.

(c) "Authorization" means a written or printed document signed by a patient or a patient's authorized representative containing: (1) A description of the health care records a health care provider is authorized to produce; (2) the patient's name, address and date of birth; (3) a designation of the person or entity authorized to obtain copies of the health care records; (4) a date or event upon which the force of the authorization shall expire which shall not exceed one year; (5) if signed by a patient's authorized representative, the authorized representative's name, address, telephone number and relationship or capacity to the patient; and (6) a statement setting forth the right of the person signing the authorization to revoke it in writing.

Sec. 2. ~~(a)~~ Subject to applicable law, including federal law pertaining to correctional institutions and covered health care providers acting under the direction of a correctional institution; and information obtained from confidential sources, copies of health care records shall be furnished to a patient or a patient's authorized representative within 30 days of the receipt of the authorization, or the health care provider shall notify the patient or the patient's authorized representative of the reasons why copies are not available. Health care providers may condition the furnishing of the patient's health care records to the patient or the patient's authorized representative upon the payment of charges not to exceed a $15 handling or service fee and $.35 per page for copies of health care records routinely duplicated on a standard photocopy machine. Providers may charge for the reasonable cost of all duplications of health care record information which cannot be routinely duplicated on

a standard photocopy machine.

~~(b) The limits provided in subsection (a) shall be increased or decreased on an annual basis effective January 1 of each year in accordance with the centers for medicare and medicaid services market basket survey.~~

Sec. 3. Any health care provider, patient or authorized representative of a patient may bring a claim or action to enforce the provisions of this act, and any court having jurisdiction of such claim or action, upon a showing that the failure to comply with this act was without just cause or excuse, shall award the costs of the action and order the patient's health care records produced without cost or expense to the requesting party.

Sec. 4. Nothing in this act shall be construed to prohibit the state board of healing arts from adopting and enforcing rules and regulations that require licensees of the board to furnish health care records to patients or to their authorized representative. To the extent that the board determines that an administrative disciplinary remedy is appropriate for violation of such rules and regulations, that remedy is separate from and in addition to the provisions of this act.

Sec. **4 5**. This act shall take effect and be in force from and after its publication in the Kansas register.

AARP Kansas

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Testimony before House Judiciary Committee
March 25th, 2002
John Reinhart
Associate State Director/Communications

Good afternoon, Chairman O'Neal and members of the House Judiciary Committee. My name is John Reinhart and I am the Associate State Director of Communications for AARP Kansas. We have more than 350,000 members in the State of Kansas and appreciate the opportunity to express their *support* in behalf of Senate Bill 377.

AARP believes that the management, privacy and confidentially of a patient's medical information, including access in a timely manner and at a reasonable cost is paramount. Since Kansas is one of only six states without a statutory right to access to medical records, we believe that SB 377 represents a great opportunity to adopt consumer friendly legislation that will not have a fiscal impact on the state budget.

The AARP National State Affairs Department has reviewed and compared the proposed cost of acquiring medical records in Kansas with other states. We found that the costs currently recommended in SB 377 are slightly higher than the median cost nationally.

We firmly believe that costs to Kansas consumers for obtaining their medical records should be similar to those of other states such as Arizona, Kentucky and Montana. In those states, there are no charges to consumers to obtain their medical records. If this is not possible, we believe that consumers should have access to their medical records at the lowest cost possible.

We also promote legislation that provides consumers with access and adequate protection against the unauthorized access or dissemination of medical information including:

- Requiring an individuals' explicit and written consent be obtained prior to access or the release of their medical records or health information.

- Availability of services that provide education for consumers about their personal rights and assist them in enforcing their rights.

- Remedies are provided to consumers when they encounter delays without just cause and are provided with avenues for redress if they are harmed by an inappropriate disclosure or use of their personal medical information.

AARP *supports* SB 377. We oppose any amendments that would increase the fee structure. Such increases would make the fees imposed in Kansas among the highest in the nation for providing consumers with copies of their own medical records. Such exorbitant costs are unnecessary and would, possibly, create financial hardships on Kansans with fixed incomes.

Finally we would call you attention to written testimony submitted by Dean Gilstrap. Mr. Gilstrap is an AARP member, from Arkansas City, Kansas, where he served as high school principal for many years. Mr. Gilstrap, who is now undergoing chemotherapy treatments, could not be here today but wanted to share with the committee his experiences during these treatments in acquiring records from 10 different doctors and hospitals, the number of pages and cost of records while preparing for these treatments.

On behalf of the 350,000 AARP state members, we ask you to support SB 377 without amendments and to provide consumers with timely and affordable access to their medical records.

Thank you again for this opportunity to express our views. I stand ready to answer questions.

John Reinhart
Associate State Director/Communications
AARP Kansas

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To: House Judiciary Committee

From: Jerry Slaughter
Executive Director

Date: March 25, 2002

Subject: SB 377; access to health care records

The Kansas Medical Society appreciates the opportunity to appear today as you consider the subject of access to medical records and related privacy issues. This issue was originally introduced as SB 88 last session, which was heard and debated by the Interim Judiciary Committee last fall. SB 377 was introduced by the interim committee as the replacement for the original SB 88.

We appear as opponents to this bill today because we do not believe it is necessary. Recently promulgated federal privacy regulations already accomplish virtually everything that the proponents of this bill are seeking. While we do not believe this bill is necessary, we are not opposed to the principles behind the proposal - that of assuring patients and their legal representatives access to their medical records, without unreasonable delay, and at a reasonable cost.

This bill deals with and is duplicative of the new federal regulations that were promulgated pursuant to §264 of the 1996 Health Insurance Portability and Accountability Act (HIPAA). Known as the "Privacy Rule," (the *Standards for Privacy of Individually Identifiable Health Information*, 45 CFR Parts 160 and 164), these regulations apply to all health care providers, health plans, and all others who compile, transmit or use protected health information in any manner. The Privacy Rule essentially creates a national standard for the protection of individuals' medical records and the personal health information contained therein. The regulations are quite detailed and comprehensive, and give patients control over their health information, while holding health care providers and health plans accountable for violating patients' privacy rights. The date for implementation of the regulations has been set for April 14, 2003, in order to give health care providers and others time to adopt policies and procedures in their offices to meet compliance requirements. As you can imagine, an industry-wide educational effort is being undertaken to fully inform physicians, hospitals, health plans and others of their responsibilities under the new regulations. The Secretary of Health and Human Services has indicated that he intends to continue to refine the regulations to deal with problem

areas which have been identified by the provider community. This week HHS is releasing for public comment several proposed revisions intended to eliminate unintended barriers to the efficient delivery of care which were created by the original rule. We expect the rule to be further amended over the course of the next couple of years as the detailed requirements are more fully understood by all affected parties.

For physicians. the Kansas Healing Arts Act and regulations adopted thereto already require licensees to release patient records upon receipt of a written authorization from the patient. Additionally, violation of the regulation is prima facie evidence of dishonorable conduct, which can result in sanctions up to and including loss of license.

We believe the new federal Privacy Rule, and the existing regulations of the Healing Arts Board already provide a more than adequate framework to protect patients' privacy, assure access to their medical information, and hold providers accountable for violations. There are essentially three main components to the issue before you:

- assuring patients and their legal representatives timely access to the patient's medical information;
- enforcement, or penalties for non-compliance; and
- assuring that any costs charged to the patient for retrieval and copying of the records to comply with the request are reasonable.

Both the Healing Arts Act regulations and the federal Privacy Rule address those three points in the following ways:

Access

Privacy Rule: §164.524(a)(1) - "...an individual has a right of access to inspect and obtain a copy of protected health information about the individual in a designated record set...."; and §164.524(b)(2) - "...the covered entity must act on a request for access no later than 30 days after receipt of the request...."

Healing Arts regulations: K.A.R. 100-22-1 (a) - "...each licensee shall, upon receipt of a signed release from a patient, furnish a copy of the patient record to the patient, to another licensee designated by the patient, or to a patient's legally designated representative."

Enforcement

Privacy Rule: §160.306(a) - "A person who believes a covered entity is not complying with the applicable requirements of this part 160 or the applicable standards, requirements, and implementation specifications of subpart E of part 164 of this subchapter may file a complaint with the Secretary." The Secretary has the right to investigate and to informally resolve disputes. Additionally, the Secretary may impose civil money penalties of not more than $100 per violation, up to $25,000 per person, per year for each requirement or prohibition violated.

Healing Arts regulations: K.A.R. 100-22-1 (c) - "Any departure from this regulation shall

constitute prima facie evidence of dishonorable conduct pursuant to K.S.A. 65-2836(b), and any amendments thereto."

Cost

Privacy Rule: §164.524(c)(4) - "...the covered entity may impose a reasonable, cost-based fee..." for copying requested protected health information.

Healing Arts regulations: K.A.R. 100-22-1 (b) - "A licensee may charge a person or entity for reasonable costs to retrieve or reproduce a patient record."

As you can see from the above, it should be very clear that Kansans already have a right of access to their medical information. Both the federal Privacy Rule, and the Healing Arts regulations assure it. Likewise, assuring enforcement, or provider compliance, should not be in question. The potential for sanctions by the Healing Arts Board, as well as an investigation and civil penalties by the Secretary of the United States Department of Health and Human Services, are more than adequate enforcement tools to assure compliance with a patient's request for their medical information. We believe it is unnecessary to create a new statutory standard in Kansas, since the federal Privacy Rule and existing state regulations already have dealt with the matter.

The only aspect of this issue that does not have explicit parameters set out either in federal or state regulation is that of cost. Both the current state and federal privacy regulations allow providers to receive "reasonable" charges for copying the requested records. Neither regulation establishes a specific cost for the retrieval and copying of medical records. We understand that point is a significant issue for the proponents of this legislation. We believe that a "reasonable, cost-based" standard is appropriate, and that health care providers should be able to charge for their actual costs to retrieve and copy medical records.

However, while we do not believe the bulk of this legislation is necessary, if the Committee feels it must pass it with an explicit limitation on the recovery of duplication costs, the approach we favor is a fee schedule that allows $20 for the cost of supplies and labor, plus 50 cents per page copied. That is currently the fee schedule in use in the state of Nebraska, which we felt was fair and in the middle range of those around us. The other states and their respective fee schedules follow: Oklahoma and Arkansas were the lowest at a flat 25 cents per page; the Workers Comp fee schedule allows $16 for the first 10 pages, an additional $12 for the next 40 pages, and then an additional 35 cents per page for copies exceeding 50 pages; then Missouri with a $16.94 handling fee and 39 cents per page; then Nebraska at $20 handling fee and 50 cents per page; and Texas, which was the highest, using a $30 processing fee plus a three-tiered schedule for copying costs that started out at $1 per page through 60 pages, then 50 cents per page through 400 pages, and finally 25 cents per page for copies exceeding 400 pages. Colorado, South Dakota and Iowa do not have any limits, and allow providers to get their reasonable costs reimbursed.

We have attached a balloon amendment to the bill which would do the following:

- on page 1, lines 34 and 39, add language to make it clear that there could be other parties such as a court or an administrative agency, for example, who would have legal authorization to request health care records;
- on page 1, line, 37, add language which would allow a provider to withhold copies of the requested records if the provider believes the records could cause substantial harm to the patient or another person. This mirrors HIPAA requirements;
- on page 1, line 40, add language that would set the fee limits at the Nebraska model, as well as using language that is considered "HIPAA-compliant," or consistent with the federal privacy regulations. It is important that the language "cost of supplies and labor" be used instead of "handling or service fee," as HIPAA does not allow a "handling fee" to be charged;
- on page 2, delete lines 5-10 and insert language which addresses the enforcement provision in the bill. We propose language that would require persons suing over records to demonstrate to the court they have made a good faith effort to resolve the dispute before filing suit. This is a common concept in civil litigation and the language has been lifted directly from state and federal rules of civil procedure; and
- on page 2, line 13, add language which makes it clear that any regulations adopted by the Healing Arts Board must be consistent with this act.

Beyond addressing the cost and enforcement issues specifically in state law, we believe the balance of the bill is unnecessary, and will be superseded by the federal privacy rule when it takes effect one year from now. Since the adoption of the federal regulations, the bill confers no new right of access to Kansans that they do not already have guaranteed by federal law. Additional state rules about access and the other issues surrounding access to health information are unnecessary, are potentially confusing to patients and providers alike, and run the risk of being contrary to federal regulations. While we believe the bill is unnecessary because the federal privacy regulations under HIPAA addresses this subject, if the committee feels it must pass this bill, we urge your support of our amendments. We believe they are necessary to make the bill HIPAA compliant, as well as fairer to the provider community. Thank you for the opportunity to appear today.

As Amended by Senate Committee

Session of 2002

SENATE BILL No. 377

By Special Committee on Judiciary

1-8

AN ACT concerning access to health care records by patients and authorized representatives.

Be it enacted by the Legislature of the State of Kansas:

Section 1. As used in this act: (a) "Health care provider" means those persons and entities defined as a health care provider under K.S.A. 40-3401 and K.S.A. 7-121b, and amendments thereto, except that "health care provider" shall not include a health maintenance organization.

(b) "Authorized representative" means the person designated in writing by the patient to obtain the health care records of the patient or the person otherwise authorized by law to obtain the health care records of the patient.

(c) "Authorization" means a written or printed document signed by a patient or a patient's authorized representative containing: (1) A description of the health care records a health care provider is authorized to produce; (2) the patient's name, address and date of birth; (3) a designation of the person or entity authorized to obtain copies of the health care records; (4) a date or event upon which the force of the authorization shall expire which shall not exceed one year; (5) if signed by a patient's authorized representative, the authorized representative's name, address, telephone number and relationship or capacity to the patient; and (6) a statement setting forth the right of the person signing the authorization to revoke it in writing.

Sec. 2. ~~(a)~~ Subject to applicable law, copies of health care records shall be furnished to a patient, ~~or~~ a patient's authorized representative or any other person or entity authorized by law to obtain or reproduce such records. within 30 days of the receipt of the authorization, or the health care provider shall notify the patient or the patient's authorized representative of the reasons why copies are not available. Health care providers may condition the furnishing of the patient's health care records to the patient, ~~or~~ the patient's authorized representative upon the payment of charges not to exceed a ~~$15 handling or service fee and $.35~~ per page for copies of health care records routinely duplicated on a standard photocopy machine. Providers may charge for the reasonable cost of all duplications of health care record information which cannot be routinely duplicated on

A health care provider may withhold copies of health care records if the health care provider reasonably believes that providing copies of the requested records will cause substantial harm to the patient or another person.

or any other person or entity authorized by law to obtain or reproduce such records,

$20 fee for the cost of supplies and labor and $.50

a standard photocopy machine.

~~(b) The limits provided in subsection (a) shall be increased or decreased on an annual basis effective January 1 of each year in accordance with the centers for medicare and medicaid services market basket survey.~~

~~Sec. 3. Any health care provider, patient or authorized representative of a patient may bring a claim or action to enforce the provisions of this act, and any court having jurisdiction of such claim or action, upon a showing that the failure to comply with this act was without just cause or excuse, shall award the costs of the action and order the patient's health care records produced without cost or expense to the requesting party.~~

Sec. 3. Any health care provider, patient, authorized representative or any other entity authorized by law to obtain or reproduce such records may bring a claim or action to enforce the provisions of this act. The petition shall include an averment that the party bringing the action has in good faith conferred or attempted to confer with the other party concerning the matter in dispute without court action. Upon a showing that the failure to comply with this act was without just cause or excuse, the court shall award the costs of the action or order the records produced without cost or expense to th prevailing party.

Sec. 4. Nothing in this act shall be construed to prohibit the state board of healing arts from adopting and enforcing rules and regulations that require licensees of the board to furnish health care records to patients or to their authorized representative. To the extent that the board determines that an administrative disciplinary remedy is appropriate for violation of such rules and regulations, that remedy is separate from and in addition to the provisions of this act.

not inconsistent with this act

Sec. 4 5. This act shall take effect and be in force from and after its publication in the Kansas register.

9-6

LATHROP & GAGE L.C.

March 25, 2002

MEMORANDUM TO: Kansas House Judiciary Committee

FROM: Gail Edson

RE: SB 377

Thank you for the opportunity to address the Committee today. My name is Gail Edson and I am an associate at the law firm of Lathrop & Gage L.C. in Kansas City. I am here today on behalf of the Kansas Hospital Association to discuss SB 377, which requires copies of health care records to be provided to a patient within thirty days of a request for an authorization. Specifically, my role is to address the implications of federal Privacy Standards recently promulgated pursuant to the Health Insurance Portability and Accountability Act (HIPAA Privacy Standards).

As stated, SB 377 is intended to require health care providers to furnish copies of health care records to a patient or a patient's authorized representative within thirty days of the receipt of the authorization. Simplified, the Bill addresses six different areas: (1) the definition of the term "Authorized Representative"; (2) the definition of the term "Health Care Provider"; (3) criteria for authorization forms that require health care providers to disclose health information to patients or their authorized representatives; (4) limitations on the amount of fees a health care provider may charge patients or their authorized representatives; (5) timelines that must be adhered to in the release of the information; and (6) enforcement provisions for violations of the provision.

My main message today is that Senate Bill 377 is not required, and in fact, only duplicates requirements existing in federal law today. To assist in my efforts to convey

this message, I have prepared the attached comparison chart that looks at the six main areas addressed by Senate Bill 377. As you can tell by reviewing the chart, there are very few differences in Senate Bill 377 and the existing HIPAA Privacy Standards. The form of the authorization is similar in wording and almost identical in intent for both pieces of legislation. The six requirements for form included in the Bill mirror those included in the HIPAA Privacy Standards. Any additional requirements included in the HIPAA Privacy Standards or proposed modifications to the same only create additional privacy protections for the patient.

The time period in which a health care provider must provide information to a patient is also identical. Both the proposed law and the HIPAA Standards require that a patient be given requested copies of medical records within 30 days, or if records cannot be provided within that time frame, the reasons why the provider cannot provide the records. HIPAA requires that even if the records are stored off site, the covered entity must provide them to a patient no later than 60 days after receipt of the request. Again, HIPAA appears to provide additional protections to a patient by specifying additional required timelines by which patient information must be provided.

The definition of "Authorized Individual" is similar to the definition of a "Personal Representative" as included in the HIPAA Privacy Standards in that the definitions of both rely on applicable law to define who may receive information on behalf of an individual. Certainly under either, a patient's signed authorization can name any individual that can receive their medical records. Furthermore, it appears that the term "Health Care Provider" is defined more broadly in the HIPAA Privacy Standards than the proposed Kansas law. For instance, the HIPAA Privacy Standards definition states that the term includes "any other person who furnishes, bills, or is paid for health care in the normal course of business." Therefore, it appears as if the HIPAA Privacy Standards include additional entities that are responsible for providing timely access of records to patients.

While HIPAA Privacy Standards do not expressly set the amount of fees that may be charged by a provider, it does require providers to charge only a reasonable and cost-based fee, which may include a fee for the supplies for or labor of copying the materials. The proposed Bill requires the same, although is it explicit in required fees for copying materials on a photocopier. Because the HIPAA Privacy Standards limit fees to a cost-based standard and also exclude any fees related to the retrieval or handling of the information, the requirements set forth in the proposed Bill are repetitive and unnecessary.

The enforcement provisions for each provide penalties for violations of any access rights of a patient. Under Senate Bill 377, providers who violate the provisions of the act must pay court costs and the costs of duplicating any records that were improperly denied or delayed. Under the HIPAA Privacy Standards, covered entities that violate the standards will be subject to fines not to exceed $100 per violation. Under either circumstance, the fines that could potentially result are incentive to providers to follow requirements for the release of medical records at the authorization of the patient.

Clearly, Senate Bill merely duplicates already existing law. The HIPAA Privacy Standards became effective on April 14, 2001, and are enforceable on April 14, 2003. Therefore, there is no need for the proposed Senate action.

Furthermore, there is a chance that passing this proposed legislation will only serve to confuse the issue of access to medical records. The HIPAA Privacy Standards consisted of three hundred and sixty seven pages of regulations and commentary in the Federal Register when published on December 28, 2000. Proposed modifications, in unofficial format, cover over one hundred and seventy-five pages of regulations and commentary. Included in the myriad of pages are certain exceptions to a patient's right to access his or her own medical records. Senate Bill 377 contains no such restrictions, and no definition of what constitutes a patient's medical record. In other words, it would appear from a reading of the Bill that a patient could access any and all medical records that a provider may possess. Certainly, the HIPAA Privacy Standards contain preemption

language that would override state laws allowing access to any and all records, but my concern is more practical in nature. Patients and their representatives seeking such documents will expect open access to all records, when clearly federal law does not allow such unfettered access. Their response to a provider's denial of unfettered access to medical records will be to seek immediate reprieve from the court system, as is allowed under the current version of Senate Bill 377, and will result in unnecessary and expensive battles that will only increase the rising costs of health care.

The bottom line is this: providers, such as those represented by the Kansas Hospital Association, respect a patient's right to access his or her medical records when permitted by law. But to add duplicative requirements in state law to those already existing in federal law will only serve to complicate and confuse the responsibilities of providers. Therefore, on behalf of the Kansas Hospital Association, we oppose the passage of S.B. 377. Thank you for your time.

S.B. 377 /HIPAA Privacy Standard Comparison Chart

	S.B. 377 Definition/Requirement	HIPAA Definition/Requirement
Form of Authorization	The authorization form must include: - A description of the health care records a health care provider is authorized to produce; - the patient's name, address and date of birth; - a designation of the person or entity authorized to obtain copies of the health care records; - a date or event upon which the force of the authorization shall expire which shall not exceed one year; - if signed by the patient's authorized representative, the authorized representative's name, address, telephone number and relationship or capacity to the patient; and - a statement setting forth the right of the person signing the authorization to revoke it in writing. **S.B. 377 §(1)(c).**	The authorization form must include: - A description of the information to be disclosed that identifies the information in a specific, meaningful fashion; - the name or other specific identification of the persons, or class of persons authorized to make the requested disclosure; - the name or other specific identification of the person to whom the information may be disclosed; - An expiration date or event that relates to the individual or the purpose of the disclosure; - signature of the individual and the date, and if signed by the patient's representative, the description of the individual's authority to act for the individual; - a statement of the individual's right to revoke the authorization; and - a statement that the information disclosed pursuant to the authorization may be subject to redisclosure. **42 C.F.R. § 164.508(c).**[i]

Time period to release information	"Subject to applicable law," copies of records must be furnished to the patient or a patient's authorized representative **within 30 days** of receipt of an authorization, or the health care provider must notify the patient or the patient's authorized representative of the reasons why copies are not available. **S.B. 377, § 2.**	Access to Information: Upon a request of a patient to inspect and obtain copies of their health information (except for certain exceptions including, but not limited to, psychotherapy notes; information compiled in reasonable anticipation of, or for use in a civil, criminal, or administrative action or proceeding; information subjecto to CLIA restrictions; certain research information and certain information maintained by a correctional institution), a covered entity must act on the request **within 30 days** of receipt of the request (or 60 days in information is kept off site). **42 C.F.R. § 164.524.**
Authorized Representative	"Authorized Representative" is defined as "the person designated in writing by the patient to obtain health care records of the patient or the person otherwise authorized by law to obtain the health care records of the patient." **S.B. 377, § 1(b).**	"Personal Representative" means a person who, under applicable law, is authorized to act on behalf of the individual in making decisions related to health care, such as a court-appointed guardian or person with power of attorney (can include someone authorized in writing by the individual). **42 C.F.R. § 164.502(g) and Commentary included in the Regulatory Preamble related thereto.**

Health Care Provider	Means persons and entities defined under KSA 40-3401 and 7-121b, but not health maintenance organizations. **S.B. 377, § 1(a).**	Defines "covered entity" to include health plans, health care clearinghouses and health care providers. Health care providers are defined as providers of services as defined in the Social Security Act, a provider of medical or health services as defined by the Social Security Act, and "any other person who furnishes, bills, or is paid for health care in the normal course of business." **42 C.F.R. § 160.103.**
Fees	Access to information may be conditioned upon the payment of charges not to exceed $15 handling or service fee and $.35 per page for copies of health care records routinely duplicated on standard photocopy machine. Providers can charge the reasonable cost of copies of records that cannot be routinely copied on a standard photocopy machine. **S.B. 377, § 2.**	A covered entity can impose a "reasonable, cost-based fee" which includes only the cost of: - copying, including the cost of **"supplies for and labor of"** copying, the information requested by the patient; - postage, when the individual has requested the copy, or a summary of the explanation, be mailed; and - preparing an explanation of summary of the information, if agreed to by the patient. **42 C.F.R. § 164.524(c)(4).**

Enforcement	A health care provider, patient or authorized representative may bring a claim or action to enforce the provisions of the Act, and the court, upon a showing that the failure to comply was without just cause or excuse, must award costs of the action and order the patient's records produced without cost or expense to the requesting party. State Board of Healing Arts can create separate disciplinary actions against licensees. **S.B. 377, §§ 3 and 4.**	Civil Penalties for violations of Privacy Standards[ii]: The Secretary of Health and Human Services can impose civil penalties in the amount of not more than $100 for each violation, except that the total amount imposed on the person for all violations of an identical requirement cannot exceed $25,000. **42 U.S.C. § 1176(a)(1).** Criminal Penalties for Wrongful Disclosure: The Department of Justice may choose to impose criminal penalties if the violation is willful and knowing. The penalty cannot exceed $50,000 or jail time of not more than 1 year or both. If the violation involves false pretenses, fines and jail time increase to amounts of up to $100,000 and 5 years. If the violation involves the intent to sell or transfer information for financial gain or malicious harm, then fines and jail time increase to $250,000 and 10 years respectively. **42 U.S.C. § 1177.**

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[i] Proposed modifications to the Privacy Standards are expected to be released on March 27, 2002. These modifications will include the following additions to the authorization criteria: (1) the authorization must describe the purpose of the use or disclosure; (2) the form must describe not only the right to revoke the authorization, but instructions on how to exercise the right and, to the extent such in formation is included in a Notice of Privacy Practices, a reference to the Notice; and (3) a statement that treatment, payment, enrollment or eligibility for benefits may not be conditioned on obtaining the authorization if not permitted by the Privacy Standards.

[ii] The Department of Health and Human Services will release separate and distinct regulations that govern the enforcement processes for all Administrative Simplification violations. However, regardless of the regulatory processes, the statute is clear that a fine

may be imposed for any violation of the regulations (including violating a patient's right of access to information).

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HOUSE JUDICIARY COMMITTEE
Testimony re: SB 377
Presented by Jim Sergeant
Vice President of Managed Care
on behalf of
Wesley Medical Center
March 25, 2002

Mr. Chairman and Members of the Committee:

My name is Jim Sergeant, Vice President of Managed Care at Wesley Medical Center in Wichita

Wesley Medical Center certainly is supportive of the concept that all patients should have access to their medical records, and that there should not be arbitrary deterrents created regarding costs or time delays in accessing those records. However, Wesley does have some concerns about SB 377 as it is currently written. I have attached to my testimony balloon amendments, which if adopted in their entirety, would change Wesley's position from one of opposing SB 377 to one of neutrality. The reason the adoption of these amendments would not change our position to one of support for SB 377 is primarily because we believe this legislation is unnecessary and is duplicative of the legislation already passed by Congress, the Health Insurance Portability and Accountability Act of 1966 (HIPAA).

I want to take a minute to demonstrate what our hospital has to do when we receive a request for medical records. Many people believe that when there is a request for medical records, it is simply a matter of opening a file, pulling out a particular document, photocopying it, and giving it to the requestor. Regarding medical records, nothing could be further from the truth. Although this legislation is designed to make medical records accessible, there is other legislation, primarily at the federal level, which is designed to make certain that medical records are treated confidentially. There are penalties for the healthcare provider if they make an error in either direction. If we do not release something that should have been released, we can be penalized. If we release something, which should not have been released, we can be penalized.

Sometimes we will receive a request for a particular document, such as a letter or lab work, or other identifiable document with a certain date. In that case, it would be a matter of retrieving the chart, finding that document in the file, reviewing that document, making certain that the document does not contain any confidential information that should not be disclosed under any of the federal requirements, then photocopying it and providing it to the requestor. Prior to pulling a record we must confirm that the requestor is an authorized representative. Many times they are not authorized to receive the information.

Some of the items which cannot be disclosed or released by the hospital pursuant to federal law or otherwise include certain information regarding psychiatric treatment or medications, certain surgeries, and certain healthcare information (such as abortions, HIV, AIDS, or other sensitive matter relating to certain sexual procedures).

Because of this, it is necessary for us to have credential individuals who are knowledgeable about federal and state law and about which documents/information can and cannot be released. A request for medical records is not just a matter of photocopying the file. A request requires the staff literally to read every document in the file, determine whether or not that document fits the parameters of the record request, and then, whether or not the document should or should not be released because of some provision of law. If a document should not be released, there then must be documentation to substantiate the basis for not releasing medical records. This is an extremely time consuming and extensive process. In fact, 81% of the cost of releasing medical information is due to the intensity and professional status of the labor pool.

Let me give you some examples of what is required by medical records staff pursuant to federal and other law. [See attachment 1]

I won't repeat arguments or issues that have been raised by other conferees, but I would like to put on the record our comments regarding some of the amendments proposed by the Kansas Medical Society and the Kansas Hospital Association. [See attachment 2.]

On Page 1, section 2, lines 24, 27, and 29, there should be a provision to add "or any other person or entity authorized by law to obtain such records." Wesley Medical Center receives requests for records from patients, authorized representatives of patients, and other entities such as Medicaid, Medicare, peer review organizations, and others. As I will discuss later, being able to recover the costs of providing medical records is very important to Wesley. When the Legislature sets a fee or limit on a fee that can be charged by the hospital for medical records, but only makes that provision applicable to some of the requests for records, it puts us in a situation whereby we may not be able to recover all the costs of providing medical records because of the groups that are exempted from the provisions of the act.

We support as do other groups, provisions that would bring this legislation into conformity with HIPAA, and therefore support the provision that permits a healthcare provider to withhold copies if the requested records will cause substantial harm to the patient or another person. (Page 1, section 2, line 27)

Wesley also supports the increase in the fee for the costs of supplies and labor and an increase in the charge per page. Our analysis of the costs to our hospital for providing medical records, which does not include storage costs, equates to approximately 72 cents per copy, utilizing 2001 data. With a fee structure as set out in the bill, the ability to retrieve its actual costs of supplying medical records is a function of the number of requests and the average number of pages per request. Based upon our analysis, we believe that the amendment to increase the fee

for the costs of supplies and labor and the charge per page would bring us closer to being able to recover the costs of providing medical records. (Page 1, section 2, line 30)

Lastly, section 3 of the bill provides for the creation of a cause of action against healthcare providers for failure to comply with the act. We believe this is extreme overkill. Patients and their authorized representatives should have access to their records, and in a timely manner. However, if for some reason a delay occurs in providing records, the filing of a lawsuit (with a $101 filing fee), the hiring of legal counsel, the requirement that the healthcare provider retain legal counsel, and the substantial delays in time that civil litigation would entail is not a reasonable approach in the first instance. Therefore, we support the proposed amendment to section 3 that would provide for a cause of action only after the petitioner has "in good faith conferred or attempted to confer with the other party concerning the matter in dispute without court action". In this way, if there is an intentional and absolute disregard for the act by a healthcare provider, the cause of action would still be permitted, but if the failure to provide the information was a clerical error, an oversight, or a justifiable delay, there would have to be an attempt to confer before commencing litigation. We believe this is a reasonable middle ground to the current provisions of SB 377.

Thank you for your consideration of our comments and I would be happy to yield to questions.

Attachment 1

Examples of Complexity of Fulfilling Medical Records Requests

Example 1:

An individual is involved in a car accident. As a result of the accident, the injured party is treated at Wesley Medical Center. Several weeks later, Wesley Medical Center medical record department receives a records request on the injured person from the auto insurance company (Exhibit A). The record must be thoroughly examined by a trained medical record technician. After reviewing approximately 100 pages of the injured party's 300 page medical record, it is discovered that page 101 contains federally protected medical information. The medical records department must then stop their review and send a letter to the insurance company (Exhibit B) requesting that a new medical records request (Exhibit C) be completed and returned to Wesley Medical Center medical records department. Wesley Medical Center cannot tell the requesting insurance company why we cannot honor their first request. If the injured party does not agree to release the information Wesley Medical Center will not be paid for the resources already consumed. If the injured party signs the request, Wesley Medical Center will then continue to thoroughly review the remaining 199 pages for content and time span accuracy.

Example 2:

An attorney sends a written request for medical records, which among other things, requests copies of lab work. The patient's file is approximately 200 pages. The technician reviews 100 pages of the file, and has pulled out 30 pages that comply with the request. However, the technician reviews a page of lab work, which includes lab results for 10 different tests, one of which is a positive result for HIV. The technician must now stop the review, since the document cannot be released, although requested, because of federal privacy law. A letter must be sent to the attorney requesting authorization from the patient to release such information. The hospital cannot tell the attorney why the request for medical records is being declined. The hospital must reply that the medical records request cannot be fulfilled. The hospital cannot release a portion of the file, and only withhold the information which is protected. The hospital must withhold the entire material requested. If the patient authorization is then returned, the hospital can continue to fulfill the information.

Example 3:

A patient has been involved in an automobile accident, and comes to the hospital. The accident results in litigation. The adverse attorney requests the medical records of the patient, including nurses' notes and doctors' notes. Once again, the nurses'/doctors' notes (and all other records) must be read/reviewed for privacy information. The nurses' notes reflect that the accident occurred when the patient was on his way to the Menninger Clinic for a meeting. The record with the nurses' note will be released.

Example 4:

Same factual situation as #2, but nurses' notes reflect patient was on his way to the Menninger Clinic to see his psychiatrist. The record with the nurses' note will not be released.

Example 5:

Same factual situation as #2, but nurses' notes reflect patient was on his way to Stormont-Vail Hospital for his Aids treatment. The record with the nurses' note will not be released

Example 6:

Same factual situation as #2, but the doctor's two-page medical history reflects patient is using an Aids medication. The medical history will not be released.

EXHIBIT A

FEB 13 2002

CLAIM # [redacted]

AUTHORIZATION TO PROVIDE INFORMATION

I, [redacted], authorize:
(INJURED PERSON)

1) any medical, osteopathic or chiropractic physician, any dentist, hospital, clinic, rehabilitation facility, or other medical practitioner or provider who has or is or will be furnishing services to me to provide my medical and dental information, including history, treatment, diagnosis, prognosis, billing records and

2) any firm, employer, or insurance company to furnish information about my earnings, loss of earnings, work history, and medical information in their possession to

[redacted] Insurance Companies and its claim or legal representatives.

I understand and authorize that, as part of the claim handling process, [redacted] Mutual Automobile Insurance Company or any of its subsidiaries and/or its claim or legal representatives may disclose medical information obtained by this authorization to physicians, dentists or healthcare providers for evaluation.

This information is authorized to permit processing of a claim I have made against [redacted] Insurance Companies and/or their insureds arising out of an accident or occurrence on January 16, (year) 2002.

This authorization is valid for the duration of the claim, and I agree a photocopy of it is as valid as the original.

I have read this authorization and acknowledge I or a person authorized by me will receive a copy of this authorization upon request.

Date: 2-9, (year) 2002

[redacted]
SIGNATURE OF PATIENT/EMPLOYEE, PERSONAL REPRESENTATIVE, OR NEXT OF KIN

[redacted]
SOCIAL SECURITY NUMBER
(For use by the provider of information to locate records.)

[redacted]
DATE OF BIRTH OF INJURED PERSON

11-6

EXHIBIT B

Date: 03/22/2002

Test Test
Test
Test
Tes
San Jose, CA 95110

RE: Test, Test
Date of Birth: / /
Social Security Number:

To Whom It May Concern:

Your request for medical record information on the above named patient has been received. We will need the following:

PLEASE PROVIDE THE ENCLOSED AUTHORIZATION IN ORDER FOR US TO PROVIDE THESE FEDERALLY PROTECTED RECORDS WHICH YOU HAVE REQUESTED ON THE ABOVE PATIENT.

If we may be of any further assistance, please feel free to contact us at the address listed below. Thank you.

_____

Medical Record Department
Release of Information

EXHIBIT C

WESLEY MEDICAL CENTER
Health Information Management Department/Release of Information
550 N. Hillside
Wichita, KS 67214-4976
Phone (316) 688-2513 Fax (316) 688-7668

CONSENT FOR THE RELEASE OF CONFIDENTIAL INFORMATION

_____ _____ _____
(Patient Name) (Birth Date) (SSN)

_____ _____
(Street Address) (City, State & Zip) (Phone No.)

I AUTHORIZE MY RECORDS TO BE RELEASED TO:

_____
(Name of Person or Institution)

_____
(Street Address) (City, State & Zip)

_____ _____
(Phone No.) (Fax No.)

TO BE RELEASED FROM: WESLEY MEDICAL CENTER
Health Information Management Dept.
550 North Hillside
(Name of Facility)
Wichita, KS 67214-4976

_____ _____
(Address) (Phone No.)

for the following purpose _____

for treatment dates _____
(Specify Dates)

including the following portions of the record(s):

___ Abstract/Pertinent Information ___ Lab ___ ER ___ Pathology

___ Discharge Summary ___ Operative ___ History & Physical ___ X-ray

Other: _____

I the undersigned, have read the above and authorize the staff of the disclosing facility named to disclose such information as herein contained. I understand that this consent may be withdrawn by me at any time except to the extent that action has been taken in reliance upon it. I acknowledge, and hereby consent to such, that the released information may contain HIV testing, HIV results, or AIDS information. I also understand that any disclosure is bound by Title 42 of the Code of Federal Regulations governing the confidentiality of alcohol, drug abuse, and mental status patient records and that redisclosure of this information to a party other than the one designated above is forbidden without additional written authorization on my part. This facility is released and discharged of any liability, and the undersigned will hold the facility harmless, for complying with this "Consent for the Release of Confidential Information".

This authorization expires 60 days from the below date, and covers only treatment periods indicated above. Proof of identification will be provided by authorizing individual.

Copy Fees/Charges will comply with all laws and regulations applicable to release of information

_____ _____ _____
Date Patient (or Legal Representative) (Relationship to Patient)

NOTICE to person or agency receiving information: Federal laws and regulations prohibit redisclosure of the information whose confidentiality is protected in the absence of specific consent of the patient or person authorized to consent of the patient.

Attachment 2

As Amended by Senate Committee

Session of 2002

SENATE BILL No. 377

By Special Committee on Judiciary

1-8

AN ACT concerning access to health care records by patients and authorized representatives.

Be it enacted by the Legislature of the State of Kansas:

Section 1. As used in this act: (a) "Health care provider" means those persons and entities defined as a health care provider under K.S.A. 40-3401 and K.S.A. 7-121b, and amendments thereto, except that "health care provider" shall not include a health maintenance organization.

(b) "Authorized representative" means the person designated in writing by the patient to obtain the health care records of the patient or the person otherwise authorized by law to obtain the health care records of the patient.

(c) "Authorization" means a written or printed document signed by a patient or a patient's authorized representative containing: (1) A description of the health care records a health care provider is authorized to produce; (2) the patient's name, address and date of birth; (3) a designation of the person or entity authorized to obtain copies of the health care records; (4) a date or event upon which the force of the authorization shall expire which shall not exceed one year; (5) if signed by a patient's authorized representative, the authorized representative's name, address, telephone number and relationship or capacity to the patient; and (6) a statement setting forth the right of the person signing the authorization to revoke it in writing.

Sec. 2. ~~(a)~~ Subject to applicable law, copies of health care records shall be furnished to a patient, ~~or~~ a patient's authorized representative or any other person or entity authorized by law within 30 days of the receipt of the authorization, or the health care provider shall notify the patient or the patient's authorized representative of the reasons why copies are not available. Health care providers may condition the furnishing of the patient's health care records to the patient, ~~or~~ the patient's authorized representative, upon the payment of charges not to exceed a ~~$15 handling or service fee and $.35~~ per page for copies of health care records routinely duplicated on a standard photocopy machine. Providers may charge for the reasonable cost of all duplications of health care record information which cannot be routinely duplicated on

A health care provider may withhold copies of health care records if the health care provider reasonably believes that providing copies of the requested records will cause substantial harm to the patient or another person.

or any other person or entity authorized by law t obtain or reproduce such records,

$20 fee for the cost of supplies and labor and $.50

a standard photocopy machine.

~~(b) The limits provided in subsection (a) shall be increased or decreased on an annual basis effective January 1 of such year in accordance with the centers for medicare and medicaid services market basket survey.~~

~~Sec. 3. Any health care provider, patient or authorized representative of a patient may bring a claim or action to enforce the provisions of this act, and any court having jurisdiction of such claim or action, upon a showing that the failure to comply with this act was without just cause or excuse, shall award the costs of the action and order the patient's health care records produced without cost or expense to the requesting party.~~

Sec. 4. Nothing in this act shall be construed to prohibit the state board of healing arts from adopting and enforcing rules and regulations that require licensees of the board to furnish health care records to patients or to their authorized representative. To the extent that the board determines that an administrative disciplinary remedy is appropriate for violation of such rules and regulations, that remedy is separate from and in addition to the provisions of this act.

Sec. ~~4~~ 5. This act shall take effect and be in force from and after its publication in the Kansas register.

Sec. 3. Any health care provider, patient, authorized representative or any other entity authorized by law to obtain or reproduce such records may bring a claim or action to enforce the provisions of this act. The petition shall include an averment that the party bringing the action has in good faith conferred or attempted to confer with the other party concerning the matter in dispute without court action. Upon a showing that the failure to comply with this act was without just cause or excuse, the cou shall award the costs of the action or order th records produced without cost or expense to prevailing party.

not inconsistent with this act

11-10

Kansas Association of Osteopathic Medicine

1260 SW Topeka Boulevard
Topeka, Kansas 66612

Phone (785) 234 5563
Fax (785) 234 5564

Testimony on Senate Bill 377
HOUSE JUDICIARY COMMITTEE
By Charles L. Wheelen
March 25, 2002

Thank you for the opportunity to testify against Senate Bill 377. The Kansas Association of Osteopathic Medicine is opposed to additional legislation regarding medical records because it is unnecessary. There already exist state and federal laws that assure access to the information contained in a patient's medical records. There are also regulations that provide for disciplinary action against physicians for failure to adhere to those laws.

Existing administrative laws prescribe standards for accuracy, storage, and retrieval of medical records as well as patient rights to obtain copies of medical records. Specifically, *Kansas Administrative Regulation* 100-22-1 demands that physicians provide copies of medical records to a patient or "a patient's legally designated representative." That regulation goes on to say that, "Any departure from this regulation shall constitute prima facie evidence of dishonorable conduct pursuant to K.S.A. 65-2836(b), and any amendments thereto." In other words, the physician's license may be revoked, suspended, or limited if the Board of Healing Arts finds that the physician has denied the patient or the patient's representative a copy of the medical record, or has charged an unreasonable fee for the copy. During hearings conducted by the 2001 Special Committee on Judiciary there were concerns expressed because the Board of Healing Arts regulation did not impose a maximum fee nor impose a time limit. These concerns were relayed to the Executive Director of the Board and as a result, the Board of Healing Arts has proposed amendments to K.A.R. 100-22-1 that would address these concerns.

Similar administrative laws govern hospitals and other medical care facilities. K.A.R. 28-34-9a prescribes standards for accuracy, storage, and retrieval of medical records, whereas item (8) under subsection (a) of K.A.R. 28-34-3b grants each patient or the patient's legally designated representative "access to the information contained in the patient's medical records within the

limits of state law." If a patient or the patient's attorney has a problem obtaining a copy of a medical record from a hospital, a complaint may be filed at the Department of Health and Environment. The Secretary of Health and Environment has statutory enforcement authority.

In addition to the existing state laws governing retention and access to patient medical records, the new federal privacy regulations adopted by the Secretary of Health and Human Services (a.k.a. "HIPAA regs") provide another layer of stringent rules pertaining to personal health information. These new federal regulations grant patients the unquestionable right to examine and obtain copies of their own health care records, and request amendments to those records. In other words, *all Kansas patients already have the benefit of both state and federal laws and regulations which assure access to their own medical records.* Any additional legislation would be redundant.

Perhaps equally important is the question whether regulation of patient health information is an executive or judicial function of government. We believe that patient rights to obtain information contained in their medical records should be enforced by the agencies that regulate the professions and institutions that create those records. If the existing administrative laws are somehow flawed or inadequate, we should be focusing our attention on amending or supplementing the regulations. The courts should be reserved for important criminal and civil matters.

For the above reasons we urge you to recommend that Senate Bill 377 *not* be passed. But if these reasons are not sufficient for unfavorable action, we have attached to this statement a draft substitute for SB377. This measure differs only slightly from the Senate version of SB377. It would apply the rules for timely reproduction of copies and limits on fees to all occupations licensed by the State. We offer this substitute for the sake of fairness and equal treatment under the laws of Kansas.

Thank you for considering our position.

Proposed Substitute for Senate Bill 377

Drafted by C. Wheelen, KAOM

March 2002

Be it enacted by the Legislature of the State of Kansas:

Section 1. As used in this act: (a) "Licensee" means any person or corporation that engages in an occupation pursuant to a license granted by an agency, department, or branch of government of this state.

(b) "Authorized representative" means the person designated in writing by the client, customer or patient to obtain records of the client, customer or patient or the person otherwise authorized by law to obtain records of the client, customer or patient.

(c) "Authorization means a written or printed document signed by a client, customer or patient or an authorized representative containing: (1) A description of the records a licensee is authorized to produce; (2) the client, customer or patient's name, address and date of birth; (3) a designation of the person or entity who is authorized to obtain copies of records; (4) a date or event upon which the force of the authorization shall expire which shall not exceed one year; (5) if signed by an authorized representative, the authorized representative's name, address, telephone number and relationship or capacity to the client, customer or patient; and (6) a statement setting forth the right of the client, customer or patient signing the authorization to revoke it in writing.

Sec. 2. Subject to applicable law, copies of records shall be furnished to a client, customer or patient or to an authorized representative within 30 days of the receipt of an authorization, or the licensee shall notify the client, customer or patient or the authorized representative of the reasons why copies are not available. Licensees may condition the furnishing of the client, customer or patient's copies of records to the client, customer or patient or an authorized representative upon the payment of charges not to exceed a $15 handling or service fee and $.35 per page for copies of records routinely duplicated on a standard photocopy machine. Licensees may charge for the reasonable cost of all duplications of records or other information which cannot be routinely duplicated on a standard photocopy machine.

Sec. 3. Any licensee, client, customer, patient or authorized representative may bring a claim or action to enforce the provisions of this act, and any court having jurisdiction of such claim or action, upon showing that the failure to comply with this act was without just cause or excuse, shall award the costs of the action and order the client, customer or patient's copies of records produced without cost or expense to the requesting party.

Sec. 4. Nothing in this act shall be construed to prohibit a licensing agency, department or branch of government of this state from adopting and enforcing rules and regulations that require licensees to furnish records to a client, customer or patient or to an authorized representative. To the extent that a licensing agency, department or branch of government of this state determines that an administrative disciplinary remedy is appropriate for violation of such rules and regulations, that remedy is separate from and in addition to the provisions of this act.

Sec. 5. This act shall take effect and be in force from and after its publication in the Kansas register.

ISSUES MANAGEMENT GROUP, INC.

Testimony for the House Judiciary Committee
March 25, 2002
Bud Burke/AHIOS

Mr. Chairman and distinguished committee members, my name is Bud Burke and I am pleased to appear before the committee today to represent AHIOS, the Association for Health Information Outsourcing Services.

The costs involved with providing medical records have continued to rise as the cost of technology, training, liability insurance, labor and other costs have escalated.

A significant majority of Health Care Providers in Kansas have found that they save costs by outsourcing the management of patients medical records.

When arbitrary caps are placed on one class of patients records,which are below the providers cost, then the burden is shifted. In some cases the cost will be shifted to the medical provider who then must shift those increased costs to the entire patient base or absorb them.

The fees charged by outsourcing providers are structured to meet the particular needs of the health care provider. For example, most health care providers are furnished a set number of "courtesy" copies at no cost. These records are used by physicians who have hospital privilege, for peer and utilization review purposes, quality assurance, billing office, risk management, etc. If the overall cost of providing medical records becomes too high then the ability to provide these "courtesy" copies is impacted.

Our Association believes that the competitive market place provides the best regulation of price without governmental direction, however, if it is the desire of the Legislature to further regulate, then we encourage the adoption of the balloon amendments proposed by the Kansas Medical Society.

Thank you for the opportunity to appear before you today and I stand for your questions.

2009 Camelback Drive
Lawrence, Kansas 66047
(785) 749-5822 *fax* (785) 749-1502

800 SW Jackson, Suite 808
Topeka, Kansas 66612
(785) 232-2320 *fax* (785) 232-2868

Keys for Networking, Inc.

The Kansas Parent Information and Resource Center

The State Organization of the Federation of Families for Children's Mental Health

To: Members of the House Judiciary Committee
From: Jane Adams, Ph.D., Executive Director

Re: Support for SB 377, Access to health care records by patients

In my absence, I am providing you with written testimony supporting SB 377.

Keys For Networking, Inc. is a state parent organization for families who have children with severe emotional disabilities. Last year Keys served over 10,000 families.

As an organization serving families who have children with serious emotional disorders, we feel that SB 377 secures the opportunity for these parents to have much needed access to their families medical records. At Keys we know first hand how difficult it has been for families to retrieve their child's mental health records. Keys For Networking, Inc. often receives calls from parents who need to access their children's records in order to assist SRS and county courts to determine appropriate actions for treatment. We believe that parents must have an active role in determining the best care for their child. We believe this bill would make it possible for families to access their medical records at a reasonable cost and in a fair amount of time.

Affordable and timely access to medical records is important to parents of children with serious emotional disorders (SED). Because of the constant and ever changing medical needs and challenges faced by children with serious emotional disorders, parents must be able to access their child's records in order to be an active member in deciding the best methods of treatment for their child. This bill gives Kansas' parents an opportunity to make wise decisions about their family's health care. Parents make better, well-thought decisions for their children when they the information to do so.

Keys For Networking, Inc. often receives calls from parents who need to access their children's records in order to assist SRS and county courts to determine appropriate actions for treatment. We believe that parents must have an active role in determining the best care for their child.

1301 S. Topeka Blvd. • Topeka, Kansas 66612
(785) 233-8732 • (800) 499-8732 msg line • Fax (785) 235-6659 fax line

KAMU

Kansas Association
for the
Medically Underserved
The State Primary Care Association

112 SW 6th Ave., Suite 201 Topeka, KS 66603 785-233-8483 Fax 785-233-8403 www.ink.org/public/kamu

SB 377 Medical Records

March 25, 2002
House Judiciary Committee

Chairman O'Neal and members of the House Judiciary Committee. My name is Joyce Volmut. I am the Executive Director of the Kansas Association for the Medically Underserved, an association of safety net clinics, that includes the State Funded Community Based Primary Care Clinics, the Federally Qualified Health Centers (FQHC's) and other private non profit primary care clinics, non profit hospitals, rural health clinics and local health departments that are part of our membership.

The Kansas Association for the Medically Underserved (KAMU) supports SB377. We feel this is an important bill in assuring access to the patient record and ultimately timely primary care for individuals and families who are in need of their medical record. The Kansas Association for the Medically Underserved fully supports the intent of this legislation for the following reasons: It gives Kansans a statutory right to access their medical records, it sets a reasonable time limit on accessing records and it provides a mechanism for measuring how the cost for acquiring records should be assessed. Our Association served as part of a coalition reviewing the bill over the past summer and have been following its progression during this legislative session.

In the past year the Kansas Primary Care Clinics and Federally Qualified Health Centers provided services to approximately 101,000 individuals. These are individuals who work minimum wage jobs, who have difficulty accessing primary care and who have frequently had to move from provider to provider in order to find cost effective care, especially specialty care. For many of these patients the record itself is the medical, that is the only reservoir of information that documents the patients history, the various treatment regimes and complications that may have ensued. The majority of families we serve have incomes below 150% of the federal poverty level. Therefore even the smallest cost for patient records may be prohibitive. ***For this reason we are opposed to any amendments that increase fees.*** This could mean more cost for the family if services needed to be repeated because of inaccessibility of record due to cost.

In behalf of the underserved patients of Kansas and the Kansas Clinics and Health Centers I urge you to pass SB 377 with the current fee structure.

Joyce Volmut, Executive Director Kansas Association for the Medically Underserved
785-233-8483 jvolmut@swbell.net

AMERICAN CANCER SOCIETY® Hope. Progress. Answers.

March 25, 2002

Statement in support of Senate Bill 377 Under Review by the House Committee on the Judiciary

Chairman O'Neal, Members of the Committee, and guests:

As the Government Relations Director for the American Cancer Society, I represent over 270,000 volunteers and supporters in Kansas, and on their behalf, I support Senate Bill 377, a bill that would enable cancer patients statutory access to their records in a reasonable amount of time and at a reasonable cost.

What is at issue in this bill? Guaranteed patient access, plain and simple. High costs are a boundary for patients who are just trying to get by. In fact, if you were to ask your constituents, you would probably hear them say $15 plus $.35 per page is too high. They would be appalled that opponents of this bill think they should pay even more. Additionally, the enforcement provision provides patients some recourse if their request is not fulfilled.

During the interim hearings, I submitted testimony from Lea Robrahn, an eleven-month breast cancer survivor from Overland Park, Kansas, who had her own battle with this issue. It is worth mentioning that when I asked for her testimony, fee schedules were still in negotiation, and we had not agreed on the current fee level. Take note of the amount she paid for her records and her comments:

> "On January 19, 2001 I was diagnosed with breast cancer. In the rush to surgery, my surgeon picked a plastic surgeon for the reconstruction. When he was not available, another was picked. After meeting with him, the cancer surgery and first part of the reconstruction was completed.
>
> A few months later, another plastic surgeon was chosen to complete the reconstruction. I made a call to the first plastic surgeon to get a copy of the file in mid-July. It took about a week for the "file" person to call me to tell me I needed to sign a release. No other requirements were stated. She sent it in the mail.
>
> The paper I received was just a release. It had no stipulations as to cost or how much time it would take. I signed it and returned it the same day. The release had stated that the file copy would be sent to me.

AMERICAN CANCER SOCIETY
UNITED WAY
A Partnership That SAVES LIVES

HEARTLAND DIVISION, INC.
KANSAS CITY METRO OFFICE
6700 ANTIOCH ROAD • SUITE 100, MERRIAM, KANSAS 66204-1200
(913) 432-3277 • FAX (913) 432-1732

House Judiciary
Attachment 16
3-25-02

Three weeks later, I called to ask about the file. There was no return call from either the file clerk or the doctor's nurse.

My stress level was sky high during this period. As a part of my chemotherapy, my vital signs were taken every week. Every time I had to deal with this doctor or his office, my pulse was racing and my blood pressure was high. I was tense and irritable all the time. The second part of chemotherapy was easy on my body. The frustration, anger and depression I felt originated from dealing with this doctor. I was angry day and night, not sleeping, and just plain stressed.

I did finally receive a copy of my file. It took about six weeks in all. The cost was $ 15.50 plus 35 cents per page. At 12 pages total, a short file, it was $19.70. While not a large amount, I felt it was unreasonable both in the time frame it took to receive it and in cost.

I do not think that 30 days is soon enough. All it requires is someone to pull the file and copy the pages. My file was about reconstruction, not a life-threatening event. If it had been life threatening, the file should have been surrendered immediately."

-- Lea Robrahn
9908 Mastin
Overland Park, KS 66212

As Lea stated, her case was not life threatening, but what if it had been? Without this legislation, medical record-holders have no incentive to increase their production and limit their charges. This bill would set fair and equitable time limits and fee schedules, and provides enforcement for those provisions, giving peace of mind to thousands of cancer patients. Where there is no standard, there is opportunity to take advantage of loopholes in the system. These loopholes hurt Lea and her family. They hurt your constituents. With your help, these wrongs can be made right.

Thank you for your time and kind consideration. I urge you to support Senate Bill 377.

Stephanie Sharp
Government Relations Director
American Cancer Society

1315 SW Arrowhead	6700 Antioch, Suite 100	400 N. Broadway
Topeka, KS 66604	Merriam, KS 66204	Wichita, KS 67202
785-273-4422 ext. 6218	913-747-6019	316-265-3400

Kansas AFL-CIO

2131 S.W. 36th St. Topeka, KS 66611 785/267-0100 Fax 785/267-2775

TO: Members of the House Judiciary Committee

FROM: Wayne Maichel, Kansas AFL-CIO

RE: Senate Bill 377

DATE: March 25, 2002

Mr. Chairman and members of the House Judiciary Committee, thank you for the opportunity to comment on SB 377. Kansas AFL-CIO continues its support of SB 377, which gives Kansans a statutory right to access their own medical records within 30 days and at a reasonable cost.

The AFL-CIO supports the efforts of the Judiciary Interim Committee and the Senate Judiciary Committee to address these issues. SB 377 accomplishes the goals of providing Kansans with a statutory right of access, within a reasonable time and at a standard, predictable cost.

Thank you for the opportunity to comment on SB 377. I respectfully urge the committee to support passage of this bill without amendments that increase cost.

House Judiciary
Attachment 17
3-25-02

Kansas Retired Teachers Association

"Pay Homage to Our Past - Prepare for OurFuture "

2001-2002

March 24, 2002

Chairman O'Neal and members of the House Judiciary Committee

Greetings:

The four thousand members of KARSP are supporting SB377 that deals with patients rights to access their own medical records in a reasonable time and at a reasonable cost. We believe that Kansas consumers need the provisions and guarantees provided by this bill. It appears to us that if the Kansas Medical Association and some other have their way KS will become one of the highest priced states in the nation in which to acquire medical records. This is unacceptable. Access to medical records is imperative to all of us but especially to senior citizens who often have more health problems and are likely to be treated by several physicians.

We urge and implore the committee to OPPOSE any amendments that will increase fees. SB 377 establishes reasonable rates: The maximum cost a health care provider can charge for medical records is a $15 administrative fee plus 35 cents per page. That is expensive but it seems to be a fair value and is the fee structure unanimously recommended by the Special Committee on Judiciary and passed by the Senate. Amendments to increase fees will place barriers between patients and their medical records. If they can't afford their records, they can't access them. It occurs to us that might be a reason some groups are proposing higher fees; to eliminate the requests for records.

Gratefully, both the Special Committee on Judiciary and the Senate rejected any amendments to increase fees. We believe the House committee should do the same. Kansans need access to their medical records at reasonable costs and in a reasonable time period. Proper medical treatment and, indeed, the medical health of consumers depend upon it. Please insure our access to our medical records at a reasonable cost.

Thank you for permitting me to present this information on behalf of the Kansas Association of Retired School Personnel.

James T. Walters
NRTA Coordinator
KARSP
1924 SW Arrowhead Rd.
Topeka, KS 66604
(785) 272-1788

House Judiciary
Attachment 18
3-25-02

CASA of Shawnee County
"A Powerful Voice in a Child's Life"

A non-profit, tax-exempt organization

West Hall – 300 S.W. Oakley
Topeka, KS 66606
785.232.2777 – Fax 785.232.9493
casatopeka@yahoo.com

Sue W. Lockett, Executive Director

TO: Members of the House Judiciary Committee

FROM: Sue Lockett, CASA of Shawnee County SWL

RE: Senate Bill 377

DATE: March 25, 2002

Mr. Chairman and members of the House Judiciary Committee, thank you for the opportunity to comment on SB 377. CASA of Shawnee County continues its support of legislation giving Kansans a statutory right to access their own medical records within 30 days and at a reasonable cost.

CASA (Court Appointed Special Advocates) is comprised of volunteers who are trained members of the community, appointed by a judge to advocate for the best interests of a child brought into the judicial system. Our volunteers work with social workers, school staff, health agencies, foster families, attorneys and anyone else who can provide information about the child's situation. CASA supports SB 377 because the bill would guarantee a patient or their authorized representative the right to access their medical records within 30 days and at a reasonable cost. These medical records can be important tools in determining the special needs of the children that we serve. Often we request medical records and believe that the provisions of SB 377 will assist us in that effort.

Thank you for the opportunity to comment on SB 377. I respectfully urge the committee to support passage of this bill.

Internal Medicine
ASSOCIATES, LLC

INTERNAL MEDICINE

James M. Geitz, M.D.

James A. Barnett, M.D., F.A.C.P.

W. Brock Kretsinger, D.O.

W. Timothy Duncan, M.D.

Rachel A. Duncan, M.D.

MID-LEVEL PROVIDER

Deborah N. Ballard, A.R.N.P.

EMERITUS

Phillip W. Morgan, M.D.
(1928-1966)

Edward J. Ryan, M.D.
(1947-1979)

John L. Morgan, M.D.
(1949-1984)

Gould C. Garcia, M.D.
(1964-1999)

SERVICES

Bone Densitometry

Ultrasonography

Mammography

General Radiology

In-Office Laboratory

Nuclear Cardiology

Echocardiography

Holter Monitor

Exercise Testing

Pacemaker Clinic

Testimony for SB 377

Medical Records

Chairman O'Neal and other distinguished members of the House Judiciary Committee, thank you for the opportunity to come before you today. As a physician, I wish to express my concerns regarding SB 377. Currently, our office takes pride in providing medical records for patient care in a very prompt fashion. Often, we fax records. Our goal is to provide continuity of care. These records are provided without charge to the patient. Our practice patterns are similar to other clinics, and represents the standard of care across the state.

Current policy by the State Board of Healing Arts requires that medical records be provided to other parties in a prompt and reasonable fashion. A copy of the regulations has been included. I do not believe additional legislation is necessary and have concerns regarding the unintended consequences of SB 377. There are three significant consequences that I think should be considered.

- Cost shifting.
- Delay in providing medical records.
- Possible/probable charge to the patient.

Healthcare providers in the state of Kansas are committed to providing medical records in a timely and affordable fashion. I am very concerned about the possible unintended consequences of SB 377 and appreciate your careful consideration of the issue.

Signed:

James A. Barnett, M.D., F.A.C.P

JAB/gkp

Article 22.--DISHONORABLE CONDUCT

K.A.R. 100-22-1. Release of records. (a) Unless otherwise prohibited by law, each licensee shall, upon receipt of a signed release from a patient, furnish a copy of the patient record to the patient, to another licensee designated by the patient, or to a patient's legally designated representative. However, if the licensee reasonably determines that the information within the patient record is detrimental to the mental or physical health of the patient, then the licensee may withhold the record from the patient and furnish the record to another licensee designated by the patient.
(b) A licensee may charge a person or entity for reasonable costs to retrieve or reproduce a patient record. A licensee shall not condition the furnishing of a patient record to another licensee upon prepayment of these costs.
(c) Any departure from this regulation shall constitute prima facie evidence of dishonorable conduct pursuant to K.S.A. 65-2836(b), and any amendments thereto. (Authorized by K.S.A. 65-2865; implementing K.S.A. 1997 Supp. 65-2836, as amended by L. 1998, Ch. 142, Sec. 12; effective May 1, 1985; amended Nov. 13, 1998.)

100-22-2. Description of professional activities. (a) Any person applying for an exempt license shall divulge on the application for such license a description of all professional activities related to the healing arts such person intends to perform if issued an exempt license.
(b) Any person holding an exempt license shall, at the time of renewal, divulge on the renewal application all professional activities related to the healing arts such person intends to perform during the renewal period.
(c) Any departure from subsection (a) or (b) may constitute evidence of dishonorable conduct pursuant to K.S.A. 1986 Supp. 65-2836(b) as amended by L. 1987, Ch. 176, Sec. 5 as further amended by L. 1987, Ch. 242, Sec. 2 and any amendments thereto. (Authorized by K.S.A. 65-2865; implementing K.S.A. 1986 Supp. 65-2836 as amended by L. 1987, Ch. 176, Sec. 5 as further amended by L. 1987, Ch. 242, Sec. 2; effective, T-88-52, Dec. 16, 1987; effective May 1, 1988.)

100-22-3. Business transactions with patients. (a) Non-health-related goods or services. A licensee shall be deemed to engage in dishonorable conduct by offering to sell a non-health-related product or service to a patient from a location at which the licensee regularly practices the healing arts unless otherwise allowed by this subsection. A licensee shall not be deemed to engage in dishonorable conduct by offering to sell a non-health-related product or service if all of the following conditions are met:
(1) The sale is for the benefit of a public service organization.
(2) The sale does not directly or indirectly result in financial gain to the licensee.
(3) No patient is unduly influenced to make a purchase.
(b) Business opportunity. A licensee shall be deemed to engage in dishonorable conduct if all of the following conditions are met:
(1) The licensee recruits or solicits a patient either to participate in a business opportunity involving a sale of a product or service, or to recruit or solicit others to participate in a business opportunity.
(2) The sale of the product or service directly or indirectly results in financial gain to the licensee.
(3) the licensee recruits or solicits the patient at any time that the patient is present in a location at which the licensee regularly practices the healing arts. (Authorized by K.S.A. 65-2865; implementing K.S.A. 1998 Supp. 65-2836; effective May 5, 2000.)

back to listing

Kansas State Board of Healing Arts
235 S. Topeka Boulevard - Topeka, KS 66603-3068
Phone: 785- 296-7413 Fax: 785-296-0852

20-2

Kansas Academy of Family Physicians

7570 W. 21st St. N. Bldg. 1046, Suite C • Wichita, KS 67205 • 316-721-9005
1-800-658-1749 • Fax 316-721-9044 • kafp@kafponline.org • http://www.kafponline.org

To: House Judiciary Committee
From: Carolyn Gaughan, CAE, Executive Director
Date: March 25, 2002
Re: SB 377

Chairman O'Neal and members of the House Judiciary Committee, thank you for the opportunity to present the written remarks of the Kansas Academy of Family Physicians in regard to Senate Bill 377.

The proponents of SB 277 maintain that the purpose of this legislation is to create a statutory right for patients to access their medical records. This is a concept that health care professionals universally support. However, there is already ample state and federal law and regulation that guarantees such rights. This legislation is unnecessary and may serve to further complicate the already confusing tangle of state and federal law that healthcare professionals must observe when caring for their patients. The Kansas Academy of Family Physicians (KAFP) opposes this legislation as unnecessary.

However, should the committee wish to pass this bill KAFP believes there are several points that would benefit from further refinement. KAFP supports the amendments proposed by the Kansas Medical Society. We agree that medical records should not be a source of profits for health professionals or facilities. However, basic fairness dictates they should be able to recoup the cost of reproducing records. Copying medical records is a difficult and time-consuming process, which requires specialized medical and legal training. The present fee schedule proposed in SB 377 is inadequate to cover the cost to providers. We strongly support the amendment to increase the fee to $20 for supplies and labor and $.50 per page for copies that can be xeroxed.

HIPPA explicitly prohibits charging a "handling or service fee." Therefore, language in the cost provisions should be amended to be HIPPA-compliant and the language altered to "a fee for the cost of supplies and labor." Otherwise, healthcare professionals will be unable to assess a fee for the costly and time-consuming work of analyzing a medical record for duplication.

KAFP also supports the KMS amendment that reflects the current state of Kansas and federal law that permits health care professionals to withhold certain parts of the medical record if they reasonably believe disclosure will harm the patient or a third party.

House Judiciary
Attachment 21
3-25-02

Kansas Academy of Family Physicians

7570 W. 21st St. N. Bldg. 1046, Suite C • Wichita, KS 67205 • 316-721-9005
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This bill currently allows people to sue over records. The KAFP supports an amendment that requires people to demonstrate that they tried to resolve the dispute before turning to our already overburdened courts for resolution. This is a common concept in litigation. The language of the proposed amendment comes directly from state and federal rules of civil procedure.

Numerous federal and state laws and regulations require that physicians, hospitals and other health care professionals be the guardians of a patient's medical privacy. KAFP strongly believes that SB 277 is unnecessary legislation and we urge its defeat.

However, in the alternative, we respectfully urge the adoption of the amendments we have previously referenced to ensure that the bill does not place an unfair burden of health care professionals. Thank you for considering our testimony.

Kansas Academy of Physician Assistants

Post Office Box 597 Topeka, Kansas 66601-0597 Telephone Number: 785-235-5065
Facsimile Number: 785-235-8676

Legislative Testimony

March 25, 2002
House Judiciary Committee

Senate Bill No. 377

Chairman O'Neal and Members of the House Judiciary Committee:

Thank you for the opportunity to present the testimony of the Kansas Academy of Physician Assistants on Senate Bill No. 377, a measure concerning access to health care records by patients and others. The Kansas Academy of Physician Assistants is opposed to Senate Bill No. 377. Currently, members of the medical community operate under state and federal guidelines developed to enable appropriate easy access to patient records. The intent of this legislation is to solve a problem that doesn't exist. We do however, support the balloon amendments offered by the Kansas Medical Society and encourage your Committee to adopt them if you determine that this legislation in needed.

We agree that it is important to ensure patients, or their authorized representative, with timely access to information regarding their health care. However, healthcare providers should also be permitted to recover the costs associated with furnishing these detailed documents. We also believe that it is most important that the patient's privacy be respected and safeguarded to avoid potentially facilitating the release of confidential medical information, protecting the patient and others from risk.

The Kansas Academy of Physician Assistants believes the amendments offered by the Kansas Medical Society to Senate Bill No. 377 would permit a patient access to their healthcare records while respecting and protecting their privacy.

Thank you for your consideration.

Loretta Hoerman, PA-C
Legislative Chairperson
Kansas Academy of Physician Assistants

KANSAS OPTOMETRIC ASSOCIATION

1266 SW Topeka Blvd. • Topeka, KS 66612
(785) 232-0225 • (785) 232-6151(FAX)
koa@cjnetworks.com

March 25, 2002

TO: HOUSE JUDICIARY COMMITTEE

FROM: GARY L. ROBBINS, CAE, EXECUTIVE DIRECTOR

RE: COMMENTS ON SENATE BILL 377

We have watched the progress of Senate Bill 377 with great interest. The Kansas Optometric Association strongly supports the position that patients should have access to copies of their medical records. However, we have strong reservations about the current fee schedule in SB 377. The patient records for patients with glaucoma and diabetic retinopathy will contain numerous color retinal photos documenting the progress of those diseases. We strongly support a fee increased to $20 for supplies and labor and $.50 per page for copies. Further, if the actual cost of duplicating the color retinal photos exceeds the expense of duplicating them, the provider should be reimbursed for the actual expense.

The Kansas Optometric Association would support any proposed amendment, which would require plaintiffs to show proof that efforts were initiated to resolve the dispute before seeking legal action.

Finally, all health providers are required to comply with numerous federal and state laws regarding the privacy of our patient's medical records. We are deeply concerned that the additional requirements in SB 377 will create possible confusion and even inadvertently create conflicts with the HIPAA requirements.

KANSAS BAR ASSOCIATION

1200 SW Harrison St.
P.O. Box 1037
Topeka, Kansas 66601-1037
Telephone (785) 234-5696
FAX (785) 234-3813
www.ksbar.org

LEGISLATIVE TESTIMONY

March 25, 2002

TO: CHAIRMAN MIKE O'NEAL AND MEMBERS OF THE HOUSE JUDICIARY COMMITTEE

FROM: PAUL DAVIS, KBA LEGISLATIVE COUNSEL

RE: SENATE BILL 377

My name is Paul Davis and I serve as Legislative Counsel to the Kansas Bar Association. The Kansas Bar Association is a diverse organization. We have 6,000 members, who are judges, prosecutors, plaintiffs' attorneys, defense attorneys, estate planning attorneys, etc.. Legislation that provides for patient access to medical records in a timely manner and at a reasonable cost is important to much of our diverse membership because this issue arises in so many different contexts during the attorney-client relationship.

What are the situations? A criminal defense attorney needs to get access to her client's mental health records to determine whether an insanity plea is plausible. An estate planning attorney needs to access his client's medical records to see if any special provisions need to be inserted in a durable power of attorney for health care (living will). A bankruptcy attorney needs to access her client's medical billing records to determine what health care services were delivered prior to the filing of a bankruptcy petition and are therefore dischargeable. An attorney representing someone in an automobile accident must obtain the client's health care records so that a settlement can be procured with the at-fault driver's insurance company. An attorney, hired by an insurance company, who is representing an insured must be able to access the injured party's medical records to determine whether the claim ought to be settled or defended in court. These are just a few of the many situations where patients and the attorneys that represent them need to be able to access medical records in a timely manner and at a reasonable cost.

This issue is not complex. A patient or a patient's authorized representative ought to be able to access that patient's medical records in a timely manner and at a reasonable cost. This is the premise of Senate Bill 377. With that said, we acknowledge that the medical community views this issue from a different perspective. We have had numerous meetings with representatives of the Kansas Medical Society and the Kansas

House Judiciary
Attachment 23
3-25-02

Hospital Association to listen to their concerns. We have done our best to address their concerns without compromising the premise of the bill. This process has taken us through many different bill drafts. Please look at Attachments A and B which demonstrate how much language has been removed from the original Senate Bill 88 to address the concerns of health care providers. We will continue to negotiate in the spirit of compromise, but I believe the bill has been boiled down as much as possible.

I want to quickly touch on the components of Senate Bill 377, which are before you today. Section 1 is a definitional section that is wholly consistent with HIPAA. In fact, much of the language is pulled directly from HIPAA. We understand and agree with the concerns of health care providers that a separate standard from HIPAA not be created. I want to be very clear in saying that we have made every effort to ensure that this legislation does not conflict with HIPAA. Any argument to the contrary is simply fallacious.

Access and Reasonable Cost

Section 2 of the bill addresses the cost of producing medical records. There currently is no limit upon what health care providers can charge for the photocopying of medical records. The instances of exorbitant prices being assessed by health care providers are infinite. A representative of the Kansas Health Information Management Network (KHIMA) presented testimony to this committee when you conducted a hearing on Senate Bill 88 that her organization determined that a $1.57 per page charge was necessary for health care providers to simply break even on the costs of providing the records (Attachment C). If this is true, I suggest that we all quit our day jobs, sit by a copy machine and get rich.

I also want you to know that most health care providers are able to provide patients with their medical records in a timely manner and at a reasonable cost. What we are trying to get at today with this legislation is the distinct minority of providers that are not providing records in a timely manner and at a reasonable cost. I have attached a letter from Marlene Niesinger, who works for an attorney in Kansas City, Kansas (Attachment D). Her description of the struggle that patients and attorneys go through to obtain medical records and the costs that are charged is not an anomaly. I know this because I've heard the same story dozens of times.

The issue of obtaining medical records in a timely manner has been resolved by HIPAA, which requires health care providers to release records within thirty days of a request. Senate Bill 377 proposes to address the cost issue by utilizing a fee limits that are consistent with Missouri law. The fees that are charged in Missouri are entirely reasonable and are familiar to health care providers who operate in the Kansas City metropolitan area. Many health care providers outsource their medical records photocopying to vendors such as the Smart Corporation. Smart Corporation is alive and well in Missouri so any fears expressed on the part of health care providers that they would no longer be able to outsource medical records photocopying if this bill is enacted, simply aren't true.

An adequate remedy for patients

When the legislature amends the criminal code, you know that whatever legislation you pass has no meaning whatsoever without the police and other law enforcement agencies enforcing the newly created law. Since law enforcement can't enforce the provisions of this bill, there must be a provision that allows for either the patient or the health care provider to enforce the Act. That provision is contained in Section 3 of the bill. This provision is absolutely critical to the bill. You will notice that it is available to not only the patient and the patient's authorized representative, but also to the health care provider. This provision simply allows for any of these parties to bring a claim in a district court if another party is not complying the provisions of the Act.

How would this play out? If a health care provider is not willing to provide medical records that have been requested, a patient could file a claim in the district court to compel the provider to release the records. In order for a judge to make such a finding, the health care provider's reason for providing the records must be without just cause or excuse. Therefore, if the provider doesn't provide the records because they are protected by a separate statute, such as a peer review statute, than the provider certainly has just cause or excuse to withhold the records.

I can tell you from experience that this enforcement provision will be seldom utilized. Patients and the lawyers who represent patients will do everything possible to obtain medical records without having to go to court. However, it is essential that the provision exist so that providers know that if they don't comply with the Act, a remedy is available to patients. You might say that the provision acts as a "hammer". Similar provisions exist in many other states so this not something that is foreign to health care providers across the country (Attachment E).

During our last discussion with the health care providers, the Kansas Medical Society expressed strong opposition to Section 3 of the latest working draft. I want to take this opportunity to address some of the concerns that they have expressed. First of all, this provision simply does not create a new cause of action against physicians or other providers. It is a remedy provision and nothing more. Provisions similar to this exist in many other places in our statutes. For example, the legislature amended the Kansas Open Records Act in 2000. The new law requires that attorney fees be paid to persons requesting records when the denial was not in good faith or was without a reasonable basis. Additionally, public agencies who provide records can be subjected to a $500 fine. This is far more than what we are asking for. We simply request that upon a finding by a judge that a health provider who withheld medical records without just cause or excuse have to pay the costs of the court action (this is usually very minimal) and provide the medical records to the patient at no cost. We originally asked that health care provider pay attorney fees under these circumstances, but we have removed that provision in an effort to reach a compromise with the providers.

The Medical Society has suggested that an administrative remedy involving the Board of Healing Arts already exists and is more appropriate. This is not a workable solution for several reasons. The Board of Healing Arts is charged with licensing and regulating a number of health care providers. They do not regulate or license hospitals. The Board of Healing Arts does not have an established process for handling these situations nor should they be put in a position of making judgments about whether the Act is being followed or not. There may be timeliness issues, such as a speedy trial requirement or a statute of limitations issue, that demands a quick resolution of disputes. The court system is equipped for this, the Board of Healing Arts is not. Additionally, this act does not fall under the guise of the Kansas Administrative Procedures Act. Why have an administrative remedy for something that isn't an administrative action?

This legislation is about allowing patients to access their records in a timely manner and at a reasonable cost. We are currently one of six states that does not provide some type of statutory access to medical records for patients. An increasing number of states are also establishing limits on photocopying costs for medical records. The time has come for Kansas to get on the train. ***I ask you to embrace Senate Bill 377 and to recommend its enactment to the full House of Representatives.***

I thank you for your consideration of this issue and welcome any questions that you have.

Session of 2001

SENATE BILL No. 88

By Committee on Judiciary

1-22

AN ACT concerning access to health care records and health care billing records by patients and others.

Be it enacted by the Legislature of the State of Kansas:

Section 1. As used in this act:

(a) "Health care provider" means a person licensed to practice any branch of the healing arts by the state board of healing arts, a person who holds a temporary permit to practice any branch of the healing arts issued by the state board of healing arts, a person engaged in a postgraduate training program approved by the state board of healing arts, a podiatrist, an optometrist, a pharmacist, a dentist, a physical therapist, a psychiatrist, a psychologist, a licensed professional counselor, a licensed clinical professional counselor, a licensed master level psychologist, a licensed clinical psychotherapist, a licensed specialist clinical social worker, a baccalaureate social worker, a master social worker, a specialist social worker, a licensed marriage and family therapist, a nurse practitioner, a nurse anesthetist, a physician's assistant, a hospital, a medical center or clinic, a medical care facility, an ambulatory surgical center, a health maintenance organization, a psychiatric hospital, a mental health center or mental health clinic or other person or entity providing medical or health care within the State of Kansas;

(b) "patient" means a person who receives medical or health care from a health care provider, including but not limited to, any examination, testing, evaluation, diagnosis or treatment of any physical or psychological injury, illness or disorder or any claimed physical or psychological injury, illness or disorder;

(c) "representative of a patient" means: (1) A parent of a minor child patient; (2) a spouse, child or parent of a patient who is not competent; (3) the guardian or conservator of a patient; (4) an heir of a deceased patient or an executor, administrator or other representative of a deceased patient's estate; or (5) an attorney or other person designated in writing by a patient or by a representative of a patient;

(d) "authorized party" means a person or entity who has been authorized by the patient or the patient's representative, or by court order or operation of law, to have access to health care records or health care

Attachment A

23-5

billing records of the patient for a limited purpose;

(e) "health care" means the provision of care, services or supplies to a patient and includes any: (1) Preventive, diagnostic, therapeutic, rehabilitative, maintenance or palliative care, counseling, service or procedure with respect to the physical or mental condition, or functional status, of a patient or affecting the structure or function of the body; (2) sale or dispensing of a drug, device, equipment or other item pursuant to a prescription; or (3) procurement or banking of blood, sperm, organs or any other tissue for a administration to patients;

(f) "health care records" means any information, recording, data, papers, records or documents generated or maintained by a health care provider whether in written, photographic, ultrasonographic, fluoroscopic, microfilm, audiotape, videotape or electronic form concerning medical or health care, treatment or evaluation of the patient, including but not limited to, notes, summaries, reports, forms, films, images, telephone orders or messages, x-rays, monitor strips, slides, electronically or computer stored data, printouts and correspondence; and

(g) "health care billing records" means any records or information concerning the charges or fees for medical or health care, treatment or evaluation of the patient, or any payments or adjustments thereto, including but not limited to, billings, ledgers, electronically or computer stored data, printouts and correspondence.

Sec. 2. (a) Except as provided in section 5, and amendments thereto, a patient or representative of a patient, upon reasonable notice or request, shall be entitled to inspect and copy any health care records or health care billing records in the possession of a health care provider concerning medical or health care of the patient.

(b) Any health care provider who receives a request from a patient or representative of a patient for access to or copies of any health care records or health care billing records, shall provide access to or copies of such records within 10 days after the receipt of such notice or request, or shall notify the patient or representative of the patient making the request within 10 days after the receipt of such notice or request, of the reason why access to or copies of such records is being withheld or delayed, indicating the date when access to or copies of such records will be provided.

Sec. 3. (a) Except as provided in section 5, and amendments thereto, an authorized party, upon reasonable notice or request, shall be entitled to inspect and copy any health care records or health care billing records in the possession of a health care provider concerning medical or health care of the patient, subject to any limitations upon the authorization.

(b) Any health care provider who receives a notice or request from an authorized party for access to or copies of any health care records or

23-6

Attachment 4

health care billing records, shall provide access to or copies of such records within 10 days after the receipt of such notice or request, or shall notify the authorized party making the request within 10 days after the receipt of such notice or request of any reason why access to or copies of such records is being withheld or delayed, indicating the date when access to or copies of such records will be provided.

(c) An authorized party who has obtained health care records or health care billing records concerning a patient shall, upon notice or request, supply a copy of such records to the patient or representative of the patient.

(d) An authorized party who has obtained health care records or health care billing records concerning a patient shall maintain the confidentiality of such records and shall not use or release such records except for the purpose for which authorization was given by the patient or representative of the patient, or in connection with the proceedings for which authorization was given by court order or operation of law.

Sec. 4. (a) No charge for retrieving or copying health care records shall exceed the maximum fees allowed under the workers compensation schedule of medical fees issued by the Kansas department of human resources unless the health care provider establishes the reason the requested records cannot reasonably be retrieved or copied without additional expense.

(b) A health care provider shall be entitled to reimbursement for the reasonable expenses incurred in retrieving and copying health care records, and may demand that such reimbursement be provided in advance of providing access to or copies of such records.

(c) A health care provider shall not be entitled to reimbursement of any expenses incurred in retrieving or copying health care billing records unless the health care provider establishes the reason the requested records cannot reasonably be retrieved or copied in the ordinary course of business.

(d) A health care provider shall not make any alterations, additions or deletions of information recorded in the health care records of a patient except that a health care provider may make additional contemporaneous entries in the health care records, and may make corrections or additions to the health care records which are clearly designated as late entries with the date of entry shown.

Sec. 5. (a) A health care provider may withhold or limit access to or copies of health care records or health care billing records, or a portion thereof, if the health care provider certifies that providing access to or copies of the requested records, or a portion thereof, will create a significant risk of harm to the patient.

(b) If a health care provider withholds or limits access to or copies of

23-7
Attachment A

health care records or health care billing records under subsection (a) because releasing such records to the patient or to a specific representative of the patient or authorized party would create a significant risk of harm to the patient, the health care provider shall arrange to provide access to or copies of the requested records to another representative of the patient or authorized party, or to the patient, under conditions sufficient to protect the patient from the risk of such harm, if it is reasonably possible to do so.

Sec. 6. (a) Any health care provider, patient, representative of a patient or authorized party may bring a claim or action to enforce the provisions of this act, and any court having jurisdiction of such claim or action may, in its discretion, award attorney fees for failure to comply with this act without just cause or excuse.

(b) The patient, or a representative of a minor, incompetent or deceased patient, shall be given reasonable notice of any action concerning access to or copying of health care records or health care billing records, and may intervene as a party in any such action.

Sec. 7. This act shall not be construed or interpreted to limit or impair access to health care records or health care billing records under any federal or state statute, law, regulation, rule or order.

Sec. 8. This act shall take effect and be in force from and after its publication in the statute book.

23-8

Attachment 4

As Amended by Senate Committee

Session of 2002

SENATE BILL No. 377

By Special Committee on Judiciary

1-8

AN ACT concerning access to health care records by patients and authorized representatives.

Be it enacted by the Legislature of the State of Kansas:

Section 1. As used in this act: (a) "Health care provider" means those persons and entities defined as a health care provider under K.S.A. 40-3401 and K.S.A. 7-121b, and amendments thereto, except that "health care provider" shall not include a health maintenance organization.

(b) "Authorized representative" means the person designated in writing by the patient to obtain the health care records of the patient or the person otherwise authorized by law to obtain the health care records of the patient.

(c) "Authorization" means a written or printed document signed by a patient or a patient's authorized representative containing: (1) A description of the health care records a health care provider is authorized to produce; (2) the patient's name, address and date of birth; (3) a designation of the person or entity authorized to obtain copies of the health care records; (4) a date or event upon which the force of the authorization shall expire which shall not exceed one year; (5) if signed by a patient's authorized representative, the authorized representative's name, address, telephone number and relationship or capacity to the patient; and (6) a statement setting forth the right of the person signing the authorization to revoke it in writing.

Sec. 2. ~~(a)~~ Subject to applicable law, copies of health care records shall be furnished to a patient or a patient's authorized representative within 30 days of the receipt of the authorization, or the health care provider shall notify the patient or the patient's authorized representative of the reasons why copies are not available. Health care providers may condition the furnishing of the patient's health care records to the patient or the patient's authorized representative upon the payment of charges not to exceed a $15 handling or service fee and $.35 per page for copies of health care records routinely duplicated on a standard photocopy machine. Providers may charge for the reasonable cost of all duplications of health care record information which cannot be routinely duplicated on

Attachment B

a standard photocopy machine.

~~(b) The limits provided in subsection (a) shall be increased or decreased on an annual basis effective January 1 of each year in accordance with the centers for medicare and medicaid services market basket survey.~~

Sec. 3. Any health care provider, patient or authorized representative of a patient may bring a claim or action to enforce the provisions of this act, and any court having jurisdiction of such claim or action, upon a showing that the failure to comply with this act was without just cause or excuse, shall award the costs of the action and order the patient's health care records produced without cost or expense to the requesting party.

Sec. 4. Nothing in this act shall be construed to prohibit the state board of healing arts from adopting and enforcing rules and regulations that require licensees of the board to furnish health care records to patients or to their authorized representative. To the extent that the board determines that an administrative disciplinary remedy is appropriate for violation of such rules and regulations, that remedy is separate from and in addition to the provisions of this act.

Sec. ~~4~~ **5**. This act shall take effect and be in force from and after its publication in the Kansas register.

23-10

Attachment B

THE HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT OF 1996 (HIPAA)

3. The Health Insurance Portability and Accountability Act of 1996 (HIPAA) is very complex and deals with all aspects of medical record keeping. Senate Bill 88 conflicts with HIPAA in many areas and the federal law will pre-empt any conflicting state law unless the state law is more stringent. An example of this: HIPAA privacy standards require health care providers to provide patients access to their health information except under very limited and specific circumstances. SB 88 allows information to be withheld if there is a "significant risk of harm" to the patient. This is a less stringent standard than HIPAA. Also, under HIPAA patients can request restrictions of uses and disclosures of their health information and SB 88 does not provide for this. These are just a couple of examples where HIPAA will pre-empt SB 88. Our question is why enact state legislation that is in obvious conflict with HIPAA.

MEDICAL RECORD COPY COST

4. We are concerned with Section 4 of SB 88 regarding the charge that will be allowed for copying health care records. The Workers' Compensation Fee Schedule was established for proceedings that are highly regulated with administrative law judges resolving disputes. There is no allowance for yearly Consumer Price Index (CPI) increases. The Workers' Compensation Fee Schedule would cover the cost of copying medical records if it was like Kinko's where you provide the papers and they make the copies. In Health Information the process is much more complex. The request is reviewed to identify the patient and what information is needed. This may require additional correspondence with the requester. Then the request is evaluated by a trained professional or person trained specifically to assure all the legal requirements have been met and that the medical information requested is complete. The cost includes the labor to retrieve the medical information from whatever medium or site of storage, copy multi size forms front and back (a very manual process), re-assemble and file the record, and the postage necessary to mail. Also, included in the cost is the paper, envelope, staples, copy machine and toner and I could go on and on with space, etc. KHIMA's last copy cost survey was completed in 1997 and indicated that we need $1.57 per page to break even on cost. Attorney requests for medical records usually require a complete copy of all medical records for the patient and thus many copies are made. We average 84 pages per request for attorneys at our facility. Workers' Compensation Fee Schedule will pay $36.90 for 84 pages compared to $131.88 at $1.57 per page. At this rate the provider will subsidize roughly $95.00 which ultimately drives up the cost of health care.

Thank you for your consideration of our request to oppose Senate Bill 88.

23-11

Attachment C

LAW OFFICES
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KTLA Legislative Update
Jayhawk Tower, 700 S.W. Jackson
Suite 706
Topeka, Kansas 66603

To Whom It May Concern:

We are very glad to contribute with some of our problems in obtaining medical records. To begin with K. U. Medical Center and Occupational Medicine are the worst in replying to our requests. We are constantly forced to call them again and again for their medical records. We have cases where we have called for four to six months and up to a year for medical records. We have had several cases where they have called us on the phone and asked us if we still need particular medical records when the case has settled several months before.

We have trouble with other health care providers as well. When we call requesting information as to when the records will be sent, as for instance when the client is due to see another doctor soon, they say that payment must be made in advance although they will not always provide us with the amount for the charges. In a case like that, we will request they fax the charges in order to expedite the matter. Even when payment has been made in advance they are almost never willing to fax the medical records although we need them immediately. This is even in cases when there are only one to five pages of medical records.

Last year we had a very hard time getting medical records from KU Medical Center. For about two weeks they claimed that their computers were down. Then they said they were so far behind it was going to take several weeks until they could service our requests for medical records. At another time they said they had made a change in their staff and that its would take a lot of time to get caught up.

Other health care providers claim that all the records are collected through outside companies such as Smart Corporation or Still Corporation and that the matter is simply out of their hands. When they give us the number of their medical records collector we get the runaround from those same companies with excuses as to why the records have not been provided and a myriad of reasons for their delays. We constantly have a problem with medical records been received at the office after the need for them has passed.

There are several doctors and medical clinics that claim they only process medical records one day out of the week and tell you that you are simply out of of lot if you call the day after. They will not even consider making hand exception the matter how urging the need the records.

We are also in receipt of various billing statements for these medical records. There is no rhyme or reason to many of these bills. For the most part we do not see them following the medical fee schedule. We assume if we start making a lot of noise about the billings we will be put even further down the list for our medical record requests.

All in all it is a very frustrated enterprise trying to get these medical records even when there requested months in advance. I hope disinformation goods helpful. I wish to successive time to help improve the situation and take this opportunity to thank you in advance for you kind consideration of this matter.

Marlene Nicsinger Marlene Nicsinger
Medical Records Department

23-12

TOTAL P.02

AR ST S 16-46-106
A.C.A. § 16-46-106

ARKANSAS CODE OF 1987 ANNOTATED
TITLE 16. PRACTICE, PROCEDURE, AND COURTS
SUBTITLE 4. EVIDENCE AND WITNESSES
CHAPTER 46. DOCUMENTARY EVIDENCE GENERALLY
SUBCHAPTER 1. GENERAL PROVISIONS

Current through End of 1999 Reg. Sess.

16-46-106 Access to medical records.

(a)(1) In contemplation of, preparation for, or use in any legal proceeding, any person who is or has been a patient of a doctor, hospital, ambulance provider, medical health care provider, or other medical institution shall be entitled to obtain access, personally or by and through his or her attorney, to the information in his or her medical records, upon request and with written patient authorization, and shall be furnished copies of all medical records pertaining to his or her case upon the tender of the expense of such copy or copies.

(2) Cost of each photocopy, excluding X rays, shall not exceed one dollar ($1.00) per page for the first five (5) pages and twenty-five cents (.25 cents) for each additional page, except that the minimum charge shall be five dollars ($5.00).

(3) Provided, however, a reasonable retrieval fee for stored records of a hospital or an ambulance provider may be added to the photocopy charges.

(4) Provided, further, this section shall not prohibit reasonable fees for narrative medical reports or medical review when performed by the doctor or medical institution subject to the request.

(b)(1) If a doctor believes a patient should be denied access to his or her medical records for any reason, the doctor must provide the patient or the patient's guardian or attorney a written determination that disclosure of such information would be detrimental to the individual's health or well-being.

(2)(A) At such time, the patient or the patient's guardian or attorney may select another doctor in the same type practice as the doctor subject to the request to review such information and determine if disclosure of such information would be detrimental to the patient's health or well-being.

(B) If the second doctor determines, based upon professional judgment, that disclosure of such information would not be detrimental to the health or well-being of the individual, the medical records shall be released to the patient or the patient's guardian or attorney.

(3) If the determination is that disclosure of such information would be detrimental, then it either will not be released or the objectionable material will be obscured before release.

(4) The cost of this review of the patient's record will be borne by the patient or the patient's guardian or attorney.

(c) Nothing in this section shall preclude the existing subpoena process; however, if a patient is compelled to use the subpoena process in order to obtain access to, or copies of, their own medical records after reasonable requests

23-13

Attachment F

WEST'S ANNOTATED CALIFORNIA CODES
EVIDENCE CODE
DIVISION 9. EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES
CHAPTER 3. OTHER EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES

Current through end of 1999-2000 Reg.Sess.
and 1st Ex.Sess. and Nov. 7, 2000, election.

§ 1158. Inspection and copying of patient's records; authorization; failure to comply; costs

Whenever, prior to the filing of any action or the appearance of a defendant in an action, an attorney at law or his or her representative presents a written authorization therefor signed by an adult patient, by the guardian or conservator of his or her person or estate, or, in the case of a minor, by a parent or guardian of the minor, or by the personal representative or an heir of a deceased patient, or a copy thereof, a physician and surgeon, dentist, registered nurse, dispensing optician, registered physical therapist, podiatrist, licensed psychologist, osteopathic physician and surgeon, chiropractor, clinical laboratory bioanalyst, clinical laboratory technologist, or pharmacist or pharmacy, duly licensed as such under the laws of the state, or a licensed hospital, shall make all of the patient's records under his, hers or its custody or control available for inspection and copying by the attorney at law or his, or her, representative, promptly upon the presentation of the written authorization.

No copying may be performed by any medical provider or employer enumerated above, or by an agent thereof, when the requesting attorney has employed a professional photocopier or anyone identified in Section 22451 of the Business and Professions Code as his or her representative to obtain or review the records on his or her behalf. The presentation of the authorization by the agent on behalf of the attorney shall be sufficient proof that the agent is the attorney's representative.

Failure to make the records available, during business hours, within five days after the presentation of the written authorization, may subject the person or entity having custody or control of the records to liability for all reasonable expenses, including attorney's fees, incurred in any proceeding to enforce this section.

All reasonable costs incurred by any person or entity enumerated above in making patient records available pursuant to this section may be charged against the person whose written authorization required the availability of the records.

"Reasonable cost," as used in this section, shall include, but not be limited to, the following specific costs: ten cents ($0.10) per page for standard reproduction of documents of a size 8 1/2 by 14 inches or less; twenty cents ($0.20) per page for copying of documents from microfilm; actual costs for the reproduction of oversize documents or the reproduction of documents requiring special processing which are made in response to an authorization; reasonable clerical costs incurred in locating and making the records available to be billed at the maximum rate of sixteen dollars ($16) per hour per person, computed on the basis of four dollars ($4) per quarter hour or fraction thereof; actual postage charges; and actual costs, if any, charged to the witness by a third person for the retrieval and return of records held by that third person.

Where the records are delivered to the attorney or the attorney's representative for inspection or photocopying at the record custodian's place of business, the only fee for complying with the authorization shall not exceed fifteen dollars ($15), plus actual costs, if any, charged to the record custodian by a third person for retrieval and return of records held offsite by the third person.

CREDIT(S)

1995 Main Volume

Attachment E

CONNECTICUT GENERAL STATUTES ANNOTATED
TITLE 20. PROFESSIONAL AND OCCUPATIONAL LICENSING, CERTIFICATION, TITLE PROTECTION AND REGISTRATION. EXAMINING BOARDS
CHAPTER 369. HEALING ARTS

Current through 1-1-2000

§ 20-7c. Access to medical records and information

(a) (1) A provider, except as provided in section 4-194, shall supply to a patient upon request complete and current information possessed by that provider concerning any diagnosis, treatment and prognosis of the patient; and (2) a provider shall notify a patient of any test results in the provider's possession that indicate a need for further treatment or diagnosis.

(b) Upon a written request of a patient, his attorney or authorized representative, or pursuant to a written authorization, a provider, except as provided in section 4-194, shall furnish to the person making such request a copy of the patient's health record, including but not limited to, bills, x- rays and copies of laboratory reports, contact lens specifications based on examinations and final contact lens fittings given within the preceding three months or such longer period of time as determined by the provider but no longer than six months, records of prescriptions and other technical information used in assessing the patient's health condition. No provider shall charge more than forty-five cents per page, including any research fees, handling fees or related costs, and the cost of first class postage, if applicable, for furnishing a health record pursuant to this subsection, except such provider may charge a patient the amount necessary to cover the cost of materials for furnishing a copy of an x-ray, provided no such charge shall be made for furnishing a health record or part thereof to a patient, his attorney or authorized representative if the record or part thereof is necessary for the purpose of supporting a claim or appeal under any provision of the Social Security Act [FN1] and the request is accompanied by documentation of the claim or appeal. A provider shall furnish a health record requested pursuant to this section within thirty days of the request.

(c) If a provider, as defined in section 20-7b, reasonably determines that the information is detrimental to the physical or mental health of the patient, or is likely to cause the patient to harm himself or another, he may withhold the information from the patient. The information may be supplied to an appropriate third party or to another provider who may release the information to the patient. If disclosure of information is refused by a provider under this subsection, any person aggrieved thereby may, within thirty days of such refusal, petition the superior court for the judicial district in which he resides for an order requiring the provider to disclose the information. Such a proceeding shall be privileged with respect to assignment for trial. The court, after hearing and an in camera review of the information in question, shall issue the order requested unless it determines that such disclosure would be detrimental to the physical or mental health of the person or is likely to cause the person to harm himself or another.

(d) The provisions of this section shall not apply to any information relative to any psychiatric or psychological problems or conditions.

CREDIT(S)

1999 Main Volume

(1983, P.A. 83-413, § 2; 1986, P.A. 86-43, § 2; 1991, P.A. 91-137, § 2; 1993, P.A. 93-316, § 3; 1994, P.A. 94-158, § 2; 1995, P.A. 95-100; 1999, June Sp.Sess., P.A. 99-2, § 44.)

[FN1] 42 U.S.C.A. § 301 et seq.

<General Materials (GM) - References, Annotations, or Tables>

23-15

Attachment E

TEXT

CODE OF GEORGIA
TITLE 24. EVIDENCE
CHAPTER 10. SECURING ATTENDANCE OF WITNESSES AND PRODUCTION AND PRESERVATION OF EVIDENCE
ARTICLE 4. PRODUCTION OF MEDICAL RECORDS

Current through 2000 General Assembly

24-10-73 Payment of costs in advance; pauper's affidavit; tender prerequisite to contempt sanction; when costs deferred.

The court or agency compelling the production of medical records or of reproductions thereof pursuant to subsections (a) and (c) of Code Section 24-10-71 shall in civil cases and administrative proceedings, except upon pauper's affidavit, provide for payment in advance to the institution keeping the records of the reasonable costs of reproduction and reasonable costs incident to the transportation of the records. No institution or person shall be held in contempt or otherwise penalized for failure of production unless it appears of record that the costs provided in this Code section have been established and tendered. When the institution, at the time of service of a subpoena or order for production, is a party to the proceeding, the court or agency may in its discretion defer such costs and award them with the other costs in the proceeding.

CREDIT

(Ga. L. 1971, p. 441, § 2.)

<General Materials (GM) - References, Annotations, or Tables>

Code, 24-10-73
GA ST 24-10-73
END OF DOCUMENT

23-16

Attachment E

Formerly cited as IL ST CH 110 ¶ 8-2003

WEST'S SMITH-HURD ILLINOIS COMPILED STATUTES ANNOTATED
CHAPTER 735. CIVIL PROCEDURE
ACT 5. CODE OF CIVIL PROCEDURE
ARTICLE VIII. EVIDENCE
PART 20. INSPECTION OF HOSPITAL RECORDS

Current through P.A. 91-800, apv. 6/13/2000

5/8-2003. Physician's and other healthcare practitioner's records

§ 8-2003. Physician's and other healthcare practitioner's records. Every physician and other healthcare practitioner except as provided in Section 8- 2004, shall, upon the request of any patient who has been treated by such physician or practitioner, permit such patient's physician or authorized attorney or the holder of a Consent pursuant to Section 2-1003 to examine and copy the patient's records, including but not limited to those relating to the diagnosis, treatment, prognosis, history, charts, pictures and plates, kept in connection with the treatment of such patient. Such request for examining and copying of the records shall be in writing and shall be delivered to such physician or practitioner. Such written request shall be complied with by the physician or practitioner within a reasonable time after receipt by him or her at his or her office or any other place designated by him or her. The physician or practitioner shall be reimbursed by the person requesting such records at the time of such examination or copying, for all reasonable expenses incurred by the physician or practitioner in connection with such examination or copying.

The requirements of this Section shall be satisfied within 60 days of the receipt of a request by a patient or his or her physician or authorized attorney or the holder of a Consent pursuant to Section 2-1003.

Failure to comply with the time limit requirement of this Section shall subject the denying party to expenses and reasonable attorneys' fees incurred in connection with any court ordered enforcement of the provisions of this Section.

This amendatory Act of 1995 applies to causes of action filed on or after its effective date.

CREDIT(S)

1992 Main Volume

P.A. 82-280, § 8-2003, eff. July 1, 1982. Amended by P.A. 84-7, § 1, eff. Aug. 15, 1985.

2000 Electronic Update

Amended by P.A. 89-7, § 15, eff. March 9, 1995.

FORMER REVISED STATUTES CITATION

1992 Main Volume

Formerly Ill.Rev.Stat.1991, ch. 110, ¶ 8-2003.

<General Materials (GM) - References, Annotations, or Tables>

VALIDITY

<Public Act 89-7, which amended this section, has been held unconstitutional in its entirety by the Illinois Supreme

Attachment E

WEST'S LOUISIANA STATUTES ANNOTATED
LOUISIANA REVISED STATUTES
TITLE 40. PUBLIC HEALTH AND SAFETY
CHAPTER 5. MISCELLANEOUS HEALTH PROVISIONS
PART XXIX. HEALTH CARE INFORMATION

Current through all 2000 Regular and Extraordinary Session Acts

§ 1299.96. Health care information; records

A. (1) Each health care provider shall furnish each patient, upon request of the patient, a copy of any information related in any way to the patient which the health care provider has transmitted to any company, or any public or private agency, or any person.

(2)(a) Medical records of a patient maintained in a health care provider's office are the property and business records of the health care provider.

(b) Except as provided in R.S. 44:17, a patient or his legal representative, or in the case of a deceased patient, the executor of his will, the administrator of his estate, the surviving spouse, the parents, or the children of the deceased patient, seeking any medical, hospital, or other record relating to the patient's medical treatment, history, or condition, either personally or through an attorney, shall have a right to obtain a copy of such record upon furnishing a signed authorization and upon payment of a reasonable copying charge, not to exceed one dollar per page for the first twenty-five pages, fifty cents per page for twenty-six to five hundred pages, and twenty-five cents per page thereafter, a handling charge not to exceed ten dollars for hospitals and five dollars for other health care providers, and actual postage. The individuals named herein shall also have the right to obtain copies of patient X-rays upon payment of reasonable reproduction costs. In the event a hospital record is not complete, the copy of the records furnished hereunder may indicate, through a stamp, coversheet, or otherwise, that the record is incomplete.

(c) If a copy of the record is not provided within a reasonable period of time, not to exceed fifteen days following the receipt of the request and written authorization, and production of the record is obtained through a court order or subpoena duces tecum, the health care provider shall be liable for reasonable attorney fees and expenses incurred in obtaining the court order or subpoena duces tecum. Such sanctions shall not be imposed unless the person requesting the copy of the record has by certified mail notified the health care provider of his failure to comply with the original request, by referring to the sanctions available, and the health care provider fails to furnish the requested copies within five days from receipt of such notice. Except for their own gross negligence, such health care providers shall not otherwise be held liable in damages by reason of their compliance with such request or their inability to fulfill the request.

(d) A health care provider may deny access to a record if the health care provider reasonably concludes that knowledge of the information contained in the record would be injurious to the health or welfare of the patient or could reasonably be expected to endanger the life or safety of any other person.

(e) Nothing in this Section shall be construed to limit or prohibit access to the information contained in the records of a patient maintained by a health care provider in any legally permissible manner other than those delineated pursuant to R.S. 22:213.2 and in this Section, subject to the provisions of R.S. 13:3734.

(3)(a) Medical and dental records shall be retained by a physician or dentist in the original, microfilmed, or similarly reproduced form for a minimum period of six years from the date a patient is last treated by a physician or dentist.

(b) Graphic matter, images, X-ray films, and like matter that were necessary to produce a diagnostic or therapeutic report shall be retained, preserved and properly stored by a physician or dentist in the original, microfilmed or similarly reproduced form for a minimum period of three years from the date a patient is last treated by the physician or dentist.

(7) <<+"Physician" means a person authorized under Chapter 4731. of the Revised Code to practice medicine and surgery, osteopathic medicine and surgery, or podiatry.+>>

(B) <<-A hospital shall prepare a finalized medical record for each patient who receives health care treatment at the hospital, within a reasonable time after treatment.->>

<<-(C)->> A patient <<+or patient's representative+>> who wishes to examine or obtain a copy of part or all of a <<-finalized->> medical record <<-covering a prior inpatient stay or outpatient treatment->> shall submit to the <<-hospital->> <<+health care provider+>> a <<- signed,->> written request <<+signed by the patient+>> dated not more than sixty days before the date on which it is submitted. The patient <<+or patient's representative+>> who wishes to obtain a copy of the record shall indicate in the request whether the copy is to be sent to the patient's residence<<+, physician or chiropractor, or representative,+>> or held for the patient at the <<-hospital->> <<+office of the health care provider+>>. Within a reasonable time after receiving a request that meets the requirements of this division and includes sufficient information to identify the record requested, <<-the hospital->> <<+a health care provider that has the patient's medical records+>> shall permit the patient to examine the record during regular business hours <<+ without charge+>> or<<+, on request,+>> shall provide a copy of the record in accordance with <<-the request->> <<+ section 3701.741 of the Revised Code+>>, except that if a physician <<+or chiropractor+>> who has treated the patient determines for clearly stated treatment reasons that disclosure of the requested record is likely to have an adverse effect on the patient, the <<- hospital->> <<+health care provider+>> shall provide the record to a physician <<+or chiropractor+>> designated by the patient. The <<- hospital->> <<+health care provider+>> shall take reasonable steps to establish the identity of the <<-patient examining,->> <<+person making the request to examine+>> or <<-requesting->> <<+obtain+>> a copy of<<-,->> the patient's record.

<<-(D)->><<+(C)+>> If a <<-hospital->> <<+health care provider+>> fails to furnish a <<-finalized->> medical record as required by division <<-(C)->>(B) of this section, the patient <<+or patient's representative+>> who requested the record may bring a civil action to enforce the patient's right of access to the record.

<<-(E)->><<+(D)(1)+>> This section does not apply to medical records whose release is covered by <<+section 173.20 or 3721.13 of the Revised Code, by+>> Chapter 1347. or 5122. of the Revised Code <<-or->><<+,+>> by 42 C.F.R. part 2, "Confidentiality of Alcohol and Drug Abuse Patient Records<<-.->><<+,+>>" <<-Nothing->> <<+or by 42 C.F.R. 483.10.+>>

<<+(2) Nothing+>> n this section is intended to supersede the confidentiality provisions of sections 2305.24 to 2305.251 of the Revised Code.

<< OH ST § 3701.741 >>

<<+Sec. 3701.741. (A) Through December 31, 2004, each health care provider and medical records company shall provide copies of medical records in accordance with this section.+>>

<<+(B) Except as provided in divisions (C) and (E) of this section, a health care provider or medical records company that receives a request for a copy of a patient's medical record may charge not more than the amounts set forth in this section. Total costs for copies and all services related to those copies shall not exceed the sum of the following:+>>

<<+(1) An initial fee of fifteen dollars, which shall compensate for the records search;+>>

<<+(2) With respect to data recorded on paper, the following amounts:+>>

<<+(a) One dollar per page for the first ten pages;+>>

<<+(b) Fifty cents per page for pages eleven through fifty;+>>

<<+(c) Twenty cents per page for pages fifty-one and higher.+>>

<<+(3) With respect to data recorded other than on paper, the actual cost of making the copy;+>>

Citation
SDCL § 36-2-16

Found Document

Rank 1 of 1

Database
SD-ST-ANN

TEXT

SOUTH DAKOTA CODIFIED LAWS
TITLE 36. PROFESSIONS AND OCCUPATIONS
CHAPTER 36-2. PRACTITIONERS OF HEALING ARTS IN GENERAL

Current through End of 2000 Reg. Sess.

36-2-16 Medical records released to patient or designee on request -- Expenses paid by patient -- Violation as misdemeanor.

A licensee of the healing arts shall provide copies of all medical records, reports and X-rays pertinent to the health of the patient, if available, to a patient or the patient's designee upon receipt by the licensee of a written request or a legible copy of a written request signed by the patient. A violation of this section is a Class 2 misdemeanor. The licensee may require before delivery that the patient pay the actual reproduction and mailing expense.

CREDIT

Source: SL 1979, ch 236, § 2; 1981, ch 258, § 3; 1992, ch 158, § 69.

<General Materials (GM) - References, Annotations, or Tables>

NOTES, REFERENCES, AND ANNOTATIONS

Cross-References.
Hospitals and other institutions to furnish records to patients, § 34-12- 15.
Penalties for classified misdemeanors, § 22-6-2.

S D C L § 36-2-16
SD ST § 36-2-16
END OF DOCUMENT

Attachment E

Citation
W ,T S 16-29-1
Code, § 16-29-1

Found Document

Rank 1 of 1

Database
WV-ST-ANN

TEXT

WEST VIRGINIA CODE 1966
CHAPTER 16. PUBLIC HEALTH.
ARTICLE 29. HEALTH CARE RECORDS.

Current through End of 2000 1st Ex.Sess.

§ 16-29-1 Copies of health care records to be furnished to patients.

Any licensed, certified or registered health care provider so licensed, certified or registered under the laws of this state shall, upon the written request of a patient, his authorized agent or authorized representative, within a reasonable time, furnish a copy, as requested, of all or a portion of the patient's record to the patient, his authorized agent or authorized representative subject to the following exceptions:

(a) In the case of a patient receiving treatment for psychiatric or psychological problems, a summary of the record shall be made available to the patient, his authorized agent or authorized representative following termination o he treatment program.

(b) Nothing in this article shall be construed to require a health care provider responsible for diagnosis, treatment or administering health care services in the case of minors for birth control, prenatal care, drug rehabilitation or related services or venereal disease according to any provision of this code, to release patient records of such diagnosis, treatment or provision of health care as aforesaid to a parent or guardian, without prior written consent therefor from the patient, nor shall anything in this article be construed to apply to persons regulated under the provisions of chapter eighteen [§§ 18-1-1 et seq.] of this code or the rules and regulations established thereunder.

(c) The furnishing of a copy, as requested, of the reports of X-ray examinations, electrocardiograms and other diagnostic procedures shall be deemed to comply with the provisions of this article: Provided, That original radiological study film from a radiological exam conducted pursuant to a request from a patient or patient's representative shall be provided to the patient or patient's representative upon written request and payment for the exam. The health care provider shall not be required to interpret or retain copies of the film and shall be immune from liability resulting from any action relating to the absence of the original radiological film from the patient's record.

(d) This article shall not apply to records subpoenaed or otherwise requested through court process.

(e) The provisions of this article may be enforced by a patient, authorized agent or authorized representative, and any health care provider found to be in v ation of this article shall pay any attorney fees and costs, including court costs incurred in the course of such enforcement.

23-21

Attachment E

provider's records or papers shall be furnished within fifteen days of such request to the patient or his attorney upon such patient's or attorney's written request, which request shall comply with the requirements of subsection E of § 32.1-127.1:03. However, copies of a patient's records shall not be furnished to such patient where the patient's treating physician has made a part of the patient's records a written statement that in his opinion the furnishing to or review by the patient of such records would be injurious to the patient's health or well-being, but in any such case such records shall be furnished to the patient's attorney within fifteen days of the date of such request. A reasonable charge may be made for the service of maintaining, retrieving, reviewing and preparing such copies. Except for copies of X-ray photographs, however, such charges shall not exceed fifty cents per page for up to fifty pages and twenty-five cents a page thereafter for copies from paper and one dollar per page for copies from microfilm or other micrographic process, plus all postage and shipping costs and a search and handling fee not to exceed ten dollars. Any hospital, nursing facility, physician, or other health care provider receiving such a request from a patient's attorney shall require a writing signed by the patient confirming the attorney's authority to make the request and shall accept a photocopy, facsimile, or other copy of the original signed by the patient as if it were an original.

C. Upon the failure of any hospital, nursing facility, physician, or other health care provider to comply with any written request made in accordance with subsection B within the period of time specified in that subsection and within the manner specified in subsections E and F of § 32.1-127.1:03, the patient or his attorney may cause a subpoena duces tecum to be issued. The subpoena may be issued (i) upon filing a request therefor with the clerk of the circuit court wherein any eventual suit, would be required to be filed, and payment of the fees required by subdivision A 18 of § 17.1-275, and fees for service or (ii) by the patient's attorney in a pending civil case in accordance with § 8.01-407 if issued by such attorney at least five business days prior to the date that production of the record is desired upon payment of the fees required by subdivision A 23 of § 17.1-275 at the time of filing of a copy of the subpoena duces tecum with the clerk. The subpoena shall be returnable within twenty days of proper service, directing the hospital, nursing facility, physician, or other health care provider to produce and furnish copies of the reports and papers to the clerk who shall then make the same available to the patient or his attorney. If the court finds that a hospital, nursing facility, physician, or other health care provider willfully refused to comply with a written request made in accordance with subsection B, either by willfully or arbitrarily refusing or by imposing a charge in excess of the reasonable expense of making the copies and processing the request for records, the court may award damages for all expenses incurred by the patient to obtain such copies, including court costs and reasonable attorney's fees.

D. The provisions of subsections A, B, and C hereof shall apply to any health care provider whose office is located within or without the Commonwealth if the records pertain to any patient who is a party to a cause of action in any court in the Commonwealth of Virginia, and shall apply only to requests made by an attorney, or his client, in anticipation of litigation or in the course of