Approved
Date: 1-22-02

MINUTES OF THE SENATE JUDICIARY COMMITTEE.

The meeting was called to order by Chairperson Senator Vratil at 9:38 a.m. on January 16, 2002 in Room 123-S of the Capitol.

All members were present except: Senator Haley (excused)

Committee staff present:
Gordon Self, Revisor
Mike Heim, Research
Jerry Donaldson, Research
Mary Blair, Secretary

Conferees appearing before the committee:
Professor Chris Drahozal, School of Law, K.U.
Randy Hearrell, Kansas Judicial Council

Others attending: see attached list

The minutes of the January 15, 2002 meeting were approved on a motion by Senator Adkins, seconded by Senator O'Connor, Carried.

Conferee Drahozal presented background information on the original Uniform Arbitration Act (UAA) which was enacted in 1973 to ensure enforceability of arbitration agreements. He discussed the provisions and scope of the Revised Uniform Arbitration Act (RUAA) which was promulgated by the National Conference of Commissioners on Uniform State Laws in 2000 and was designed to modernize the original UAA, codify case law in the states since the enactment of the UAA, and to resolve ambiguities and fill gaps in the UAA. The conferee made reference to a copy of the original UAA as well as a copy of a sample feature article entitled, "Why States Should Not Tamper with the Revised Uniform Arbitration Act" which he provided with his written testimony. (attachment 1) Discussion followed.

Conferee Hearrell presented two bill requests. The first amends current probate code law by allowing a non-resident to be appointed as an administrator of an estate providing the administrator has appointed, in writing, an agent residing in the county where the appointment is made and the agent provides written acceptance of such appointment. The second amends current law regarding a child who has been appointed a guardian *ad litem*. Because of the potential for a conflict of interest, this bill authorizes the appointment of an attorney for the child. (attachment 2) Following discussion on both bills, Senator Donovan moved to introduce the first bill, Senator Oleen seconded. Carried. Senator Adkins moved to introduce the second bill, Senator Schmidt seconded. Carried.

Staff research person, Mike Heim, identified handouts he provided to Committee: a summary of several bills from the 2001 session (attachment 3) and the Report of the Special Committee on Judiciary to the 2002 Kansas Legislature (attachment 4). He briefly summarized 2001 holdover Senate Judiciary Committee Bills. (attachment 5)

The meeting adjourned at 10:30 a.m. The next scheduled meeting is January 22, 2002.

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: January 16, 2002

NAME	REPRESENTING
Randy M. Hearrell	Judicial Council
ART THOMPSON	OFFICE OF JUDICIAL ADM.
MARK SCHOOLER	ABATE OF KANSAS, INC.
Meadow Jansen	ABATE of KS INC
WEASEL	CITIZEN
KEITH R LANDIS	CHRISTIAN SCIENCE COMMITTEE ON PUBLICATION FOR KANSAS
Doug Smith	Pinegar, Smith & Assoc.
Barb Jones	KSC
Brenda Harmon	KSC
Joe Herold	KSC
Nancy Lindberg	AG
KEVIN GRAHAM	AG
Lynara South	Juvenile Justice Auth
Kevin Barone	Hein/Weir. Chtd
Trista Beadles	Governor's Office
Connie Burns	Whitney Damron, PA
Kathy Olsen	Ks Bankers Assoc.
Kevin Davis	Am Family Ins.

REVISED UNIFORM ARBITRATION ACT

Christopher R. Drahozal
Professor of Law
University of Kansas School of Law

Presentation to the Senate Judiciary Committee
Topeka, Kansas
January 16, 2002

Background

- Kansas enacted the original Uniform Arbitration Act (UAA) in 1973 (K.S.A. 5-401 et seq.)
- UAA also adopted by 33 other states plus the District of Columbia, and in substantially similar form by 14 more
- Enacted to ensure enforceability of arbitration agreements (particularly pre-dispute arbitration agreements) in face of common law hostility toward such agreements
- Federal Arbitration Act ("FAA"), enacted in 1925, does the same on national level for "contracts evidencing a transaction involving commerce" (9 U.S.C. § 1) – construed as extending to the full reach of Congress' power to regulate interstate commerce (Allied-Bruce Termini Cos. v. Dobson, 513 U.S. 265 (1995))
- UAA and FAA are "bare bones" statutes: deal only with basic matters such as enforcement of arbitration agreements and awards, appointment of arbitrators, and compelling attendance of witnesses

Revised Uniform Arbitration Act ("RUAA") (attached)

- Promulgated by National Conference of Commissioners on Uniform State Laws in 2000 after lengthy study and drafting process. On second reading, approved by vote of 50 in favor and no votes against (one abstention and two absent)
- Enacted in three states: Hawaii (Haw. Rev. Stat. § 658A-1 et seq.), Nevada (Nev. Rev. Stat. § 38.206 et seq.), New Mexico (N.M. Stat. Ann. § 44-7A-1 et seq.)
- Designed to modernize UAA, to codify case law in the states since the enactment of UAA, and to resolve ambiguities and fill gaps in UAA

Jud 1-16-02 att 1

- Goal of drafters to incorporate positive aspects of "judicialization" of arbitration while preserving the characteristics of arbitration that can make it a faster and cheaper means of dispute resolution

- Also designed statute to provide some degree of consumer protection through various mandatory procedural provisions, while seeking to minimize preemption of Act by the Federal Arbitration Act

RUAA Highlights: Changes from UAA

- *Party Autonomy*: RUAA identifies which provisions of the statute are default rules that can be changed by the parties and which are mandatory rules that cannot be waived (§ 4)

- *Arbitrability*: Makes clear which challenges to arbitration agreements can be resolved by a court and which must be decided by the arbitrator (§ 6)

- *Provisional Remedies*: Authorizes courts and arbitrators in appropriate circumstances to award provisional relief (such as preliminary injunctions) (§ 8)

- *Consolidation*: Permits courts to order consolidation of related arbitration proceedings, unless parties agree otherwise (§ 10)

- *Arbitrator Disclosure*: Requires arbitrators to disclose material financial interests in proceeding and substantial relationship with parties; failure to disclose results in presumption of "evident partiality" as ground for setting aside award (§ 12)

- *Arbitral Immunity*: Provides that arbitrators have same immunity from suit as judges (§ 14)

- *Arbitral Process*: Clarifies that arbitrators have the authority to hold preliminary conferences and grant dispositive motions (§ 15)

- *Discovery*: Permits discovery that will make proceeding "fair, expeditious, and cost effective"; authorizes third party discovery; and streamlines process for enforcement of out-of-state subpoenas (§ 17)

- *Attorneys' Fees*: Allows arbitrators to award attorneys' fees if authorized by statute or the parties' agreement (§ 21)

- *Punitive Damages*: Authorizes arbitrators to award punitive damages, but requires arbitrators to state separately the amount of such damages and explain the basis for the award (§ 21)

- For a more detailed summary, written before final approval of RUAA but substantively accurate, see Report of the Committee on Arbitration of the Bar of the City of New York (attached)

Scope of RUAA

- Current Kansas Uniform Arbitration Act excludes certain contracts and claims from the provision of the Act that makes pre-dispute arbitration agreements enforceable (K.S.A. § 5-401(c))
  - "Contracts of insurance, except for those contracts between insurance companies, including reinsurance contracts"
  - "[C]ontracts between and employer and employees, or their respective representatives"
  - "[A]ny provision of a contract providing for arbitration of a claim in tort"
- Federal Arbitration Act preempts Kansas UAA as to exclusions for employment contracts and tort claims, but not as to insurance contracts (*Compare* Skewes v. Shearson Lehman Bros., 829 P.2d 874 (Kan. 1992) (tort claims exclusion preempted by FAA) *with* Friday v. Trinity Universal of Kansas, 939 P.2d 869 (Kan. 1997) (insurance exclusion not preempted due to McCarran-Ferguson Act); Mutual Reinsurance Bureau v. Great Plains Mut. Ins. Co., 969 F.2d 931 (10th Cir.) (same), *cert. denied*, 506 U.S. 1001 (1992))
- Revised Uniform Arbitration Act contains no exclusions, to avoid preemption by FAA
- RUAA Drafters' position on non-conforming amendments:

> Rather than improve the arbitration process, proposals to alter its provisions to address issues that are not unique to the particular state are likely to create more harm than good, weakening a well-conceived statute containing many interrelated provisions, increasing the amount of arbitration-related litigation, and defeating the purpose of legislating an efficient, fair, economical, non-litigation alternative to resolving disputes.
>
> Moreover, nonconforming amendments could raise significant enforcement problems because of the federal preemption doctrine. . . .

Frances J. Pavetti, *Why States Should Not Tamper with the Revised Uniform Arbitration Act*, ADR Currents (June-August 2001) (chair of RUAA drafting committee) (attached)

Conclusion

- RUAA has received the unqualified endorsement of the American Bar Association (House of Delegates and numerous sections, including the Dispute Resolution and Business Law sections), American Arbitration Association, JAMS, National Arbitration Forum, and the National Academy of Arbitrators

- Modernizes legal framework governing arbitration to the benefit of Kansas parties to arbitration agreements

UNIFORM ARBITRATION ACT (2000)

SECTION 1. DEFINITIONS. In this [Act]:

(1) "Arbitration organization" means an association, agency, board, commission, or other entity that is neutral and initiates, sponsors, or administers an arbitration proceeding or is involved in the appointment of an arbitrator.

(2) "Arbitrator" means an individual appointed to render an award, alone or with others, in a controversy that is subject to an agreement to arbitrate.

(3) "Court" means [a court of competent jurisdiction in this State].

(4) "Knowledge" means actual knowledge.

(5) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation; or any other legal or commercial entity.

(6) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

SECTION 2. NOTICE.

(a) Except as otherwise provided in this [Act], a person gives notice to another person by taking action that is reasonably necessary to inform the other person in ordinary course, whether or not the other person acquires knowledge of the notice.

(b) A person has notice if the person has knowledge of the notice or has received notice.

(c) A person receives notice when it comes to the person's attention or the notice is delivered at the person's place of residence or place of business, or at another location held out by the person as a place of delivery of such communications.

SECTION 3. WHEN [ACT] APPLIES.

(a) This [Act] governs an agreement to arbitrate made on or after [the effective date of this [Act]].

(b) This [Act] governs an agreement to arbitrate made before [the effective date of this [Act]] if all the parties to the agreement or to the arbitration proceeding so agree in a record.

(c) On or after [a delayed date], this [Act] governs an agreement to arbitrate whenever made.

SECTION 4. EFFECT OF AGREEMENT TO ARBITRATE; NONWAIVABLE PROVISIONS.

(a) Except as otherwise provided in subsections (b) and (c), a party to an agreement to arbitrate or to an arbitration proceeding may waive or, the parties may vary the effect of, the requirements of this [Act] to the extent permitted by law.

(b) Before a controversy arises that is subject to an agreement to arbitrate, a party to the agreement may not:

(1) waive or agree to vary the effect of the requirements of Section 5(a), 6(a), 8, 17(a), 17(b), 26, or 28;

(2) agree to unreasonably restrict the right under Section 9 to notice of the initiation of an arbitration proceeding;

(3) agree to unreasonably restrict the right under Section 12 to disclosure of any facts by a neutral arbitrator; or

(4) waive the right under Section 16 of a party to an agreement to arbitrate to be represented by a lawyer at any proceeding or hearing under this [Act], but an employer and a labor organization may waive the right to representation by a lawyer in a labor arbitration.

(c) A party to an agreement to arbitrate or arbitration proceeding may not waive, or the parties may not vary the effect of, the requirements of this section or Section 3(a) or (c), 7, 14, 18, 20(d) or (e), 22, 23, 24, 25(a) or (b), 29, 30, 31, or 32.

SECTION 5. [APPLICATION] FOR JUDICIAL RELIEF.

(a) Except as otherwise provided in Section 28, an [application] for judicial relief under this [Act] must be made by [motion] to the court and heard in the manner provided by law or rule of court for making and hearing [motions].

(b) Unless a civil action involving the agreement to arbitrate is pending, notice of an initial [motion] to the court under this [Act] must be served in the manner provided by law for the service of a summons in a civil action. Otherwise, notice of the motion must be given in the manner provided by law or rule of court for serving [motions] in pending cases.

SECTION 6. VALIDITY OF AGREEMENT TO ARBITRATE.

(a) An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract.

(b) The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.

(c) An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.

(d) If a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to, an agreement to arbitrate, the arbitration proceeding may continue pending final resolution of the issue by the court, unless the court otherwise orders.

SECTION 7. [MOTION] TO COMPEL OR STAY ARBITRATION.

(a) On [motion] of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement:

(1) if the refusing party does not appear or does not oppose the [motion], the court shall order the parties to arbitrate; and

(2) if the refusing party opposes the [motion], the court shall proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate.

(b) On [motion] of a person alleging that an arbitration proceeding has been initiated or threatened but that there is no agreement to arbitrate, the court shall proceed summarily to decide the issue. If the court finds that there is an enforceable agreement to arbitrate, it shall order the parties to arbitrate.

(c) If the court finds that there is no enforceable agreement, it may not pursuant to subsection (a) or (b) order the parties to arbitrate.

(d) The court may not refuse to order arbitration because the claim subject to arbitration lacks merit or grounds for the claim have not been established.

(e) If a proceeding involving a claim referable to arbitration under an alleged agreement to arbitrate is pending in court, a [motion] under this section must be made in that court. Otherwise a [motion] under this section may be made in any court as provided in Section 27.

(f) If a party makes a [motion] to the court to order arbitration, the court on just terms shall stay any judicial proceeding that involves a claim alleged to be subject to the arbitration until the court renders a final decision under this section.

(g) If the court orders arbitration, the court on just terms shall stay any judicial proceeding that involves a claim subject to the arbitration. If a claim subject to the arbitration is severable, the court may limit the stay to that claim.

SECTION 8. PROVISIONAL REMEDIES.

(a) Before an arbitrator is appointed and is authorized and able to act, the court, upon [motion] of a party to an arbitration proceeding and for good cause shown, may enter an order for provisional remedies to protect the effectiveness of the arbitration proceeding to the same extent and under the same conditions as if the controversy were the subject of a civil action.

(b) After an arbitrator is appointed and is authorized and able to act:

(1) the arbitrator may issue such orders for provisional remedies, including interim awards, as the arbitrator finds necessary to protect the effectiveness of the arbitration proceeding and to promote the fair and
expeditious resolution of the controversy, to the same extent and under the same conditions as if the controversy were the subject of a civil action and

(2) a party to an arbitration proceeding may move the court for a provisional remedy only if the matter is urgent and the arbitrator is not able to act timely or the arbitrator cannot provide an adequate remedy.

(c) A party does not waive a right of arbitration by making a [motion] under subsection (a) or (b).

SECTION 9. INITIATION OF ARBITRATION.

(a) A person initiates an arbitration proceeding by giving notice in a record to the other parties to the agreement to arbitrate in the agreed manner between the parties or, in the absence of agreement, by certified or registered mail, return receipt requested and obtained, or by service as authorized for the commencement of a civil action. The notice must describe the nature of the controversy and the remedy sought.

(b) Unless a person objects for lack or insufficiency of notice under Section 15(c) not later than the beginning of the arbitration hearing, the person by appearing at the hearing waives any objection to lack of or insufficiency of notice.

SECTION 10. CONSOLIDATION OF SEPARATE ARBITRATION PROCEEDINGS.

(a) Except as otherwise provided in subsection (c), upon [motion] of a party to an agreement to arbitrate or to an arbitration proceeding, the court may order consolidation of separate arbitration proceedings as to all or some of the claims if:

(1) there are separate agreements to arbitrate or separate arbitration proceedings between the same persons or one of them is a party to a separate agreement to arbitrate or a separate arbitration proceeding with a third person;

(2) the claims subject to the agreements to arbitrate arise in substantial part from the same transaction or series of related transactions;

(3) the existence of a common issue of law or fact creates the possibility of conflicting decisions in the separate arbitration proceedings; and

(4) prejudice resulting from a failure to consolidate is not outweighed by the risk of undue delay or prejudice to the rights of or hardship to parties opposing consolidation.

(b) The court may order consolidation of separate arbitration proceedings as to some claims and allow other claims to be resolved in separate arbitration proceedings.

(c) The court may not order consolidation of the claims of a party to an agreement to arbitrate if the agreement prohibits consolidation.

SECTION 11. APPOINTMENT OF ARBITRATOR; SERVICE AS A NEUTRAL ARBITRATOR.

(a) If the parties to an agreement to arbitrate agree on a method for appointing an arbitrator, that method must be followed, unless the method fails. If the parties have not agreed on a method, the agreed method fails, or an arbitrator appointed fails or is unable to act and a successor has not been appointed, the court, on [motion] of a party to the arbitration proceeding, shall appoint the arbitrator. An arbitrator so appointed has all the powers of an arbitrator designated in the agreement to arbitrate or appointed pursuant to the agreed method.

(b) An individual who has a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party may not serve as an arbitrator required by an agreement to be neutral.

SECTION 12. DISCLOSURE BY ARBITRATOR.

(a) Before accepting appointment, an individual who is requested to serve as an arbitrator, after making a reasonable inquiry, shall disclose to all parties to the agreement to arbitrate and arbitration proceeding and to any other arbitrators any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding, including:

(1) a financial or personal interest in the outcome of the arbitration proceeding; and

(2) an existing or past relationship with any of the parties to the agreement to arbitrate or the arbitration proceeding, their counsel or representatives, a witness, or another arbitrator.

(b) An arbitrator has a continuing obligation to disclose to all parties to the agreement to arbitrate and arbitration proceeding and to any other arbitrators any facts that the arbitrator learns after accepting appointment which a reasonable person would consider likely to affect the impartiality of the arbitrator.

(c) If an arbitrator discloses a fact required by subsection (a) or (b) to be disclosed and a party timely objects to the appointment or continued service of the arbitrator based upon the fact disclosed, the objection may be a ground under Section 23(a)(2) for vacating an award made by the arbitrator.

(d) If the arbitrator did not disclose a fact as required by subsection (a) or (b), upon timely objection by a party, the court under Section 23(a)(2) may vacate an award.

(e) An arbitrator appointed as a neutral arbitrator who does not disclose a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party is presumed to act with evident partiality under Section 23(a)(2).

(f) If the parties to an arbitration proceeding agree to the procedures of an arbitration organization or any other procedures for challenges to arbitrators before an award is made, substantial compliance with those procedures is a condition precedent to a [motion] to vacate an award on that ground under Section 23(a)(2).

SECTION 13. ACTION BY MAJORITY. If there is more than one arbitrator, the powers of an arbitrator must be exercised by a majority of the arbitrators, but all of them shall conduct the hearing under Section 15(c).

SECTION 14. IMMUNITY OF ARBITRATOR; COMPETENCY TO TESTIFY; ATTORNEY'S FEES AND COSTS.

(a) An arbitrator or an arbitration organization acting in that capacity is immune from civil liability to the same extent as a judge of a court of this State acting in a judicial capacity.

(b) The immunity afforded by this section supplements any immunity under other law.

(c) The failure of an arbitrator to make a disclosure required by Section 12 does not cause any loss of immunity under this section.

(d) In a judicial, administrative, or similar proceeding, an arbitrator or representative of an arbitration organization is not competent to testify, and may not be required to produce records as to any statement, conduct, decision, or ruling occurring during the arbitration proceeding, to the same extent as a judge of a court of this State acting in a judicial capacity. This subsection does not apply:

(1) to the extent necessary to determine the claim of an arbitrator, arbitration organization, or representative of the arbitration organization against a party to the arbitration proceeding; or

(2) to a hearing on a [motion] to vacate an award under Section 23(a)(1) or (2) if the [movant] establishes prima facie that a ground for vacating the award exists.

(e) If a person commences a civil action against an arbitrator, arbitration organization, or representative of an arbitration organization arising from the services of the arbitrator, organization, or representative or if a person seeks to compel an arbitrator or a representative of an arbitration organization to testify or produce records in violation of subsection (d), and the court decides that the arbitrator, arbitration organization, or representative of an arbitration organization is immune from civil liability or that the arbitrator or representative of the organization is not competent to testify, the court shall award to the arbitrator, organization, or representative reasonable attorney's fees and other reasonable expenses of litigation.

SECTION 15. ARBITRATION PROCESS.

(a) An arbitrator may conduct an arbitration in such manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding. The authority conferred upon the arbitrator includes the power to hold conferences with the parties to the arbitration proceeding before the hearing and, among other matters, determine the admissibility, relevance, materiality and weight of any evidence.

(b) An arbitrator may decide a request for summary disposition of a claim or particular issue:

(1) if all interested parties agree; or

(2) upon request of one party to the arbitration proceeding if that party gives notice to all other parties to the proceeding, and the other parties have a reasonable opportunity to respond.

(c) If an arbitrator orders a hearing, the arbitrator shall set a time and place and give notice of the hearing not less than five days before the hearing begins. Unless a party to the arbitration proceeding makes an objection to lack or insufficiency of notice not later than the beginning of the hearing, the party's appearance at the hearing waives the objection. Upon request of a party to the arbitration proceeding and for good cause shown, or upon the arbitrator's own initiative, the arbitrator may adjourn the hearing from time to time as necessary but may not postpone the hearing to a time later than that fixed by the agreement to arbitrate for making the award unless the parties to the arbitration proceeding consent to a later date. The arbitrator may hear and decide the controversy upon the evidence produced although a party who was duly notified of the arbitration proceeding did not appear. The court, on request, may direct the arbitrator to conduct the hearing promptly and render a timely decision.

(d) At a hearing under subsection (c), a party to the arbitration proceeding has a right to be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing.

(e) If an arbitrator ceases or is unable to act during the arbitration proceeding, a replacement arbitrator must be appointed in accordance with Section 11 to continue the proceeding and to resolve the controversy.

SECTION 16. REPRESENTATION BY LAWYER. A party to an arbitration proceeding may be represented by a lawyer.

SECTION 17. WITNESSES; SUBPOENAS; DEPOSITIONS; DISCOVERY.

(a) An arbitrator may issue a subpoena for the attendance of a witness and for the production of records and other evidence at any hearing and may administer oaths. A subpoena must be served in the manner for service of subpoenas in a civil action and, upon [motion] to the court by a party to the arbitration proceeding or the arbitrator, enforced in the manner for enforcement of subpoenas in a civil action.

(b) In order to make the proceedings fair, expeditious, and cost effective, upon request of a party to or a witness in an arbitration proceeding, an arbitrator may permit a deposition of any witness to be taken for use as evidence at the hearing, including a witness who cannot be subpoenaed for or is unable to attend a hearing. The arbitrator shall determine the conditions under which the deposition is taken.

(c) An arbitrator may permit such discovery as the arbitrator decides is appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious, and cost effective.

(d) If an arbitrator permits discovery under subsection (c), the arbitrator may order a party to the arbitration proceeding to comply with the arbitrator's discovery-related orders, issue subpoenas for the attendance of a witness and for the production of records and other evidence at a discovery proceeding, and take action against a noncomplying party to the extent a court could if the controversy were the subject of a civil action in this State.

(e) An arbitrator may issue a protective order to prevent the disclosure of privileged information, confidential information, trade secrets, and other information protected from disclosure to the extent a court could if the controversy were the subject of a civil action in this State.

(f) All laws compelling a person under subpoena to testify and all fees for attending a judicial proceeding, a deposition, or a discovery proceeding as a witness apply to an arbitration proceeding as if the controversy were the subject of a civil action in this State.

(g) The court may enforce a subpoena or discovery-related order for the attendance of a witness within this State and for the production of records and other evidence issued by an arbitrator in connection with an arbitration proceeding in another State upon conditions determined by the court so as to make the arbitration proceeding fair, expeditious, and cost effective. A subpoena or discovery-related order issued by an arbitrator in another State must be served in the manner provided by law for service of subpoenas in a civil action in this State and, upon [motion] to the court by a party to the arbitration proceeding or the arbitrator, enforced in the manner provided by law for enforcement of subpoenas in a civil action in this State.

SECTION 18. JUDICIAL ENFORCEMENT OF PREAWARD RULING BY ARBITRATOR. If an arbitrator makes a preaward ruling in favor of a party to the arbitration proceeding, the party may request the arbitrator to incorporate the ruling into an award under Section 19. A prevailing party may make a [motion] to the court for an expedited order to confirm the award under Section 22, in which case the court shall summarily decide the [motion]. The court shall issue an order to confirm the award unless the court vacates, modifies, or corrects the award under Section 23 or 24.

SECTION 19. AWARD.

(a) An arbitrator shall make a record of an award. The record must be signed or otherwise authenticated by any arbitrator who concurs with the award. The arbitrator or the arbitration organization shall give notice of the award, including a copy of the award, to each party to the arbitration proceeding.

(b) An award must be made within the time specified by the agreement to arbitrate or, if not specified therein, within the time ordered by the court. The court may extend or the parties to the arbitration proceeding may agree in a record to extend the time. The court or the parties may do so within or after the time specified or ordered. A party waives any objection that an award was not timely made unless the party gives notice of the objection to the arbitrator before receiving notice of the award.

SECTION 20. CHANGE OF AWARD BY ARBITRATOR.

(a) On [motion] to an arbitrator by a party to an arbitration proceeding, the arbitrator may modify or correct an award:

(1) upon a ground stated in Section 24(a)(1) or (3);

(2) because the arbitrator has not made a final and definite award upon a claim submitted by the parties to the arbitration proceeding; or

(3) to clarify the award.

(b) A [motion] under subsection (a) must be made and notice given to all parties within 20 days after the movant receives notice of the award.

(c) A party to the arbitration proceeding must give notice of any objection to the [motion] within 10 days after receipt of the notice.

(d) If a [motion] to the court is pending under Section 22, 23, or 24, the court may submit the claim to the arbitrator to consider whether to modify or correct the award:

(1) upon a ground stated in Section 24(a)(1) or (3);

(2) because the arbitrator has not made a final and definite award upon a claim submitted by the parties to the arbitration proceeding; or

(3) to clarify the award.

(e) An award modified or corrected pursuant to this section is subject to Sections 19(a), 22, 23, and 24.

SECTION 21. REMEDIES; FEES AND EXPENSES OF ARBITRATION PROCEEDING.

(a) An arbitrator may award punitive damages or other exemplary relief if such an award is authorized by law in a civil action involving the same claim and the evidence produced at the hearing justifies the award under the legal standards otherwise applicable to the claim.

(b) An arbitrator may award reasonable attorney's fees and other reasonable expenses of arbitration if such an award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding.

(c) As to all remedies other than those authorized by subsections (a) and (b), an arbitrator may order such remedies as the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding. The fact that such a remedy could not or would not be granted by the court is not a ground for refusing to confirm an award under Section 22 or for vacating an award under Section 23.

(d) An arbitrator's expenses and fees, together with other expenses, must be paid as provided in the award.

(e) If an arbitrator awards punitive damages or other exemplary relief under subsection (a), the arbitrator shall specify in the award the basis in fact justifying and the basis in law authorizing the award and state separately the amount of the punitive damages or other exemplary relief.

SECTION 22. CONFIRMATION OF AWARD. After a party to an arbitration proceeding receives notice of an award, the party may make a [motion] to the court for an order confirming the award at which time the court shall issue a confirming order unless the award is modified or corrected pursuant to Section 20 or 24 or is vacated pursuant to Section 23.

SECTION 23. VACATING AWARD.

(a) Upon [motion] to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if:

(1) the award was procured by corruption, fraud, or other undue means;

(2) there was:

(A) evident partiality by an arbitrator appointed as a neutral arbitrator;

(B) corruption by an arbitrator; or

(C) misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;

(3) an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to Section 15, so as to prejudice substantially the rights of a party to the arbitration proceeding;

(4) an arbitrator exceeded the arbitrator's powers;

(5) there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under Section 15(c) not later than the beginning of the arbitration hearing; or

(6) the arbitration was conducted without proper notice of the initiation of an arbitration as required in Section 9 so as to prejudice substantially the rights of a party to the arbitration proceeding.

(b) A [motion] under this section must be filed within 90 days after the [movant] receives notice of the award pursuant to Section 19 or within 90 days after the [movant] receives notice of a modified or corrected award pursuant to Section 20, unless the [movant] alleges that the award was procured by corruption, fraud, or other undue means, in which case the [motion] must be made within 90 days after the ground is known or by the exercise of reasonable care would have been known by the [movant].

(c) If the court vacates an award on a ground other than that set forth in subsection (a)(5), it may order a rehearing. If the award is vacated on a ground stated in subsection (a)(1) or (2), the rehearing must be before a new arbitrator. If the award is vacated on a ground stated in subsection (a)(3), (4), or (6), the rehearing may be before the arbitrator who made the award or the arbitrator's successor. The arbitrator must render the decision in the rehearing within the same time as that provided in Section 19(b) for an award.

(d) If the court denies a [motion] to vacate an award, it shall confirm the award unless a [motion] to modify or correct the award is pending.

SECTION 24. MODIFICATION OR CORRECTION OF AWARD.

(a) Upon [motion] made within 90 days after the [movant] receives notice of the award pursuant to Section 19 or within 90 days after the [movant] receives notice of a modified or corrected award pursuant to Section 20, the court shall modify or correct the award if:

(1) there was an evident mathematical miscalculation or an evident mistake in the description of a person, thing, or property referred to in the award;

(2) the arbitrator has made an award on a claim not submitted to the arbitrator and the award may be corrected without affecting the merits of the decision upon the claims submitted; or

(3) the award is imperfect in a matter of form not affecting the merits of the decision on the claims submitted.

(b) If a [motion] made under subsection (a) is granted, the court shall modify or correct and confirm the award as modified or corrected. Otherwise, unless a motion to vacate is pending, the court shall confirm the award.

(c) A [motion] to modify or correct an award pursuant to this section may be joined with a [motion] to vacate the award.

SECTION 25. JUDGMENT ON AWARD; ATTORNEY'S FEES AND LITIGATION EXPENSES.

(a) Upon granting an order confirming, vacating without directing a rehearing, modifying, or correcting an award, the court shall enter a judgment in conformity therewith. The judgment may be recorded, docketed, and enforced as any other judgment in a civil action.

(b) A court may allow reasonable costs of the [motion] and subsequent judicial proceedings.

(c) On [application] of a prevailing party to a contested judicial proceeding under Section 22, 23, or 24, the court may add reasonable attorney's fees and other reasonable expenses of litigation incurred in a judicial proceeding after the award is made to a judgment confirming, vacating without directing a rehearing, modifying, or correcting an award.

SECTION 26. JURISDICTION.

(a) A court of this State having jurisdiction over the controversy and the parties may enforce an agreement to arbitrate.

(b) An agreement to arbitrate providing for arbitration in this State confers exclusive jurisdiction on the court to enter judgment on an award under this [Act].

SECTION 27. VENUE. A [motion] pursuant to Section 5 must be made in the court of the [county] in which the agreement to arbitrate specifies the arbitration hearing is to be held or, if the hearing has been held, in the court of the [county] in which it was held. Otherwise, the [motion] may be made in the court of any [county] in which an adverse party resides or has a place of business or, if no adverse party has a residence or place of business in this State, in the court of any [county] in this State. All subsequent [motions] must be made in the court hearing the initial [motion] unless the court otherwise directs.

SECTION 28. APPEALS.

(a) An appeal may be taken from:

(1) an order denying a [motion] to compel arbitration;

(2) an order granting a [motion] to stay arbitration;

(3) an order confirming or denying confirmation of an award;

(4) an order modifying or correcting an award;

(5) an order vacating an award without directing a rehearing; or

(6) a final judgment entered pursuant to this [Act].

(b) An appeal under this section must be taken as from an order or a judgment in a civil action.

SECTION 29. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among States that enact it.

SECTION 30. RELATIONSHIP TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. The provisions of this Act governing the legal effect, validity, or enforceability of electronic records or electronic signatures, and of contracts performed with the use of such records or signatures conform to the requirements of Section 102 of the Electronic Signatures in Global and National Commerce Act.

SECTION 31. EFFECTIVE DATE. This [Act] takes effect on [effective date].

SECTION 32. REPEAL. Effective on [delayed date should be the same as that in Section 3(c)], the [Uniform Arbitration Act] is repealed.

SECTION 33. SAVINGS CLAUSE. This [Act] does not affect an action or proceeding commenced or right accrued before this [Act] takes effect. Subject to Section 3 of this [Act], an arbitration agreement made before the effective date of this [Act] is governed by the [Uniform Arbitration Act].

Report of the Committee on Arbitration
Recommending Association Support for the Proposed
Revised Uniform Arbitration Act

The Committee on Arbitration of the Association of the Bar of the City of New York recommends that the Association support adoption of the proposed Revised Uniform Arbitration Act ("RUAA") both (1) by the National Conference of Commissioners on Uniform State Laws (the "Commission") at its meeting in July, 2000, in St. Augustine, Florida, and (2) by the New York State Legislature after passage by the Commission.

Background

The original Uniform Arbitration Act ("UAA") was promulgated by the Commission in 1955. Thereafter, it was enacted intact by 35 jurisdictions and with modifications in 14 more. New York did not enact the UAA. Its own arbitration statute was one of the first in the United States, adopted in 1920. The 1925 United States Federal Arbitration Act ("FAA") was based on the New York statute. The FAA and UAA have a number of similar, if not identical, provisions. All three statutes were enacted to ensure the enforceability of pre-dispute arbitration agreements in the face of long-standing judicial hostility. The limited grounds for vacating or modifying awards are similar in all three acts.[1]

Like the FAA, the UAA is a bare-bones statute dealing only with such basic matters as enforcement of arbitration agreements, appointment of arbitrators, compelling attendance of witnesses and review of awards. It left much to be worked out in the courts, the rules of arbitration-sponsoring organizations and the agreements of parties to arbitrate. The proposed RUAA is much more comprehensive. It has been created to codify case law since the UAA went into effect, and to resolve ambiguities in and questions raised by the UAA with which the courts have wrestled, sometimes reaching different results. It is also an effort to modernize the old statute. The revised statute deals with such matters as whether the court or the arbitrators determine arbitrability, provisional remedies, consolidation of proceedings, arbitrator disclosure of interests and relationships, arbitrator and arbitration organization immunity, discovery, subpoenaed testimonies, arbitrator authority to order pre-hearing conferences and decide dispositive motions, and punitive damages, attorneys' fees and other remedies.

Since enactment of the UAA there has been a tendency for arbitration to become more and more like litigation in court. The RUAA tries -- we think, successfully -- to incorporate positive aspects of this development while retaining the differences that make arbitration a faster and less expensive alternative. The proposal is the result of much

[1] FAA, 9 U.S.C. § 10, 11; UAA, § 12, 13; NY CPLR, § 7511.

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study and hard work and is likely to be very influential in the field of arbitration for many years to come. It may become a model for a revised FAA and will certainly influence the legislative process at the federal level.

The process of revision began with the appointment of a Study Commission to look at areas in which the UAA might usefully be revised. After its report was issued in 1995, a Drafting Committee was appointed in 1997 to explore the issues raised in the report and draft a revised statute to propose to the full Commission. The Drafting Committee has met over eight times in the course of three years. Its efforts produced a draft that was given a first reading by the full Commission in July, 1999, and a revised draft that will receive a second, and probably final, reading at the Commission's annual meeting this July.

The Committee on Arbitration of this Association has had considerable input into the drafting process. The Committee discussed a succession of drafts of the RUAA at a number of meetings. The Committee's chairman attended all of the meetings of the RUAA Drafting Committee. The Committee is well satisfied with the final product. It is expected that the draft will receive the support of a number of Sections of the American Bar Association and numerous other organizations, and the Committee believes that the Association should support the draft.

A brief synopsis of some of the more important provisions of the RUAA follows.

Codifying Provisions

Arbitrability

The RUAA, in Section 6(b), follows the decision of the U.S. Supreme Court in First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995), that, if there is no explicit agreement to the contrary, the question of whether the parties have agreed to arbitrate is subject to decision by the courts, either prior to an award or following arbitration by de novo judicial review. Section 6(c) adopts the rule that questions of procedural arbitrability, such as the statute of limitations, and of enforceability, should be decided by the arbitrators. See Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967).

Provisional Remedies

The draft (§ 8) codifies existing law in many jurisdictions that allows courts to grant provisional remedies in aid of arbitration. It also adopts the principle found in the rules of some arbitral organizations that arbitrators also have the authority to grant such relief. To make an arbitrator's interim order effective, while preserving the expeditious

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nature of arbitration, the draft provides for court enforcement of the granting -- but not the denial -- of provisional relief.

Arbitrator Disclosure

Section 12 of the RUAA codifies the requirement of the existing rules of many arbitration-sponsoring organizations, the 1977 Code of Ethics for Arbitrators, as well as the law of many jurisdictions, that neutral arbitrators must make timely disclosure to the parties and other arbitrators of financial interests they may have in the outcome of the arbitration and significant relationships with a party, witness or other person or entity involved in the arbitration. The proposal also imposed a stricter standard than most laws and rules, by requiring even a non-neutral, party-appointed arbitrator, who is generally permitted to be predisposed toward the appointing party, to disclose the nature of his relationship to the party that appointed him. This expanded disclosure is primarily for the benefit of the third arbitrator, who is neutral, and can be waived by the parties.

Provision is also made for matters pertaining to arbitrator disclosure to be potential grounds for vacating an award, including a presumption of "evident partiality" in the event of an undisclosed "known, direct and material" interest in the outcome of the arbitration or relationship with a party. The draft also provides for payment of attorneys' fees by the party that unsuccessfully seeks to compel arbitrator testimony.

Immunity

The proposed statute (§ 14(a)) follows the well-established rule that, like a judicial officer, both arbitrators and organizations that administer or facilitate arbitration are immune from civil liability for actions taken in the course of an arbitration. And, except where, for example, arbitrator misdeeds have been prime facie established, arbitrators are made incompetent to testify about arbitration matters (§ 14(d)). The draft also provides for payment of attorneys fees by the party that unsuccessfully seeks to compel arbitrator testimony.

Clarifications

Preliminary Conferences

Section 15(a) of the draft clears up any remaining doubt that arbitrators have the authority to conduct preliminary conferences with the parties and their representatives to resolve matters such as scheduling and discovery prior to holding hearings on the merits.

Dispositive Motions

Arbitrators have been reluctant to grant dispositive motions and have needlessly allowed meritless claims to consume days of hearing. The reason is that one of the few

grounds for vacating an award, under both the FAA and the UAA, is the refusal of an arbitrator to "consider evidence material to the controversy." (see RUAA § 23(a)(3)). Section 15(b) of the draft makes clear that in an appropriate case an arbitrator may grant a dispositive motion, without holding a full evidentiary hearing on the merits, if all parties are given reasonable notice and an opportunity to respond.

Discovery

Discovery through the production of documents and, to a lesser degree, the taking of depositions, has become a fact of life in arbitration, although the rules of some arbitral organizations obscure the fact.[2] The opportunity to obtain documents or testimony in advance of hearing may be indispensable to a party's receiving justice or to making the arbitration hearings more -- not less -- expeditious. Section 17 of the RUAA deals with discovery explicitly, leaving the matter to the parties and the arbitrators in the particular case, consistent with the principle that the proceeding should be "fair, efficient and cost effective." It also resolves the uncertainty in existing case law in favor of permitting arbitrators to order discovery of third parties.

Compromise

Consolidation

Section 10 follows existing law by preventing courts from consolidating arbitrations where the arbitration agreement of a party opposing consolidation expressly prohibits it. For arbitration agreements that are silent on the matter of consolidation, the RUAA strikes a compromise. It rejects the extreme position of the majority of federal cases that prohibits consolidation under any circumstances and adopts a position much like that of the case law in New York. The position of the RUAA is that consolidation is appropriate where the disputes arise out of the same transactions, they have issues in common and the prejudice resulting from a failure to consolidate is not outweighed by delay or prejudice to those opposing consolidation.

Change

Attorneys' Fees

The UAA permits arbitrators to award attorneys' fees only where the parties have agreed that they may (§ 10). In addition to the case of party agreement, Section 21(b) of the RUAA will permit arbitrators to award attorneys' fees in any other circumstances in

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[2] See American Arbitration Association Rule R-23(a)(i) which provides for "the production of documents and other information."

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which such an award would be permitted in court in a civil action, such as where they are provided by statute.

Innovations

Out of State Subpoenas

Currently in proceedings in a state court to take the testimony of a witness in another state one must go through three procedural steps in court. First, one must procure a commission or some other form of order from a court in the state of the proceeding. Second, one must take the commission or order to a court in the state of the witness and there obtain a subpoena issued by that court or an order upon which a subpoena can be based. Third, if the subpoena is ignored, one must return to the court of the state in which the witness is located for an order to compel testimony or find the witness in contempt. If the proceeding in the first state is an arbitration, under current law the process requires yet a fourth maneuver of obtaining, as a first step, a subpoena or ruling from the arbitrator(s). Much of this multi-step procedure is purely a formality. Indeed, often the first step or two in court can be done ex parte. Under Section 17(g) of the RUAA at least two steps are eliminated. If the RUAA has been enacted in the state of the witness, a subpoena may be issued directly by the arbitrator(s) and served on the witness, and it is only if the witness fails to comply that the party desiring the testimony must go to court in the state of the witness to enforce the subpoena. The rights of the witness resisting the taking of testimony are preserved since the witness can apply for a protective order or order quashing the subpoena in a court of his or her own state or ignore the subpoena and wait for an order compelling testimony from that court.

Punitive Damages

Under the law of a few states, including New York, arbitrators have not had the power to award punitive damages. The prevailing rule in most states and under the FAA has been to the contrary, upholding the authority of arbitrators to award exemplary damages unless the parties have agreed to the contrary. The RUAA has adopted the majority view. But it has added some safeguards. In general under existing law, and under the RUAA, arbitrators are not required to follow the strict letter of the law (see RUAA § 21(c)), and the scope of judicial review is very narrow (see RUAA § 23). In view of these considerations, Section 21(a) provides that arbitrators may award punitive damages only where "such an award is authorized by law in a civil action involving the same subject matter" and where the arbitrators specify in the award both "the basis in law authorizing the award" and the amount of punitive damages separate from compensatory damages.

Record

The RUAA has changed the UAA's requirement of a written agreement to arbitrate, to a requirement that an agreement to arbitrate be contained in a "record" (§ 6), which is defined to permit use of electronic media (§ 1(7)). Use of such means are also permitted where notice is required (§ 2). In doing so the act follows the lead of the Uniform Commercial Code.

Preemption

Party Autonomy

The FAA, as interpreted by the Supreme Court, provides for preemption where state law singles out arbitration agreements for limitations not imposed on other contracts.[3] It also upholds party autonomy and preempts state law that conflicts with parties' arbitration agreements.[4] The Supreme Court has also determined that there is a federal substantive law favoring arbitration;[5] however, that law does not favor any particular arbitral regime.[6] In Section 4 the Drafting Committee has specified which of the provisions of the RUAA the parties may and may not waive. In doing so the drafters have tried very hard to be consistent with applicable federal principles and avoid preemption.

Consumer Issues

In recent years questions have been raised as to whether there should be special safeguards imposed on pre-dispute agreements requiring arbitration with employees or consumers. As noted above, the Drafting Committee has tried to be careful to avoid having the RUAA preempted by the federal requirement that state law not single out arbitration agreements for special limitation.[7] Consequently, the drafters have steered clear of providing special requirements for arbitration agreements involving particular types of parties. The RUAA is intended to be a model for state law of arbitration. The RUAA is intended to apply to all agreements to arbitrate. It aims to support arbitration and to provide a fair, expeditious and cost effective way to conduct arbitration. If, however, arbitration agreements conflict with a law applicable to contracts in general -- for example, the requirement that they not be so one-sided or unfair as to be

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[3] See 9 U.S.C. § 2:

[4] See Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University, 489 U.S. 468, 476 (1989).

[5] Moses H. Cone Memorial Hospital v. Mercury Construction Corp. , 460 U.S. 1, 24-25 (1983).

[6] Volt, supra, 489 U.S. at 476.

[7] See, e.g., Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681 (1996).

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unconscionable -- then, under existing federal and state law, the agreement may be unenforceable. The RUAA cannot change the federal law that precludes it from singling out agreements to arbitrate for special limitation. Nor is it a vehicle for amendment of the law of unconscionability as it applies to contracts in general. Thus, the matter of arbitral fairness to consumers and employees is left by the RUAA, as it must be, to federal legislation or development under evolving federal and state case law.

Application to Existing Agreements

Until a certain date, after the effective date of the act, which is to be inserted at enactment, the RUAA will apply to agreements to arbitrate in existence at the effective date only if the parties agree in a "record" to its application. After such date the act will apply to any and all arbitrations. It will also apply to any pre-dispute or post-dispute agreement to arbitrate entered into after the effective date.

Conclusion

The Arbitration Committee recommends that the Association support adoption of the RUAA.

June, 2000

Feature Articles

The following articles are featured in the June-August 2001 issue of *ADR Currents*. A sample article follows.

- "Drawing Lots to Select the Reinsurance Umpire: A High-Stakes Gamble," by James G. Sporleder and Paul R. Ryske. Lawyers at Allstate Insurance Company discuss the shortcomings of the method used by the reinsurance industry to select the third arbitrator with suggested alternatives to improve the process.

- "Issues in Employment Arbitration after *Circuit City*, Alfred G. Feliu. The hot issues that remain to be answered about arbitration of employment disputes in the aftermath of the Supreme Court's decision in *Circuit City v. Adams*.

- "Why States Should Not Tamper with the Revised Uniform Arbitration Act," by Francis J. Pavetti. The chairman of the drafting committee to revise the Uniform Arbitration Act urges states to adopt the Act as written to avoid federal preemption and other problems.

- "Marketing an Employment ADR Program," by Mary S. Elcano and Cynthia J. Hallberlin. The former general counsel, human resources, and the former chief counsel for ADR, at the U.S. Postal Service offer five strategies to successfully promote a new ADR employment program.

- "The Case For Post-Decision Debriefing in Arbitration," by David J. Hickton and Kelly B. Bakayza. Arguments in favor of a procedure termed "post-decision debriefing", which gives parties the opportunity to meet with the arbitrator after the award is issued to discuss the reasons underlying the award, provided certain conditions are met.

- "The Case Against Post-Decision Debriefing in Arbitration," by Steven Arbittier. The author offers reasons why arbitrators may not wish to participate in post-award debriefing sessions.

- "Presenting, Taking and Evaluating Evidence in International Arbitration," by Karl-Heinz Bockstiegel. A well-known international arbitrator discusses the variations in approaches how evidence is presented, taken and evaluated in international arbitration.

Sample feature article

Why States Should Not Tamper with the Revised Uniform Arbitration Act

By Francis J. Pavetti

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The author is an attorney, arbitrator and mediator based in New London, Conn. He served as chairman of the drafting committee to Revise the Uniform Arbitration Act.

The process of drafting the Revised Uniform Arbitration Act (RUAA) is over. The drafting committee completed its work and the final draft was approved and recommended for enactment by the National Conference of Commissioners on Uniform State Laws (NCCUSL), with 50 jurisdictions in favor, and one (Alabama) abstaining.1 Since then the RUAA has been endorsed by the American Bar Association, the American Arbitration Association and other groups interested in the arbitral process.2 Now we are in the critical "enactment phase" as the RUAA is introduced into the legislative sessions of the various states.

The measure has already been introduced in Connecticut, the District of Columbia, Hawaii, Iowa, Illinois, Indiana, Minnesota, Missouri, New Mexico, Oklahoma, Nevada and West Virginia. An alarming development, however, occurred when New Mexico enacted the RUAA with significant changes. This article offers reasons why the RUAA should be enacted without modification.

Promoting Uniformity

The very purpose of the NCCUSL is to "promote uniformity in the law among the several states on subjects as to which uniformity is desirable and practicable."3 Its policy is to submit uniform laws to the legislatures of the states "for adoption as promulgated so as to achieve the necessary and desirable uniformity."4 Thus, it is vital to the NCCUSL's mission that the uniform acts it recommends be enacted verbatim so as to maintain this uniformity.

Uniform acts must be distinguished from model acts. Model acts are drafted to assist the states in improving the law and minimizing diversity in legislation. By contrast, uniform acts are drafted to be adopted without change by all of the states. The only exception to the policy of verbatim adoption in the case of uniform acts is when a state has a compelling need to make a specific change that is unique to that state. Such a need would arise, for example, if a provision in a uniform act conflicted with requirement in a particular state's constitution.

Uniformity of the laws has a positive influence on commercial and domestic activity and benefits the states and their citizens in several ways. When the same uniform law applies in every state, lawyers in one state know the law in every other. Uniform laws facilitate efficiency because lawyers across the country know how these laws work and can more quickly provide advice to clients and structure transactions of various types. Uniform laws also facilitate efficiency in deciding disputes, reducing the time spent on investigating unique local laws and the need to reinvent solutions for these disputes.

In this era of increased personal and commercial mobility, individuals and businesses need to be able to move swiftly and easily between jurisdictions. Uniform laws harmonize the policies and legal procedures among the several states, allowing for smoother transitions from one jurisdiction to another. They also allow for greater predictability of outcomes, whether it is a business transaction, domestic relations issue or other matter covered by the particular uniform act.

The NCCUSL produces high quality uniform acts. The 1955 Uniform Arbitration Act (UAA) and the Uniform Commercial Code, which took 10 years to complete, are good examples. The NCCUSL considers them to be "signature" laws due to the importance of their subject matter and their wide enactment by the states.5

The quality of the uniform acts is high for several reasons. The drafting committees are composed of lawyers with diverse backgrounds who come from different areas

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of the country. The drafting committees commonly attract as advisors some of the best legal minds among practicing lawyers and academic scholars. It would be extremely difficult for each state to duplicate the amount of effort that goes into drafting a uniform law or attain the same high level of input from practitioners and scholars.

The drafting process is thorough and meticulous, usually taking at least three years to complete. The meetings of the drafting committee are open to the public and a wide range of viewpoints is presented. The draft must be presented to the entire NCCUSL at two of its annual meetings, where it is read aloud, section by section, line by line, and is heavily debated before being submitted to a vote by the states. Each state has one vote. At least 20 states must be present for the vote and a majority must approve an act before it can be officially adopted.6

In the mid-1990s the NCCUSL determined that, in light of the growth of arbitration, the complexity of many disputes, and the legal developments that had taken place, it was desirable and practicable to draft a more modern uniform act on arbitration. A drafting committee was formed and was aided in its work by a group of advisors from the American Bar Association. Drafting the RUAA took five years, including a year of preliminary study and four years of additional study and drafting. The drafting committee's primary objective for this act was to provide for an arbitration process that is fair, speedy, cost-effective and final-a real alternative to litigation.7

Opposition Lobbying Efforts

Lobbying by special interest groups is not unexpected during a legislative process. Indeed, as the RUAA has been introduced into some state legislatures, opposition against various provisions has already been encountered. One local group opposed the section that provides immunity to arbitrators from civil lawsuits (RUAA §14). But the group withdrew its opposition when it realized that few, if any, arbitrators would be willing to serve if any disgruntled party could easily sue the arbitrator for monetary damages. Another interest group came out against §21, which allows punitive damages to be awarded, not understanding that the law requires punitive damages to be allowed in arbitration if such damages are available in state court for the same type of claim.8 Yet another group expressed opposition to allowing attorneys' fees in post-award proceedings (§25), a provision intended to discourage frivolous court contests after the award is issued.

Why Resist Nonconforming Changes?

State legislators and others interested in the legislative process should keep in mind that while some nonconforming proposals might have a superficial appeal, in all likelihood, the drafting committee considered and rejected them for sound reasons. This can be determined by reading the official Comments. The reasons underlying each and every provision in the RUAA are fully explained there, complete with annotations to cases. Rather than improve the arbitration process, proposals to alter its provisions to address issues that are not unique to the particular state are likely to create more harm than good, weakening a well-conceived statute containing many interrelated provisions, increasing the amount arbitration-related litigation, and defeating the purpose of legislating an efficient, fair, economical, non-litigation alternative to resolving disputes.

Moreover, nonconforming amendments could raise significant enforcement problems because of the federal preemption doctrine. The U.S. Supreme Court has made clear that state arbitration laws that conflict with the U.S. Arbitration Act (FAA) or single out arbitration agreements for suspect status are preempted by §2 of the FAA.9 This means that a state arbitration act may not treat the validity of an arbitration agreement differently from the validity of other types of contracts.

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New Mexico tacked on a major nonconforming change to the RUAA when it enacted its RUAA on April 3, 2001. This amendment attempts to invalidate arbitration agreements involving consumers, employees, borrowers and lessees. The nonconforming changes may have been intended to address issues of "fairness." But the truth is that the amendments are more likely to create nothing but expensive litigation over the meaning of its provisions, as well as litigation on federal preemption grounds.

The RUAA drafting committee fully analyzed the issue of fairness in arbitration involving parties with less bargaining power. Section 4 of the RUAA contains a number of fundamental protections against waiver, particularly in contract of adhesion situations. In the comment to §6, which addresses the validity of arbitration agreements, the drafting committee stated that apart from §4, it "determined to leave the issue of adhesion contracts and unconscionability to developing case law because the doctrine of unconscionability reflects so much the substantive law of the states and not just arbitration, (2) the case law, statutes, and arbitration standards are rapidly changing, and (3) treating arbitration clauses differently from other contract provisions would raise significant preemption issues under the Federal Arbitration Act." (Emphasis added.)

The drafting committee considered the preemption issue and drafted the RUAA to avoid problems of enforcement because of federal preemption. The states have been warned numerous times to avoid this problem. States that disregard this warning will not aid their citizens. To avoid needless confusion and costly litigation, states should credit the hard work that went into drafting an RUAA that addresses the needs of today's world, and resist attempts to tamper with its provisions.

Endnotes

1. NCCUSL, founded in 1892, is a non-profit unincorporated association composed of state commissions on uniform laws from each state, the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands. Each jurisdiction has one vote when uniform acts are presented for approval. Most commissioners are practitioners, judges and law professors, but some serve as state legislators.

2. The RUAA has also been endorsed by the National Arbitration Forum, JamsEndispute, the National Academy of Arbitrators, the Dispute Resolution Committees of the American College of Real Estate Lawyers and the Association of the Bar of the City of New York, and by the following ABA Sections: Dispute Resolution, Litigation, Business Law, Torts and Insurance Practice, Real Property, Trusts and Probate, Labor and Employment Law, and Senior Lawyers.

3. NCCUSL Constitution, Art. 1, §1.2.

4. NCCUSL Statement of Policy, Aug. 2, 1988, §7.

5. The Prefatory Note to the RUAA states that the 1955 UAA "has been one of the most successful" of the uniform laws. The NCCUSL has drafted more than 200 uniform laws on numerous subjects and in various fields of law. As of December 2000, 126 uniform acts have been enacted by the states.

6. See the NCCUSL Web site, at www.nccusl.org ("about us").

7. The full text of the RUAA and the official Comments can be viewed on the NCCUSL Web site (click on "NCCUSL University of Pennsylvania Web Site.org").

8. Mastrobuono v. Shearson Lehman Hutton, 514 U.S. 52, 59 (1995). Also, if the punitive damages provision were deleted from the RUAA, it would probably be

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necessary to delete the companion requirement that the arbitrator state the basis in the facts and the law for the award of punitive damages.

9. Doctor's Assoc. v. Casarotto, 517 U.S. 681 (1956); Southland Corp. v. Keating, 465 U.S. 2 (1984); Perry v. Thomas, 482 U.S. 483 (1987). Agreements to arbitrate that are subject to the FAA are "valid, irrevocable, and enforceable" under §2, "save upon such grounds as exist at law or in equity for the revocation of any contract."

January 16, 2002

KANSAS JUDICIAL COUNCIL
2002 BILL REQUESTS

Sen Jud
1-16-02
Att 2

PROPOSED AMENDMENTS TO K.S.A. 59-706 & 59-1706

59-706. Residence of administrator; appointment of agent by nonresident. In cases of administration of a resident's estate:

(a) Letters of administration ~~shall not~~ may be granted to a nonresident of this state~~; and~~ when the nonresident has appointed an agent pursuant to K.S.A. 59-1706. When an administrator of a resident's estate shall become a nonresident, the court shall revoke such administrator's letters, until the nonresident has appointed an agent pursuant to K.S.A. 59-1706.

(b) Letters testamentary may be granted to a nonresident of this state when the nonresident has appointed an agent pursuant to K.S.A. 59-1706. When an executor of a resident's estate shall become a nonresident, the court shall revoke such nonresident's letters, until the nonresident has appointed an agent pursuant to K.S.A. 59-1706.

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59-1706. Nonresident fiduciary; appointment of agent required. Every nonresident appointed a fiduciary in this state shall, before entering upon the duties of the trust, appoint in writing an agent residing in the county where the appointment is made, and shall by such writing consent that the service of any notice or process when made upon said agent shall have the same force and effect as if made upon the fiduciary personally within said county and state. Such writing shall state the correct address of such agent ~~and,~~ shall be filed in the district court where such appointment is made and shall include written acceptance of such appointment by the designated agent. Service of notice or process upon such agent shall have the same force and effect as personal service upon the fiduciary.

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PROPOSED AMENDMENT TO K.S.A. 38-1505
RELATING TO RIGHT TO COUNSEL

38-1505. Right to counsel. (a) *Appointment of guardian ad litem; duties*. Upon the filing of a petition the court shall appoint a person who is an attorney to serve as guardian *ad litem* for a child who is the subject of proceedings under this code. The guardian *ad litem* shall make an independent investigation of the facts upon which the petition is based and shall appear for and represent the child. When the child's position is not consistent with the determination of the guardian *ad litem* as to the child's best interests, the guardian *ad litem* or the child may request the court to appoint a second attorney to serve either as guardian *ad litem* or as attorney for the child. The attorney shall allow the child and the guardian *ad litem* to communicate with one another but may require such communications to occur in the attorney's presence.

(b) *Attorney for parent or custodian*. A parent or custodian of a child alleged or adjudged to be a child in need of care may be represented by an attorney, other than the guardian *ad litem* or the attorney appointed for the child, in connection with all proceedings under this code. If at any stage of the proceedings a parent desires but is financially unable to employ an attorney, the court shall appoint an attorney for the parent. It shall not be necessary to appoint an attorney to represent a parent who fails or refuses to attend the hearing after having been properly served with process in accordance with K.S.A. 38-1534 and amendments thereto. A parent or custodian who is not a minor, a mentally ill person as defined in K.S.A. 1999 Supp. 59-2946 and amendments thereto or a disabled person as defined in K.S.A. 59-3002 and amendments thereto may waive counsel either in writing or on the record.

(c) *Attorney for parent who is a minor, mentally ill or disabled.* The court shall appoint an attorney for a parent who is a minor, a mentally ill person as defined in K.S.A. 59-2902 and amendments thereto or a disabled person as defined in K.S.A. 59-3002 and amendments thereto, unless the court determines that there is an attorney retained who will appear and represent the interests of the person in the proceedings under this code.

(d) *Continuation of representation.* A guardian *ad litem* appointed for a child or an attorney appointed for a child or an attorney appointed for a parent or custodian shall continue to represent the client at all subsequent hearings in proceedings under this code, including any appellate proceedings, unless relieved by the court upon a showing of good cause or upon transfer of venue.

(e) *Fees for counsel.* A guardian *ad litem* or attorney appointed for parties to proceedings under this section shall be allowed a reasonable fee for their services, which may be assessed as an expense in the proceedings as provided in K.S.A. 38-1511 and amendments thereto.

History: L. 1982, ch. 182, §§ 5; L. 1983, ch. 191, §§ 22; L. 1996, ch. 167, §§ 48; Apr. 18.

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DUI Amendments

SB 67 amends the driving under the influence (DUI) law to increase criminal penalties including jail or prison time and fines; to increase driver's license lengths of suspensions and to increase reinstatement fees; to provide for lifetime driver's license revocations; to restrict and to revamp procedures regarding driver's license suspension and revocation administrative hearings; to amend the zero tolerance law regarding driver's license suspensions; to amend the underage drinking and possession statute to require driver's license suspensions of 30 days for violations; and to make other changes.

One Diversion. A person may enter into a diversion agreement for a DUI violation only once in the person's lifetime.

Fourth and Subsequent DUI Convictions. The bill increases the nonperson felony penalty for fourth and subsequent DUI convictions as follows.

The fine shall be $2,500. The prior fine for these offenses was not less than $1,000 nor more than $2,500. The offender shall be required to serve not less than 90 days nor more than one year in the county jail. At least 72 consecutive hours of this period must be served in jail (prior law required 48 hours of consecutive time in jail) and the remainder may be served in a work release program. At the end of the incarceration and work release period, a new requirement is added that the offender shall be turned over to the Secretary of Corrections for placement in an inpatient treatment program or an outpatient treatment program. Following completion of the treatment program, the offender shall be required to be in an aftercare program approved by the Kansas Parole Board for a period of one year. Offenders who violate conditions of either the alcohol or drug abuse treatment program or the one-year after care program shall be treated as a condition violator and thereby subject to incarceration in a Department of Corrections facility for not to exceed six months.

The prior penalty for a fourth or subsequent DUI offense was a nonperson felony with a jail term of not less than 90 days nor more than one year to be served in the county jail.

DUI with a Child Under 14—One Month Extra Penalty. Any person convicted of a DUI who has a child under 14 years of age as a passenger shall have the person's punishment enhanced by one month of imprisonment. This enhanced imprisonment must be served consecutively to any other penalty. The enhanced time may be served, upon order of the judge, as house arrest, work release, or other conditional release.

Increased Criminal Fines and Disposition of Fine Moneys. The following chart shows the DUI criminal fine increases:

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	DUI Fines	
	Prior	New
First Offense	Not less than $200 nor more than $500	Not less than $500 nor more than $1,000
Second Offense	Not less than $500 nor more than $1,000	Not less than $1,000 nor more than $1,500
Third and subsequent offense	Not less than $1,000 nor more than $2,500	Not less than $1,500 nor more than $2,500
Fourth and subsequent offense	Not less than $1,000 nor more than $2,500	$2,500

The DUI criminal fine moneys increase shall be split with 50 percent to go to the Community Alcoholism and Intoxication Programs Fund and 50 percent to the Department of Corrections Alcohol and Drug Abuse Treatment Fund created by SB 67.

DUI Convictions: No Decay. The bill deletes a provision in the prior DUI law which provided that only DUI convictions occurring within the last five years could be taken into account in determining whether the offense was a first, second, or subsequent offense. Note: This elimination of the decay of prior DUI convictions also impacts driver's license.

Administrative Hearings. A new administrative hearing procedure is established for driver's license suspensions and revocations. Changes, among others, include the following:

Witnesses Limited. Witnesses at the hearing shall be limited to the licensee, the law enforcement officer signing the certification of test refusal, or failure and one other witness present at the time of the issuance of the certification called by the licensee. The examination of the officer shall be restricted to the factual circumstances relied upon in the officer's certification.

Prehearing Discovery—Limited. Prehearing discovery is limited to the officer's certification and notice of suspension, copies of documents including results of tests administered, a copy of the affidavit indicating certification of the officer, and the instrument and a copy of the testing protocol checklist.

Evidence Limited. Evidence at the hearing is limited to the prehearing discovery items plus the testimony of the licensee, and any certifying officer, the testimony of any witness present at the time of the issuance of the certification, affidavits submitted by witnesses, documents submitted by the licensee showing the existence of a medical condition, and any video or audio tape of the events.

Burden of Proof. The burden of proof is placed on the licensee to show by a preponderance of evidence that the facts set out in the officer's certification are false or insufficient.

Video or Telephone Conference Call Hearing—Venue. If the licensee requests, the hearing may be conducted by video or telephone conference call. The hearing, except as provided above, must be in the county where the arrest occurred or a county adjacent thereto.

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Test Suspension Periods Increased. The driver's license suspension periods and permanent revocation under the bill are as follows:

Test Refusal

Occurrence	Suspension/Revocation Period
First Occurrence	One Year
Second Occurrence	Two Years
Third Occurrence	Three Years
Fourth Occurrence	Ten Years
Fifth or Subsequent Occurrence	Permanent Revocation

Test Failure Suspension Periods—Ignition Interlock Use. The following chart shows the DUI test failure suspension periods and the mandated expanded use of ignition interlock devices.

Test Failure

Occurrence	Suspension/Revocation Period
First	30-day suspension and 330-day restriction
Second, Third, or Fourth	One-year suspension; then one-year ignition interlock
Fifth	Permanent revocation

Other Ignition Interlock Provisions. Persons with an interlock may operate an employer's vehicle without an interlock. Each interlock manufacturer is required to provide a credit of 2 percent of the gross program revenues as a credit for those persons unable to pay for the interlock because they are indigent.

Reinstatement Fees. The driver license examination fee, when a person is required to be reexamined as a result of a suspension, is raised from $5.00 to $25.00. The driver's license reinstatement fees increases for test refusal and test failure are reflected in the following two charts.

License Reinstatement Fees—Test Refusal	
First Occurrence	$400
Second Occurrence	$600
Third Occurrence	$800
Fourth Occurrence	$1,000

License Reinstatement Fees—Test Failure	
First Occurrence	$100
Second Occurrence	$200
Third Occurrence	$300
Fourth Occurrence	$400

Examination Fees: Use. Examination fee moneys shall be credited 80 percent to the State Highway Fund and 20 percent as provided in KSA 8-267, *e.g.*, a portion to state safety fund and the rest to the State General Fund.

Zero Tolerance Driver's License Suspension Changes. The driver's license suspension period for a person under 21 years of age with a breath or blood content of .02 or greater but less than .08 on the first occurrence is changed from one year to 30 days and restricted for 330 days.

Underage Drinking or Possession Violation (KSA 41-727). The bill requires a 30-day driver's license suspension for a person under the age of 21 who is found to be drinking or in possession of cereal malt beverages or alcoholic liquor. Any person who does not have a driver's license may not apply for one for a 30-day period following conviction.

Other Changes. The alcohol and drug safety action fund assessment required to be imposed by a court or included in a division agreement is raised from $125 to $150. The fee may be waived in whole or part if the offender is indigent.

The bill also amends the criminal history classification law dealing with the crime of involuntary manslaughter while driving under the influence of alcohol or drugs to provide that a prior DUI violation of another state's law of a city ordinance or county resolution shall count for criminal history purposes as a person felony.

Protection from Abuse; Release on Bond; Other Criminal Matters

SB 205 amends the law relating to conditions of release on bond for person crimes; requires protection from abuse orders to be entered into the National Criminal Information Center (NCIC) database; recodifies the domestic battery law; and authorizes local domestic violence special program funds in judicial districts.

The bill amends criminal procedure statues to require that, unless the judge or magistrate makes a specific finding otherwise, every bond for a person charged with a person offense (misdemeanor) in municipal court or a person misdemeanor or person felony in district court shall be conditioned on the person upon release from custody being prohibited from having any contact with the alleged victim for a period of at least 72 hours. The magistrate may place the person under supervision of a court services officer with any condition of release. Further the magistrate may order the person to pay any costs associated with the supervision of the condition of release of the appearance bond in an amount not to exceed $5 per week.

Protection from abuse orders and orders amending existing orders shall be entered into the National Criminal Information Center (NCIC) protective order file and other appropriate databases. If the order is a foreign protective order, the sheriff's office shall contact the issuing jurisdiction to verify the order and request the entry of the order into NCIC and other appropriate databases.

Emergency and temporary protective orders and related orders may be entered into the NCIC protective order file.

The bill also recodifies the crime of domestic battery to make it a separate criminal statute set apart from the current crime of misdemeanor battery. All provisions, including penalties for the crime of domestic battery, remain the same as under current law.

The bill authorizes each judicial district to create a local domestic violence special program fund in each county and to impose a fee in an amount not to exceed $100, against any defendant committing domestic battery. Expenditures shall be determined by the chief judge and shall be paid to domestic violence programs administered by the court and to local programs.

Adult Care Home and Home Health Agency Employee Background Checks; Board of Adult Care Home Administrators; Pregnancy Maintenance Funding; and Developmental Disabilities Services

HB 2067 amends statutes that relate to criminal background checks and prohibitions on employment by adult care homes and home health agencies; amends a statute that creates the Board of Adult Care Home Administrators; creates a new law directing the Secretary of Health and Environment to continue to make grants to programs that provide pregnancy maintenance services; and creates a new statute that is made a part of the Developmental Disabilities Reform Act.

Adult Care Home and Home Health Employees Criminal History Checks. The Adult Care Home Licensing Act and the act under which home health agencies are licensed and regulated are amended to add three additional crimes to those for which conviction bars employment by an adult care home or home health agency. New provisions require the Secretary of Health and Environment to provide the operator of an adult care home or home health agency who requests information about a potential employee to provide the criminal history record information of felony convictions and convictions under KSAs 21-3437 and 21-3517 in writing within three working days of receiving information from the Kansas Bureau of Investigation, regardless of whether the information discloses the subject of the request has been convicted of an offense that falls under the statutorily enumerated offenses that would affect employment. When further information from a court or the Kansas Department of Corrections is necessary, the Secretary must notify the operator that further confirmation is required and within three days of receipt of the information inform the operator. When no criminal history is found, the operator must be notified within three working days of receipt of the information from the Kansas Bureau of Investigation. Pursuant to the amendments, the Secretary is not to provide any juvenile criminal history information to an operator requesting criminal history information. The operator is to be notified only whether juvenile criminal history information indicates the subject of the record check would or would not be prohibited from being employed. A new provision is added to the laws that requires an operator of an adult care home or home health agency who receives criminal history information to keep such information confidential. A violation of confidentiality is an unclassified misdemeanor punishable by a fine of $100.

Board of Adult Care Home Administrators. The statute creating the Board of Adult Care Home Administrators is amended to provide that members of the Board appointed after the effective date of HB 2067 will be appointed by the Governor rather than the Secretary of the Department of Health and Environment. The amendments also make the Office of the Attorney General the enforcement agency for the Board and the attorney for the Board an Assistant Attorney General.

Pregnancy Maintenance Grant Funding. New legislation requires the Secretary of Health and Environment to make grants totaling $300,000 from State General Fund operating expenditures account to continue the pregnancy maintenance program in fiscal year 2002. No additional funding is added for the program, which has been in existence since fiscal year 2000.

Developmental Disabilities Services. A new statute is created that is made a part of and supplemental to the Developmental Disabilities Reform Act. The new legislation directs the Secretary of Social and Rehabilitation Services, in carrying out the provisions of subsection (b) (2) of KSA 39-1804, to ensure that all available state funds appropriated for community developmental disability services are used as match or certified match for federal financial participation to the maximum extent feasible. In addition, the Secretary is to ensure that funding provided to any community developmental disability organization or affiliate by a taxing subdivision is utilized as certifiable match for federal financial participation to the extent feasible. Any public funding identified for the purposes of the new statute is to be retained at the local level, with authority for

expenditure of such funds subject to the statutory authorization for which the funds are collected or to any agreements entered into between a community service provider and a community developmental disabilities organization. No funding received under the new section may be used to supplant funds previously received from a taxing subdivision. Revenue derived from the maximizing of federal financial participation is to be used exclusively

- to increase the regular, nonspecialized tier reimbursement rate above the state fiscal year 2001 levels for the home and community-based developmental disabilities waiver for day, residential, and individual and family supports provided after July 1, 2001; or

- for other Medicaid reimbursable services.

The Secretary is not required to use more than $15,000,000 in funding provided to community developmental disability organizations and affiliates by any taxing subdivision as a match for additional federal financial assistance.

The new statute also directs the Secretary of Social and Rehabilitation Services to require the council of community members in each service area to convene representatives of the community developmental disabilities organization, community service providers, families, consumers, and other community stakeholders annually for the purpose of developing and implementing community capacity building plans to improve the quality and efficiency of service delivery and specifies components to be included in such plans. The Secretary is to report to the SRS Oversight Committee regularly during the interim prior to the 2002 Session and to the Legislature annually on or before the 15th day of the session on the maximization of federal financial participation and the results of community capacity building plan implementation.

Omnibus Crime Bill

HB 2176, among other things, expands the coverage of certain crimes; extends the statute of limitation for sexually violent offenses; expands DNA testing and authorizes DNA testing for certain persons convicted of murder or rape; amends the law regarding competency to stand trial; expands the law regarding the finger printing of juveniles; and expands the Kansas Offender Registration Act to include individuals who are required to register under federal law, military law, or other state law as well as nonresidents who come to Kansas to work or attend school.

Unlawful Sexual Relations

The law expands the crime of unlawful sexual relations to include the following offenders:

- An employee of the Department of Social and Rehabilitation Services (SRS) or the employee of a contractor of SRS and who provides services in an SRS institution, and who engages in consensual sexual activity with the victim age 16 or older; and

- A teacher who engages in prohibited sexual activity with a 16-or 17-year-old student, enrolled in a public or private school where the offender teaches.

Note: If the offender is a parent of the student, the provisions of the aggravated incest statute will apply.

Theft of Property

- The law expands the crime of theft to include theft of property, regardless of value, from three separate establishments, within a 72-hour period of time, or two or more acts or transactions conducted or constituting a common scheme or course of conduct punishable as a severity level 9 nonperson felony.

The law is amended regarding acts of theft to include the unlawful possession of a sales receipt or universal product code label which is defined as possessing 15 or more fraudulent retail sales receipts or universal product code labels or possessing the device which manufactures these receipts or labels. Possession of these items constitutes a presumption of intent to cheat or defraud a retailer. Violation of this provision is a severity level 9 nonperson felony.

Fingerprinting of Juveniles

The law allows the Kansas Bureau of Investigation (KBI) to fingerprint juveniles who commit assault. Under prior law only juveniles who committed a class A or B person misdemeanor could be fingerprinted. Assault is a class C person misdemeanor.

Competency to Stand Trial

The law amends the Criminal Procedure Code regarding certain individuals who are incompetent to stand trial and not likely to become competent in the foreseeable future. Under the bill, the definition of mentally ill persons as contained in the Care and Treatment Act for Mentally Ill Persons is added to the Criminal Procedure Code. By expanding the definition of

mentally ill persons, it would be possible to involuntarily commit individuals with mental retardation or organic mental disorder when there is the possibility of harm to self or others.

Provisions of the law will apply to those incompetent individuals who commit certain serious crimes such as nondrug crimes at levels one through three on the sentencing guidelines, off grid crimes, all aggravated sex offenses, and aggravated arson.

The law also directs the Secretary of Social and Rehabilitation Services to convene a task force to study current programs and laws for alleged offenders with disabilities that render them potentially incompetent to stand trial, but who do not meet the criteria for involuntary commitment under Kansas law. The task force is required to review and make recommendations on the adequacy of Kansas programs and services, and current Kansas law, in protecting public safety and in providing services and support to alleged offenders. The Secretary must report to the Legislature during the 2001 Interim and shall make a final report to the 2002 Legislature.

Credit for Time Served

The bill allows a person who pleads "no contest" to a criminal charge to receive credit for the time that has been served when the sentence is committed. Prior law made no reference to this plea when determining a sentence.

Sexually Violent Offenses—Statute of Limitations—DNA Testing

The law extends the criminal statue of limitations for sexually violent offenses to ten years or one year from the date on which the identity of the suspect is conclusively established by DNA testing, whichever is later. The one-year DNA testing provision is limited as follows:

- For an offense committed prior to January 1, 2001, biological evidence collected in connection with the offense must be analyzed for DNA type no later than January 1, 2004; and

- For an offense committed on or after January 1, 2001, biological evidence collected in connection with the offense must be analyzed for DNA type no later than two years from the date of the offense.

The law also expands the statutes regarding the collection of DNA specimens to cover any adult convicted of or juvenile adjudicated of any felony level one through six. Prior law required the collection of these specimens where the person was required to register under the Kansas Offender Registration Act. Note the Offender Registration Act covers several misdemeanor sex crimes and these remain included under the bill.

The law also establishes a procedure for a person convicted of murder or rape to petition the court for DNA testing. The court may order DNA testing upon a determination that testing may produce exculpatory evidence that the petitioner was wrongfully convicted or sentenced. The costs of the tests shall be paid by the state or the petitioner as the court may order.

The law also establishes a procedure for a person convicted of murder or rape to petition the court for DNA testing. The court may order DNA testing upon a determination that testing may produce exculpatory evidence that the petitioner was wrongfully convicted or sentenced. The cost of the tests shall be paid by the state or the petitioner as the court may order.

The bill also amends the Kansas Offender Registration Act to extend coverage to any person who has been required to register under any federal, military, or state law, nonresident students, or workers who cross into the state or any county in the state for more than 14 days or for an aggregate period not exceeding 30 days in a calendar year for employment whether paid or unpaid, or to attend school as a student. Within ten days of commencement of employment or attendance at school, the nonresident must register with the sheriff.

In addition, the bill gives the Kansas Bureau of Investigation authority to participate in the Federal Bureau of Investigation's National Crime Information Center 2000. Information required to be open under Kansas law shall be open to inspection at the sheriff's office, the Kansas Bureau of Investigation, and on the World Wide Web.

Forgery; Worthless Checks

HB 2296 amends the forgery law by establishing graduated penalties for first, second, and third or subsequent convictions, and expands the civil penalties for giving worthless checks.

Regarding the crime of forgery, the bill does the following:

- For a first conviction, a mandatory fine of the amount of the forged instrument or $500, whichever is less;
- For a second conviction, a mandatory sentence of no more than 30 days imprisonment as a condition of probation and a fine of the amount of the forged instrument or $1,000, whichever is less; and
- For a third or subsequent conviction, a mandatory sentence of no more than 45 days imprisonment as a condition of probation and a fine of the amount of the forged instrument or $2,500, whichever is less.

If an offender's criminal history makes the offender subject to presumptive imprisonment or if there is a departure that makes the offender subject to imprisonment, the new provisions of the bill apply, and the offender will not be subject to other mandatory sentences.

In regard to worthless checks the bill does the following:

- Expands the liability for writing a worthless check to include interest at the statutory rate;
- Changes the law that refers to the use of restricted mail for a written demand to first class mail;
- Provides that a service charge for a worthless check shall not exceed $30; and
- Adds an element to the definition of giving a worthless check that includes a check for which the maker has not tendered to the holder's agent the money demanded within the allowable time limit.

Kansas Payment Center—Child Support

HB 2508 establishes the Kansas Payment Center (KPC) as a central unit for the collection and dissemination of child support payments. The bill mandates certain contract provisions with the private vendor operating the payment center and establishes the Central Payment Oversight Commission. Specifically, the bill contains the following provisions.

Federal Mandates

- Adopts procedures to implement federally mandated centralized collection and distribution of Title IV-D support obligation and non-IV-D support obligations entered after July 1, 1998.

Repeal of Proviso in 2001 SB 57

- Amends Section 130 of 2001 SB 57, an appropriations bill, to remove and repeal the authorization for the Department of Social and Rehabilitation Services (SRS) to set up a central unit for the collection and distribution of support payments.

Time Limits

- The payor must pay the amounts withheld and identify each payment in the same business day.
    - **Penalty**. The bill adds a penalty provision for payors who, without good cause, fail to pay over the amount withheld and identify each payment in the same business day. The penalty will be a judgement against the payor and in favor of the obligee or recipient of the payment for twice the amount of the cost recovery fee.
- The payor will have additional time *i.e.*, 10 days instead of the prior 5 days, to respond to official requests for information regarding the obligor.

Contract Issues

- Provides that any contracts shall be modified to reflect the contract requirements established by the provisions in the bill.
- Provides that any contract between SRS and a private vendor shall incorporate by reference the Kansas Supreme Court Rule establishing child support and maintenance records.
- Restricts contract provisions with a private vendor to prohibit a vendor from being paid, in whole or in part, on the basis of an amount per phone call received by KPC. Another prohibition prevents the vendor from being paid an amount per check issued for checks that were issued in error by KPC.
- Provides that a contract with a private vendor must contain penalty provisions for noncomplicance with federal regulations relating to timeliness of collections

and disbursements and shall include a monetary penalty of $100 for each erroneous transaction whether related to collection or disbursement. Of the penalty, $25 shall be allocated to the obligee and $75 shall be allocated to SRS.

- Requires that any contract must provide for full access to all data by the SRS Secretary's designee in the Central Receivables Unit, the Office of Judicial Administration, and the Chairman of the Oversight Commission. In addition, all district court clerks and court trustees shall have access to records of the center sufficient to allow them to assist in the process of matching support receipts to proper recipients and shall be provided dedicated telephone access to the center for the purpose of assisting the center in making accurate and timely disbursements.

- Provides that any contract with a private vendor shall require, in addition to sufficient customer service staff during regular business hours, 24-hour access by obligors and recipients to payment files which will show status of receipts and disbursements, including, at a minimum, date of receipt by the center, date of processing by the center, and date of mailing to the recipient.

Standardized Forms—Records

- Standardized forms to accompany payments made to the center shall be provided by the center for new orders effective on or after January 1, 2002.

- The Kansas Supreme Court, by court rule, shall establish the procedure for creation, maintenance, and correction of official child support and maintenance records for use as official court records.

Unmatched Funds

- Unmatched funds which remain unmatched for one year after a good faith effort has been made to find the recipient shall be deposited with the Kansas Treasurer, the same as unclaimed property.

Sunset

- Provisions regarding the establishment of the center, contract issues, and the Oversight Commission shall expire on July 1, 2003.

Opt Out Provisions

- Written agreements between the parties to make direct child support payments to the recipients and not to the center will constitute good cause not to have the payments made through the payment center unless the court finds that such an agreement is not in the best interests of the child(ren). The obligor must file the written agreement with the court and maintain written evidence of the payment of support obligation and provide such evidence to the court, at least annually, and to the recipient.

- Payments for maintenance, as well as support, made to a recipient by the same obligor may be made directly to the recipient if the court has made a good cause determination for such direct payments.

Central Payment Oversight Commission

The bill creates the Central Payment Center Oversight Commission. Provisions for the Oversight Commission are effective upon publication in the *Kansas Register*. Members of the Commission are as follows:

- Voting members:
  - one District Court judge;
  - one court trustee;
  - one district court clerk;
  - one employer with over 100 employees;
  - one employer with under ten employees;
  - one custodial parent with order to receive support;
  - one noncustodial parent under order to pay support;
  - one representative appointed by the Governor; and
  - the State Treasurer or designee.

- *Ex Officio* members:
  - one representative of the center;
  - one representative of the Title IV-D Director with SRS;
  - four legislators (one for each house and party);
  - one representative of the Office of Judicial Administration; and
  - SRS Central Receivable Unit manager or designee.

- Duties of the Central Payment Center Oversight Commission shall include, but are not limited to the following:
  - recommend to SRS, if appropriate, ways to improve or enhance the effectiveness of the center for the collection and disbursement of support payments;
  - recommend performance indicators for the center;
  - recommend legislation which would clarify and improve state law regarding support for children as it relates to the center;
  - present an annual report of its activities and recommendations to the Legislative Coordinating Council by February 1;
  - review and make nonbinding recommendations and suggestions regarding current or proposed contracts with a private vendor who is or may be operating the center;

- monitor federal regulations relating to the center mandate and evaluate any and all opportunities for appropriate waivers and options out of the mandate;

- monitor all unmatched funds in suspense status and make recommendations regarding the handling of unmatched payments in suspense, whether by the state or private vendor;

- monitor the penalty provisions in any private vendor contract and monitor the status of violations and collection of penalties;

- conduct public hearings in order to fulfill the oversight function, as authorized by the Legislative Coordinating Council;

- review the nature and extent of orders denying direct payments for child support and maintenance payments by judicial district; and

- review the income withholding provisions of the law and make recommendations to accelerate the timely receipt and payments of such withholdings.

Special Committee on Judiciary

Driver License Privileges for Immigrants

Conclusions and Recommendations

The Committee, after discussion, recommends the passage of Sub. for HB 2135. As noted in this report, the bill would allow a driver's license applicant to present the taxpayer identification number of the Internal Revenue Service when applying for a driver's license. The Committee further recommends that the standing Judiciary Committee adopt an amendment to the bill which would require a statement on all Kansas drivers' licenses or identification cards indicating that such documents do not establish lawful presence in the United States and do not establish eligibility for employment, voter registration or public benefits.

Proposed Legislation: None

Background

On April 14, 2000, a Colorado man and woman were arrested on allegations of transporting illegal aliens into Salina, Kansas to obtain drivers' licenses. According the *Salina Journal/News*, the accused had been in the business of producing fake identification documents and transporting undocumented workers to Kansas where "lawful presence" in the United States was not a condition for obtaining a driver's license. In response to these events, the legislature passed HB 2641 to require an applicant to show physical proof of "lawful presence" in the United States. The bill became effective July 1, 2000 and became a source of controversy among many Hispanic groups who maintained, among other things, that the new law discriminated against Hispanics. In response to these claims, two bills were introduced during the 2001 legislative session. Sub. for HB 2135 would allow an applicant to obtain a driver's license or identification card by presenting an internal revenue service individual taxpayer identification number. This bill was passed by the House Judiciary Committee but referred to the Committee where it remains. The other bill, HB 2503, simply strikes the standard of proof provisions passed by the 2000 legislature. That bill is in the House Transportation Committee but has not had any hearings. Finally, Topic No. 3–Driver License Privileges for Immigrants, was requested in response to these and other related concerns.

Committee Activities

The Committee conducted hearings on this issue on August 21, 2001. It was briefed on the topic by staff and the Director of Vehicles of the Kansas Department of Revenue. The Committee also heard from representatives and supporters of various Hispanic groups, and from the representative of the Kansas Contractors Association, Inc. Below is a summary of the Committee activity.

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Staff provided the Committee with background information that led to the passage of the current law. He also explained the two bills still in Committee and summarized other states' laws and recent legislative responses to the issue. Staff noted that the following states have some form of U.S. citizenship requirement: Arkansas, California, Colorado, Florida, Georgia, Louisiana, South Carolina, and Utah. He also told the Committee that Utah recently passed a law to permit an applicant to use the taxpayer identification number from the Internal Revenue Service to obtain a driver's license. It was also noted Tennessee passed similar legislation this year. Staff indicated that these two new laws were driven chiefly by concerns that unlicenced drivers would continue to drive without the knowledge of traffic laws.

The Director of the Division of Vehicles provided testimony about the events that led to the passage of the law. She also informed the Committee about the documents the agency requires of applicants when they apply for a Kansas drivers license. These documents include: a valid foreign passport with I-94 or valid "Processed for I-551" stamp; I-94 with refugee status; a valid I-551 INS Resident Alien/Permanent resident card, No Border Crossing cards; a valid I-688 (photo Temporary Resident) and I-688A, I-688B and I-766 (photo Employment Authorization); and a valid U.S. Military ID (dependent). The applicant must also present a second document as required by the Division. The Director's chief concern was that if the proof of lawful presence standard is removed Kansas could become a clearinghouse for undocumented persons to get licenses.

Hispanic Organizations and Supporters

Many groups representing Hispanics testified about the effects of the present law on Hispanics. Below are some highlights of that testimony:

- There are families in Kansas who are in the process of becoming legalized citizens but have not yet obtained the necessary documentation to obtain a license(Advisory Committee on Hispanic Affairs);
- The new law has resulted in greater number of non-English speaking drivers who are not licensed (Pittsburg Police Department);
- Economic need forces unlicenced drivers to drive in violation of the law (Pittsburg Area Community Outreach, Heart of America Family Services, Kansas City, Hispanic Caucus, a Sister with Sisters Ministry of Presence, Office of Hispanic Ministry);
- Some judges encourage new immigrants to get a driver's license (Child Abuse Prevention Services);
- Policymakers should create a special or temporary license to allow an applicant to purchase insurance (Advisory Committee on Hispanic Affairs);
- Most Kansas cities and towns do not have a public transportation system to transport persons to and from work(Child Abuse Prevention Services);
- Some Hispanic parents advise their children to quit school due to risks associated with driving illegally (Child Abuse Prevention Services);

- Kansas loses personal property revenue from those who cannot obtain a driver's license (Kansas City, Kansas Attorney);

- Lack of proper identification makes it easier for habitual violators to avoid prosecution (Kansas City, Kansas Attorney and Hispanics United of Wichita);

- Present law singles out Hispanics for special inquiry and discriminatory treatment (Kansas City, Kansas attorney, Hispanics United of Wichita, El Centro of Kansas City, United Latin American Citizens, Child Abuse Prevention Services of Salina);

- Many states use social security numbers and proof of lawful presence documents as two of several options applicants can present to verify their identity (Kansas City, Missouri attorney);

- Sub. for House Bill 2135, which would allow an applicant to present an Internal Revenue Service individual taxpayer identification number, would encourage compliance with Kansas law(Hispanics United of Wichita, a Sister from the Kansas City Archdiocese);

- Some undocumented workers have obtained an individual taxpayer identification number in order to file income taxes; this document also could be used to obtain a driver's license;

- Immigration matters should be strictly addressed by the federal government and not by state government (Pittsburg Police Department, Overland Park Police Department).

- Kansas has created an unfunded mandate by directing the Division of Vehicles to act as an extension of the Immigration and Naturalization Service (Kansas City, Missouri attorney); and

- Some police departments have been sued because their officers inquired about a person's immigration status; as a result, police officers are not permitted to ask such questions (Pittsburg Police Department);

A conferee representing the Kansas Contractors Association, Inc., presented testimony against changes to the current law. This conferee indicated that by allowing undocumented workers to get drivers licenses the Association would be contradicting federal policy.

Conclusions and Recommendations

The Committee, after discussion, recommends the passage of Sub. for HB 2135. As noted in this report, the bill would allow a driver's license applicant to present the taxpayer identification number of the Internal Revenue Service when applying for a driver's license. The Committee further recommends that the standing Judiciary Committee adopt an amendment to the bill which would require a statement on all Kansas drivers' licenses or identification cards indicating that such documents do not establish lawful presence in the United States and do not establish eligibility for employment, voter registration or public benefits.

DRUG COURTS

CONCLUSIONS AND RECOMMENDATIONS

The Committee endorses the concept of drug courts as an alternative for incarceration of certain drug offenders and recommends that the appropriate standing committee of the 2002 Legislature introduce the recommendations of the Kansas Sentencing Commission in regard to drug courts as soon as these recommendations are presented in bill form. The Committee urges the 2002 Legislature to enact legislation to implement the recommendations of the Kansas Sentencing Commission in regard to the establishment of drug courts.

Proposed Legislation: None

BACKGROUND

The 2001 Special Committee on Judiciary has been assigned Topic No. 6—Drug Courts. The study proposal calls for a review of the "use of drug courts and treatment facilities in conjunction with or in lieu of incarceration for drug offenders."

The drug court study request was made by the Senate Majority Leader. In a September letter addressed to Chairman Ward Loyd and the Special Committee on Judiciary the following information was provided:

"The Kansas Department of Corrections (KDOC) identifies 1,681 inmates currently incarcerated on drug-related offenses, which is 20 percent of the inmate population. Of those 1,681 inmates, only 310 are first-time misdemeanor offenders; the balance are repeat offenders. As of June 30, 2001, KDOC estimated that 28 percent of all court commitments were drug related, and nearly 30 percent of releases to supervision and of the post-incarceration population were also drug related. For fiscal year 2001, the KDOC has allocated nearly one-third of its offender program contract services' budget for substance abuse treatment programs. I believe a successful drug court program could help decrease these expenses and begin to alleviate the 'swinging door' repeat violators we now experience."

The National Criminal Justice Reference Service website contains the following information about drug courts.

A drug court can be defined as a special court given the responsibility to handle cases involving drug-addicted offenders through an extensive supervision and treatment program.

Drug court participants undergo long-term treatment and counseling, sanctions, incentives, and frequent court appearances. Successful completion of the treatment program results in dismissal of the charges, reduced or set aside sentences, lesser penalties, or a combination of these. Most importantly, graduating participants gain the necessary tools to rebuild their lives.

Drug courts vary somewhat from one jurisdiction to another in terms of structure, scope, and target populations, but

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they all share three primary goals: (1) to reduce recidivism, (2) to reduce substance abuse among participants, and (3) to rehabilitate participants.

The first drug court was implemented in 1989 in Miami, Florida, when Judge Herbert M. Klein, troubled by the disabling effects that drug offenses were wreaking upon Dade County courts, became determined to "solve the problem of larger numbers of people on drugs." (*Miami's Drug Court: A Different Approach, 1993*) The court became a model program for the Nation.

A number of surrounding states have implemented versions of drug courts. A recent study of the Jackson County (Kansas City, MO) drug court, released in April of 2001 included the following information:

- 94 percent of Jackson County drug court graduates between '95-99 had not been arrested for similar crimes through '99

- Jackson County drug court spent $2,500 per addict, but each "graduate" who stayed drug free for three years saved an estimated $30,000 in welfare, crime and prison costs.

By December 2000, nearly 600 drug courts were operating in all 50 states, the District of Columbia, Puerto Rico, Guam, and two federal districts. Another 456 drug court programs were in the planning stages (Drug Court Clearinghouse and Technical Assistance Project).

There is one drug court in Kansas operated by the City of Wichita's Municipal Court—it is limited to misdemeanor drug violations and handles approximately 3,500 cases, annually.

Further, a 33-member Drug Court Advisory Committee has been established in Shawnee County (Third Judicial District) made up of several district judges, a representative of the district attorney's office, law enforcement representatives, and the drug treatment community. The plan is to implement a drug court program for low level felony drug offenders to start in about one year.

Other notable statistics and facts regarding drug courts include, among others:

- In 1999, 22 states and 2 Native American Tribal Councils had enacted legislation relating to the planning, operation, and/or funding of drug court programs. (Drug Court Clearinghouse and Technical Assistance Project)

- Incarceration of drug-using offenders costs between $20,000 and $50,000 per person per year. The capital costs of building a prison cell can be as much as $80,000. In contrast, a comprehensive drug court system typically costs less than $2,500 annually for each offender. (National Association of Drug Court Professionals)

- In 1998, drug offenders accounted for 21 percent of the state prison population and 59 percent of the federal prison population.

- Researchers estimate that more than 50 percent of defendants convicted of a drug possession will recidivate within two to three years. Recidivism among all drug court participants has ranged from 5 percent to 28 percent and less than 4 percent for drug court graduates. (Looking at a Decade of Drug Courts, 1999)

TESTIMONY OF CONFEREES

The Committee heard from representatives of the Shawnee County District Attorney's Office, the Shawnee County Court Services Office, the Wichita City Attorney's Office, the Kansas Sentencing Commission.

The Shawnee County conferees noted that the Third Judicial District was in the process of establishing a drug court within the district court system. A 33 member Shawnee County Drug Court Advisory Committee has been established which includes prosecutors, law enforcement, the court system, and treatment professionals. The goal is to have the drug court operational within six months. The target population for the court will be low level nonviolent drug offenders.

Representatives of the Wichita City Attorney's Office described the Wichita Drug Court which is part of the municipal court. The target population is misdemeanor drug offenders with no history of committing crimes against people.

The representative of the Kansas Sentencing Commission noted the Commission will recommend a specific drug court proposal to the 2002 Legislature. The following are proposed changes that will be recommended:

- All drug possession convictions would be sentenced on severity level 4 of the drug grid instead of the current practice of enhancing the severity level for second and subsequent convictions.
- Mandatory placement for up to 18 months would replace current sentences of incarceration or probation.
- Those unsuccessfully discharged or voluntary quits would serve the entire underlying sentence.
- There would be a mandatory period of aftercare.
- A statewide drug treatment system with mandatory assessments would be established.
- An evaluation process would be developed.
- Consolidation of field services should occur before implementation.

CONCLUSIONS AND RECOMMENDATIONS

The Committee endorses the concept of drug courts as an alternative for incarceration of certain drug offenders and recommends that the appropriate standing committee of the 2002 Legislature introduce the recommendations of the Kansas Sentencing Commission in regard to drug courts as soon as these recommendations are presented in bill form. The Committee urges the 2002 Legislature to enact legislation to implement the recommendations of the Kansas Sentencing Commission in regard to the establishment of drug courts.

GUARDIANSHIP SYSTEM

CONCLUSIONS AND RECOMMENDATIONS

The Committee concluded that HB 2469 received a hearing by the House Judiciary Committee, during the 2001 Legislative Session. The standing Committee recommended an interim study of the matter. In addition, during the 2001 Interim proceedings on this issue, various amendments were offered to fine tune the original bill. The Committee anticipates further work on the bill by the time of the 2002 Session. At that time the Committee will encourage consideration of the changes.

Proposed Legislation: None

BACKGROUND

The Judicial Council Guardianship and Conservatorship Committee has been studying these topics on an ongoing basis for several years. The current codes were basically enacted in 1965. The latest examination of the codes concluded in 2000, after a two and a half year study, and resulted in proposed legislation to the 2001 Legislature. 2001 HB 2469 contains the recommendations of the Judicial Council Guardianship and Conservatorship Committee. A hearing was held before the 2001 House Judiciary Committee. The bill remains in Committee.

Selected significant features of HB 2469 include the following:

- Provisions concerning time computations, particularly necessary because of the short time period involved between the filing of a petition and the trial.

- Provisions for reinforcement of the concept that neither guardianship nor conservatorship relieves the natural parents of their parental obligation to support their minor children.

- Increases (in line with inflation since 1965) in the dollar values of small estates which can be administered without resort to a formal conservatorship.

- Provisions for insuring that these cases are heard in a place most appropriate to the circumstances of the ward or conservatee.

- Allowances for, and even the authority for the court to require that, the petitioner obtain in advance of filing the case a functional assessment and evaluation of the proposed ward or conservatee in sufficient detail so that issues of both impairment and need can be fully explored.

- Provisions allowing the court to excuse the presence of the proposed ward or conservatee from the trial when that person could not meaningfully participate.

- Specifications with regard to when and under what circumstances temporary guardians or conservators may be appointed and what authorities they would have.

- Provisions for co-guardians and co-conservators and standby guardians and standby conservators which clarify and structure these functions.

- Provisions for a requirement for designation of a resident agent for guardians and conservators who reside out of state.

- Provisions more specifically setting out the powers and responsibilities of guardians and conservators, including guardians' authority with regard to end-of-life matters.

- Allowances for, and even the authority for the court to require that, the guardian or conservator file with the court a plan for how the guardian or conservator intends to carry out their duties and responsibilities and for how and when the ward or conservatee will be encouraged and permitted to act with independence.

- Provisions for authority for a guardian to handle small estates for their wards, subject to court supervision, without the necessity for a formal conservatorship.

- Authority for the conservator to suggest to the court, and for the court to provide for, the establishment of benefits qualifying trusts and for an extended distribution of conservatorship assets in the case of a minor becoming 18 years old.

- Provisions for meaningful and timely reviews that are likely to catch problem cases without burdening the system with required perfunctory reviews in cases where there are no disputes.

- Provisions for enforcement and bond forfeiture and contempt of court procedures to deal with guardians or conservators who fail to perform their duties or who take advantage of their ward or conservatee, tempered with corrective measures for inadvertent misuses of the ward's or conservatee's estate.

- Allowances for the assessment of costs against those parties who are either responsible for the ward or conservatee, or who unnecessarily litigate claims within the guardianship or conservatorship.

- Provisions for keeping confidential medical information which would otherwise be confidential except for the fact of guardianship or conservatorship proceedings.

Committee Activity

A hearing on this topic was conducted on November 15, 2001. At the meeting, the Committee heard from a district court judge who was the Chairman of the Judicial Council Guardianship and Conservatorship Committee. Other conferees included the Executive Director of the Kansas Advocacy and Protective Services (KAPS) and a representative of the Kansas Bar Association (KBA).

The Chairman of the Judicial Council Committee recounted the work of the Committee in formulating HB 2469. The Committee looked at laws from other states as well as the Uniform Law in this area. The end result of the study (HB 2469) contains some concepts of other jurisdictions which have been tailored to fit Kansas. The representative from KAPS indicated that HB 2469 would be an improvement from current law, but that some concerns remain. The delegate

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from KBA also expressed some concern with HB 2469 and urged further examination of the bill.

Certain suggested amendments to the bill were provided to the Interim Committee by the Judicial Council for consideration.

Conclusions and Recommendations

After discussion of the topic and review of the recent proposed amendments, the Committee concluded that HB 2469 received a hearing by the House Judiciary Committee. The standing Committee recommended an interim study of the matter, during the 2001 Legislative Session. In addition, various amendments were offered during the 2001 Interim to fine tune HB 2469. The Committee anticipates further work on the bill by the 2002 Session. At that time, the Committee will encourage consideration of the changes.

Juvenile Offender and Child in Need of Care Codes

Conclusions and Recommendations

The Committee recognizes the ongoing status of the study of the Juvenile Offender Code and the Kansas Code for the Care of Children undertaken by the Judicial Council. Due to the continuing nature of this study and the possibility of recommendations from the Judicial Council Advisory Committee, the Committee recommends to the 2002 Legislature that funding be reinstated for a Social and Rehabilitation Services (SRS) pilot project to implement a statewide mediation program as a measure to cut down on foster care time.

Proposed Legislation: None.

Background

During the 2000 Legislative Session, SR 1862 was introduced. The measure would have established a group to study and make recommendations regarding the Kansas Juvenile Offender Code and the Kansas Code for Care of Children. Instead of implementing the resolution, the study of the Juvenile Offender Code and the Child in Need of Care Code was assigned to the Judicial Council. An advisory committee was formed to include the following: two district judges (one urban, one rural); two district magistrate judges; a practicing lawyer who represents juveniles; representatives of the Juvenile Justice Authority; four legislators (two Senators and two Representatives); two county attorneys (one urban, one rural); one law school professor; a Court Appointed Special Advocate (CASA) representative; SRS representatives; and a representative of the Kansas Children's Service League (KCSL). The advisory committee has held a series of monthly meetings on the project. Overall, the advisory committee has been guided by

the following principles: to simplify the Codes; to reorganize the Codes; to remove redundancy; and to meet constitutional requirements.

Committee Activity

The chairman of the advisory committee reported on the progress of the advisory committee and indicated that many recommendations will be forthcoming as a result of the study. During the discussion, the question of guardians ad litem surfaced. Reference was made to the report of the Judicial Council, dated March 1, 2001, on this topic.

A delegate from Kansas Legal Services spoke about the Children's Advocacy Resource Center (CARC) which covers three separate programs to assist children in foster care and those who serve these children. These programs include the following:

- Permanency in Child Time project (PICT), funded by SRS to provide legal assistance to prosecutors, guardians ad litem, and other parties in meeting the objectives of the Adoption and Safe Families Act.

- Foster Care Helpline, a pilot project funded by a grant from United Methodist Health Ministries, to provide social service referrals and legal information and assistance to children in foster care and the people who care for them.

- Guardian Ad Litem Support Center, funded by the Office of Judicial Administration to provide support training and other assistance to guardians ad litem.

According to the conferee, the shortcoming of the present system regarding guardians ad litem is that there are too many cases and inadequate funding for the current number of guardians ad litem available. Caseloads of over 400 for one guardian ad litem are not uncommon. The representative advocated improving the standard of practice of guardians ad litem by the following:

- Provide training;

- Demand accountability;

- Develop innovative resolution processes, such as mediation, to cut down on foster care time; and

- Establish a statewide guardian ad litem system.

Testimony from the Court Improvement Specialist with the Office of Judicial Administration presented an overview of the Kansas CASA programs and Citizen Review Board programs. Additional remarks concerning CASAs were provided by the Executive Director of the Shawnee County CASA and Citizens Review Board.

Conclusions and Recommendations

The Committee recognizes the ongoing status of the study of the Juvenile Offender Code and the Code for the Care of Children undertaken by the Judicial Council. Due to the continuing nature of this study and the possibility of recommendations of the Judicial Council Advisory Committee, the Committee recommends to the 2002 Legislature that funding be reinstated for an SRS pilot project to implement a statewide mediation program as a measure to cut down on foster care time.

KANSAS CIVIL FORFEITURE LAW

CONCLUSIONS AND RECOMMENDATIONS

The Committee concluded that there is no evidence or suggestion that problems exist with the forfeiture laws in Kansas. To the contrary, these laws are working as they were intended. The point should be emphasized that the Kansas forfeiture laws were reviewed and recodified in 1994 to reflect, in great measure, the model legislation. The current statutory scheme is indicative of a reasonable public policy benefitting the common good balancing civil liberties. Further, the Committee does not believe there has been any indication of a need for expansion of forfeiture in recent years. As a result, no legislation is recommended at this time.

Proposed Legislation: None

BACKGROUND

The Kansas Asset Seizure and Forfeiture Act, which can be found at KSA 60-4101 *et seq.*, was enacted in 1994 after a two-year period of review and debate by the Legislature. The issue of forfeiture was not new, however, since Kansas has had various laws regarding forfeiture for over 100 years. Under the act property seized as a result of use in certain illegal activities can be forfeited to the law enforcement agency involved in the seizure.

Under the current law, at KSA 60-4104, conduct and offenses can lead to forfeiture whether or not there is a prosecution or conviction. Also under current law, at KSA 60-4117, there are listed specific provisions regarding how the forfeited property may be used. A Performance Audit Report was released in August 2000 entitled "Seized Property in Kansas: Determining Whether Laws Governing the Sale of Property Are Being Followed, and How the Proceeds Are Spent." In 2001, four bills were drafted to deal with the issue of forfeiture. HB 2296 originally contained a provision making the crime of forgery subject to forfeiture. This provision was subsequently deleted when the remainder of the bill dealing with worthless checks passed. HB 2207 would expand the list of activities that constitute common nuisances, and, hence, this is ultimately subject to forfeiture as with all common nuisances, to include felony activity by criminal street gangs. HB 2405 would amend the act to require a conviction of covered offenses before forfeiture could be initated and the proceeds of forfeiture would go to the benefit of education. SB 33 would address the issues raised in the 2000 Post Audit Report, "Seized Property in Kansas: Determining Whether Laws Governing the Sale of Property are Being Followed, and How the Proceeds are Spent."

COMMITTEE ACTIVITIES

The Committee heard from several conferees on the topic of civil forfeiture. A representative of the Kansas Bar Association advocated certain modifications to the law that would not allow the law

enforcement agency involved in the seizure of property to keep the proceeds but that the proceeds should benefit public education. A conferee from the Kansas Bureau of Investigation stated that Kansas law regarding forfeiture is effective and has served as a model for other states as well as Congress. An auditor from the Legislative Division of Post Audit reviewed the Post Audit Report and indicated the only potential concern in this area arose with the identification of four agencies that had some minor compliance problems regarding the deposit of proceeds from forfeited property. The conferee recommended clearer guidance on the process governing the accounting of proceeds. A letter of opposition to HB 2405 was received from the Kansas Peace Officers Association. The Committee received copies of several articles that appeared in the *Kansas City Star* as a result of a year-long investigation on forfeiture and potential in the state of Kansas abuses by the paper.

Conclusions and Recommendations

The Committee concluded that there is no evidence or suggestion that problems exist with the forfeiture laws in Kansas. To the contrary, these laws are working as they were intended. The point should be emphasized that the Kansas forfeiture laws were reviewed and recodified in 1994 to reflect, in great measure, the model legislation. The current statutory scheme is indicative of a reasonable public policy benefitting the common good balancing civil liberties. Further, the Committee does not believe there has been any indication of a need for expansion of forfeiture in recent years. As a result, no legislation is recommended at this time.

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PRIVACY OF MEDICAL RECORDS, ACCESS TO SUCH RECORDS, EXPENSE OF OBTAINING SUCH RECORDS, AND RELATED ISSUES

CONCLUSIONS AND RECOMMENDATIONS

The Committee concludes that patients should have a statutory right to access their medical records either in person or by authorized representative. Health care providers have a responsibility to provide that access in a timely manner and at a reasonable cost, or, in the alternative, to deny or limit access if a significant harm to the patient can be demonstrated. The Committee understands that significant federal laws apply to the area of privacy of medical records and sees no reason to intrude into that regulatory field beyond doing what is necessary to ensure access under Kansas law.

The Committee recommends introduction of a bill for consideration in the 2002 Session that would:

- Define which health care providers must furnish patient records, making clear that health maintenance organizations (HMOs) are exempt.
- Specify what information an authorization document must contain.
- Require medical records to be furnished within 30-days of receipt of a written authorization request.
- Allow providers to collect a service fee not to exceed $15 and $0.35 per page copying charge, as well as reasonable costs of duplicating medical records which cannot be routinely duplicated on a standard photocopy machine (the service fee and copying charge would be subject to an annual adjustment based upon the Centers for Medicare and Medicaid Services (now CMS but previously Health Care Financing Administration (HCFA)) market-basket survey).
- Provide enforcement of the act through the courts with the costs of the action for enforcement charged to the provider and records produced without cost or expense to the requesting party.

Finally, the Committee commends both the legal community and the health care provider community for their continuing efforts to reach a workable agreement in this area of great concern to citizens of Kansas.

Proposed Legislation: The Committee recommends one bill.

BACKGROUND

In the 2001 Session of the Legislature, the Kansas Trial Lawyers Association asked for the introduction of a bill to address their concerns regarding access to medical records and health care billing records. SB 88, as introduced by the

Senate Committee on Judiciary, requires health care providers as defined in the bill to make health care records and health care billing records available to patients, representatives of patients, and persons authorized by the patient or the patient's representative. The bill defines who each of the eligible recipients might be, as well as what is meant by health care, health care records, and health care billing records.

Upon reasonable notice or request from a patient or patient representative, a health care provider must provide access to records for inspection or copying. Such access must be provided within ten days after receipt of the notice or request, or within that ten days, the health care provider must notify the patient or the representative of the patient the reason for withholding or delaying access to the records.

Authorized parties, upon reasonable notice or request, are entitled to inspect and copy any health care records or health care billing records, subject to limitations upon the authorization. The same time frame for compliance applies to authorized parties as to the patient or the representative of the patient. An authorized party receiving records must maintain the confidentiality of such records and cannot use or release such records except for the purpose for which the authorization was given by the patient, the representative of the patient, or by court order.

The health care provider may charge for providing health care records in an amount not exceeding the fee allowed under the workers compensation schedule of medical fees. The health care provider may not charge for retrieving or copying health care billing records, unless the provider establishes the reason the requested records cannot reasonably be retrieved or copied in the ordinary course of business.

The bill prohibits the health care provider from making any alterations, additions, or deletions from the health care record, but may make additional contemporaneous entries and make corrections or additions which are clearly designated as late entries with the date of entry.

The bill allows the health care provider to withhold or limit access to or copies of records if the provider certifies that providing access or copies will create a significant harm to the patient. If it is reasonable to do, the health care provider must arrange to provide access to another representative of the patient or authorized party, or to the patient, under conditions sufficient to protect the patient from harm.

Any health care provider, patient, representative of a patient, or authorized party may bring a claim or action to enforce the provisions of the act, and the court, in its discretion, may award attorney fees for failure to comply with the act without just cause or excuse. The patient, or a representative of a minor, incompetent or deceased patient, must receive notice of any action concerning records and may intervene as a party in the action.

Finally, the act is not to 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.

The Senate Committee on Judiciary held a hearing on the bill but no action

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was taken. Nevertheless, several of the parties to SB 88 continued exploring there areas of differences in search of language that all parties could accept. No such language was found during the session, however, numerous changes to the bill have been drafted by the major proponents of the bill, the Kansas Trial Lawyers Association (KTLA) and the Kansas Bar Association.

At the time of the hearing on this study topic by the Committee, a working draft for a Substitute for SB 88 prepared by the KTLA was on the table for all parties to review. The working draft would require health care records to be furnished to a patient, or a patient's legally designated representative, by a health care provider within 30 days of receipt of a written request. The provider could notify the requesting party of reasons why copies of a record are not available. The proposal allows the provider a copying charge for the records in an amount not to exceed the maximum fee allowed under the workers compensation schedule of medical fees issued by the Kansas Department of Human Resources. The health care provider, the patient, or the patient's representative could bring a court action to enforce the provisions of the act upon a showing that the failure to comply was without just cause or excuse. The court could award the cost of the action and order the records produced without cost or expense to the requesting party.

The working draft pares down the issues from the original SB 88 to mandatory access to medical records, and a copy fee tied to the workers compensation medical fee schedule. There was no agreement among the parties on the bill's content, or for that matter, on the need for the bill.

COMMITTEE ACTIVITY

At the outset of its deliberations, the Committee was made aware that the topic of medical record privacy and access to those records, by whom and under what circumstances, transcends the Kansas Legislature. Since the mid-1990s, the federal government has enacted significant legislation on the subject of privacy, much of it only now being implemented by the adoption and enforcement of rules and regulations.

Health care providers, including those defined in SB 88 and the working draft, also are subject to the federal rules and regulations covering medical record privacy. To assist it in understanding the larger environment in which the privacy of medical records was being discussed, the Committee received a briefing by staff on federal activity in this area. The Gramm-Leach-Bliley Act of 1999 changes the way financial institutions, insurance companies, and securities firms may handle personal, nonpublic information, including medical records. More specific to patient records, the Committee solicited the comments of an expert on the rules and regulations adopted by the Department of Health and Human Services to implement the Health Insurance Portability and Accountability Act of 1996 (HIPAA). Those rules and regulations, now in effect and subject to enforcement in April 2003, relate directly to the manner in which those subject to the act must address medical records privacy issues.

Representatives of the following groups provided testimony to the Special Committee: Kansas Trial Lawyers Association; Kansas Bar Association; American Cancer Society; Kansas Association for the Medically Underserved; National

Association for Mental Illness, Kansas Chapter; Kansas Advocacy and Protective Services; AARP in Kansas; Keys for Networking, Inc.; Kansas AFL-CIO; Kansas Advocacy and Protective Services, Inc.; CASA of Shawnee County; Shawnee Mission Medical Center; Kansas Association of Osteopathic Medicine; and the Kansas Medical Society.

Sponsors of SB 88 and the working draft expressed their belief that Kansans should have a statutory right to their medical records at a reasonable cost and in a timely manner. Absent such a right, citizens have reported significant delays in obtaining records and have been charged unreasonable fees for copying and providing the records. While sponsors and proponents alike recognized that the medical community views the issue from a different perspective, they continue open to compromise. But, they believe the bill has been distilled as much as possible.

The medical community opposed SB 88 as it was introduced and expressed continued opposition to the bill in the interim. Their opposition stems not from the goals of the bill, but because they believe current law and federal rules and regulations already secure for Kansans what the bill would provide. Rules and regulations adopted by the Kansas State Board of Healing Arts require licensees of the Board to release patient records upon a written request and failure to comply with such a request could subject the practitioner to a charge of dishonorable conduct and sanction by the Board. The HIPAA rules and regulations will create a national standard for all medical record disclosures once they are enforced.

In general, all parties agree that patients have a right to their records and they agree that under the federal rules and regulations that right is a legal right for all citizens. Moreover, the federal regulations permit the patient to challenge the contents of a patient's record and to submit written comments to be inserted into the record. Proponents believe now is a good time to place that right in Kansas law; opponents believe the current law is sufficient and will be buttressed by the new federal regulations.

Two other areas of disagreement are outstanding: the fee for copying records and the penalty for failure to comply with a request for a patient record. Proponents contend that fees charged to patients vary so much from one provider to another as to demonstrate on its face the need to create a standardized fee. Such a fee they suggest is the fee paid providers according to the workers compensation medical fee schedule. That fee is adopted with input from the medical community and is reviewed periodically for currency.

Medical providers see the issue differently. They point out that providers have only an advisory role in the promulgation of the medical fee schedule and not direct influence over that schedule. Further, while the schedule for fees might be adequate for the small number of patients who present under the workers compensation statutes, the schedule is not adequate to meet all circumstances. The providers do not oppose a fee being established in Kansas law so long as that fee allows the provider to recoup the actual cost of making a patient record available.

Finally, regarding penalties for failure to make records available as required under the proposed bill and working draft, the providers object to the right of access to the courts for enforcement purposes. They see the language as creating

a new cause of action against health care providers; a cause of action that is unnecessary because current law and regulation already provide penalties, including the potential for action against the license of a provider by the Board of Healing Arts. Ultimately, federal rules and regulations may be different and in conflict with the state statute, if enacted as proposed.

Proponents deny the creation of a new cause of action. Kansans already have access to the courts to gain access to their medical records if otherwise denied access. Furthermore, they argue that the Board of Healing Arts was not created to address this issue. It does not provide the patient with an adequate or timely remedy.

Conclusions and Recommendations

The Committee concludes that patients should have a statutory right to access their medical records either in person or by authorized representative. Health care providers have a responsibility to provide that access in a timely manner and at a reasonable cost, or, in the alternative, to deny or limit access if a significant harm to the patient can be demonstrated. The Committee understands that significant federal laws apply to the area of privacy of medical records and sees no reason to intrude into that regulatory field beyond doing what is necessary to ensure access under Kansas law.

The Committee recommends introduction of a bill for consideration in the 2002 Session that would:

- Define which health care providers must furnish patient records, making clear that health maintenance organizations (HMOs) are exempt.

- Specify what information an authorization document must contain.

- Require medical records to be furnished within 30-days of receipt of a written authorization request.

- Allow providers to collect a service fee not to exceed $15 and $0.35 per page copying charge, as well as reasonable costs of duplicating medical records which cannot be routinely duplicated on a standard photocopy machine (the service fee and copying charge would be subject to an annual adjustment based upon the Centers for Medicare and Medicaid Services (now CMS but previously Health Care Financing Administration (HCFA)) market-basket survey).

- Provide enforcement of the act through the courts with the costs of the action for enforcement charged to the provider and records produced without cost or expense to the requesting party.

Finally, the Committee commends both the legal community and the health care provider community for their continuing efforts to reach a workable agreement in this area of great concern to citizens of Kansas.

UPWARD DEPARTURE OF SENTENCES

CONCLUSIONS AND RECOMMENDATIONS

The Committee reviewed recent appellate court decisions affecting the Kansas law related to upward departures from sentencing guidelines in prison sentences.

Proposed Legislation: None.

BACKGROUND

Gould and *Apprendi* Decisions

The Kansas Supreme Court in *State v Gould* __ Kan __, 23 P.3d 801 (2001) decided on June 26, 2001 held that the upward departure sentence law in KSA 21-4716 on its face violated a defendant's Sixth and Fourteenth Amendment right to a jury trial, notice and due process, respectively. The statute allows a judge to impose an enhanced sentence above the length of sentence provided in the sentencing guidelines law by finding certain aggravating facts exist justifying the upward departure. Although the statute is silent on the burden of proof to be utilized by the district judge to establish a substantial and compelling reason to depart, the court noted that an earlier Kansas Supreme Court decision had held that the implicit standard of proof for finding aggravating circumstances was one of preponderance of evidence. The court said finding the Kansas law unconstitutional on its face was compelled by the holding of the United States' Supreme Court in *Apprendi v New Jersey* 530 US 466, 120 S.Ct. 2348, 147L.Ed2d 435 (2000). The *Gould* court specifically held the decision was not to apply retroactively.

The United States Supreme Court in *Apprendi* cited above held the following:

- The *Constitution* requires that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt.

- The Fourteenth Amendment right to due process and the Sixth Amendment right to trial by jury, taken together, entitle a criminal defendant to a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt. The historical foundation for these principles was said to extend down centuries into the common law. While judges in this country have long exercised discretion in sentencing, such discretion is bound by the range of sentencing options prescribed by the legislature. The historic inseparability of verdict and judgment and the consistent limitation on judges' discretion highlight the novelty of a scheme that removes the jury from the determination of a fact that exposes the defendant to a penalty exceeding the maximum he could receive if punished according to the facts reflected in the jury verdict alone.

- New Jersey's practice allows a jury to convict a defendant of a second-degree offense on its finding beyond a

reasonable doubt and then allows a judge to impose punishment identical to what New Jersey provides for first-degree crimes on the judge's finding, by a preponderance of the evidence, that the defendant's purpose was to intimidate his victim based on the victim's particular characteristic.

TESTIMONY OF CONFEREES

The Committee heard from a University of Kansas law professor, representatives of the Kansas Sentencing Commission, the Kansas Bar Association, and the Kansas County and District Attorney's Association.

Representatives of the Kansas Sentencing Commission estimated there would be 92 criminal cases decided in the year 2001 where an upward departure sentence would be imposed. The representative said that *Gould* and *Apprendi* decisions affect all upward departure sentences.

It was noted that the Sentencing Commission had appointed a subcommittee in August 2000 to study the potential impact of the *Apprendi* decision. The subcommittee following *Gould* developed a preliminary bill draft to be presented to the full Sentencing Commission at its November 1, 2001 meeting. The bill draft incorporates a bifurcated trial and sentencing procedure and was presented to the Committee as a means to address the unconstitutional provisions of the Kansas law.

The University of Kansas law professor noted the *Gould* case did not decide whether upward dispositional departures (departing from probation to imprisonment) was unconstitutional and he said that he was uncertain how the court would rule on this issue. He said the *Gould* decision should not affect the juvenile transfer statute allowing prosecution of juveniles as adults. He also said *Apprendi* did not apply to calculations under the criminal history scale.

The law professor listed the following as possible ways to remedy problems raised:

- Eliminate upward durational departures;
- Eliminate departures entirely;
- Eliminate departures and expand the presumptive sentences in the applicable grid or expand the power of the court to impose consecutive sentences;
- Establish a bifurcated trial and sentencing system; or
- Reclassify all state crimes to include maximum penalties set at twice the presumptive rate.

The representative of the Kansas Bar Association said the proposed changes to the criminal justice system as a result of the *Gould* and *Apprendi* cases will place significant new financial and staffing burdens on the court system. He urged the Legislature to support the Judicial Branch with adequate funding and staff.

The representative of the Kansas County and District Attorney's Association said the concept of a bifurcated trial and sentencing procedure appeared workable if properly crafted.

Conclusions and Recommendations

The Committee strongly recommends that the 2002 Legislature address the issue of upward departure in the Kansas sentencing law as soon as possible. The Committee notes that the Kansas Sentencing Commission was continuing to refine its proposed bill draft to meet the constitutional requirements set out in the *Gould* and *Apprendi* cases and did not have a final work product to present to the Committee prior to the completion of the Committee's meeting schedule.

The Committee recommends that one of the standing Judiciary committees introduce and work the proposed bill by the Kansas Sentencing Commission as soon as possible so the issue may move expeditiously through the Legislature.

Use of Independent Hearing Examiners by Agencies Subject to the Kansas Administrative Procedure Act

Conclusions and Recommendations

As a result of the hearings on Topic No. 5—"Use of Independent Hearing Examiners by Agencies Subject to the Kansas Administrative Procedure Act," the Committee has recommended the passage of 2001 HB 2488.

Proposed Legislation: None

Background

The Judicial Council Administrative Law Committee has been studying the administrative process in Kansas since 1971. As a result of recommendations and legislative consideration, the Legislature has adopted the Kansas Administrative Procedure Act (KAPA), which sets out the procedure for hearings for those persons affected by state agency decisions. Under KAPA, the object is to conduct a fair and impartial hearing for the person who contests the state agency action that has impacted their legal rights.

In 1997, the Office of Administrative Hearings (OAH) within the Department of Administration was established for the purpose of conducting administrative hearings for the Department of Social and Rehabilitation Services. During the 1997 Interim the Special Committee on Judiciary, after a study of the centralized office concept, recommended that the administrative hearing officers of all state agencies covered by KAPA be transferred to OAH in the Department of Administration. The result of the interim study, 1998 SB 405, which would have created such a centralized office, did not pass. 2001 HB 2488 would also create a new administrative mechanism for OAH under which presiding officers for all agencies that conduct hearings under KAPA would be transferred to OAH.

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Committee Activities

The Committee heard from a Washburn University Law Professor who is also a member of the Judicial Council Administrative Law Committee. The professor cited concerns over Kansas agencies' fairness over the years and recommended the passage of 2001 HB 2488 which would phase in the use of the OAH, independent of the Department of Administration, over five years.

The Committee received comments from the Legislative Post Auditor who conducted the Performance Audit Report entitled "Centralized Administrative Hearings: Reviewing the Advantages and Disadvantages." According to the report, proponents of centralized administrative hearings indicate that such a measure would promote both fairness and the perception of fairness by eliminating the conflict of interest that exists when a hearing officer works for the agency that is a party to the proceeding. Efficiency of operation and economic feasibility were also cited as reasons for the centralized hearing mechanism. Opposition to the measure was noted by the concern that hearing officers will become generalists without adequate technical expertise in particular subject matter areas.

Additional testimony was offered by the Director of OAH. The conferee outlined the expenses involved in furnishing administrative law judges to various agencies. Action taken by the OAH as a result of the Post Audit report was provided to the Committee. These actions included:

- Handling cases on a timely basis;
- Establishing an equitable system of billing;
- Beginning to report estimated income from all sources in the OAH budget; and
- Ensuring that participants involved in the hearing process are aware of OAH's independence from the Department of Social and Rehabilitation Services.

Conclusions and Recommendations

As a result of the hearings on Topic No. 5—"Use of Independent Hearing Examiners by Agencies Subject to the Kansas Administrative Procedure Act," the Committee has recommended the passage of 2001 HB 2488.

KANSAS LEGISLATIVE RESEARCH DEPARTMENT

Rm. 545N–Statehouse, 300 SW 10th Ave.
Topeka, Kansas 66612-1504
(785) 296-3181 ◆ FAX (785) 296-3824

kslegres@klrd.state.ks.us

http://skyways.lib.ks.us/ksleg/KLRD/klrd.html

January 15, 2002

To: Senate Judiciary Committee

From: Mike Heim, Principal Analyst

Re: Holdover Senate Judiciary Committee Bills

Bills in Senate Judiciary Committee

Senate Bills

SB 16, introduced by the Joint Committee on Corrections and Juvenile Justice Oversight, would amend the Kansas Code for Care of Children, to shorten the time frame (from 72 to 48 hours) for holding a temporary custody hearing for a child taken into protective custody.

SB 26 would amend the Kansas Standard Asset Seizure and Forfeiture Act to permit civil remedies under this law for inmates to be promulgated by the Secretary of Corrections.

SB 76, rereferred after passing out of the Committee, would expand the authority of the Governor to negotiate compacts with Indian tribes to include not only gaming but also taxation, law enforcement, and water rights.

SB 88, rereferred to the Committee, deals with access to patient records by the patient and authorized representatives. The bill was the subject of a study by the 2001 Special Committee on Judiciary and a new bill (SB 377) was recommended.

SB 95 would enact the Interstate Compact for Adult Offenders Supervisors.

SB 103 and SB 104 would amend the law dealing with criminal records of persons seeking employment with home health agencies and nursing homes, respectively. **HB 2067 was enacted in 2001 covering this issue.**

SB 116 would limit the ability of political subdivisions from bringing lawsuits against firearms' manufacturers.

SB 117 would limit the liability of sport shooting ranges from civil and criminal actions for noise pollution; from provisions of local zoning allowing elimination for nonconforming uses, and condemnation actions. **See also SB 180.**

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SB 131, rereferred to the Committee, would make refusal to take a DUI breath test a Class C misdemeanor. **Extensive DUI amendments were enacted in 2001 as part of SB 67.**

SB 136 would amend the wage garnishment law to delete a current restriction on assignment of accounts.

SB 141 would amend the Fraudulent Insurance Act. Provisions exempting insurers from providing coverage or paying claims involving fraudulent acts is limited to first party claims.

SB 173 would amend the Kansas Divorce Code to reestablish fault-based divorce if a dependent child is involved.

SB 174 would amend the Kansas Juvenile Offenders Code regarding financial responsibility for the Commissioner of Juvenile Justice Authority for juveniles placed in his custody.

SB 180, which passed the Senate and was materially changed by the House, deals with regulation of sport shooting ranges.

SB 206 would amend the DUI law dealing with driver's license suspensions to coordinate test failure and conviction suspension length of times. **Note the passage of SB 67 in 2001.**

SB 207 would establish procedures for law enforcement to report traffic violations to the U.S. State Department committed by persons claiming diplomatic immunity.

SB 215 would amend the DUI law to increase driver's license reinstatement fees, make failure to submit to a breath test a Class B misdemeanor, amend and recodify administrative procedures regarding license suspensions, and make other changes. **Note the passage of SB 67 in 2001.**

SB 225 would amend certain administrative procedures regarding driver's license suspension. **Note the passage of SB 67 in 2001.**

SB 228 would authorize the filing of a notice of interest in the title to real property valued in an amount not greater than $15,000 and permit transfer of property to the devisee or legalee after a three-year period.

SB 229 would amend the crime of cruelty to animals to increase the penalty to a non-grid felony if serious injury is caused to any animal.

SB 230 would enact a revised hate crime sentencing provision and codify the ability of a person to bring a civil damages action in such cases.

SB 241 would amend the Kansas Code for Care of Children to add "grandparent" to the definition of "Interested party" and to provide a finding of unfitness is not necessary if the

parent agrees to the appointment of a permanent guardian. **This technical change was enacted in 2001 as part of HB 2600.**

SB 262 amends the law dealing with disposition of profits from a crime to require notice to the Crime Victims Compensation Board by any person who knowingly contracts with, pays, or agrees to pay any profit from a crime to that person. Failure to provide notice makes the contracting party subject to civil penalties.

SB 265 would amend the Kansas Residential Landlord Tenant Act to provide a warning statement that the tenant is not obligated to sign the termination agreement in each agreement to terminate a rental agreement containing added provisions not in the original rental agreement. Further, the added provisions are declared not to be binding.

SB 269 would require the Secretary of Corrections to reimburse counties at a rate of $45 per day for days of confinement for felons exceeding 30 days.

SB 272 would expand the group of convicted or adjudicated persons required to submit to DNA testing to include all felons and to those committing misdemeanors. **DNA testing provisions were amended in 2001 HB 2176, which became law.**

SB 295 would expand the crime of aggravated escape from custody to include those charged with or adjudicated as a juvenile offender upon commitment to a state juvenile corrections facility that has a secure perimeter.

SB 296 would add a supplemental provision to the Kansas Consumer Protection Act dealing with the liability of telephone solicitors who fail to consult the national do-not-call list or who fail to honor those listed regarding consumer telephone calls.

SB 297 would enact the Uniform Trust Code and repeal the current Uniform Trustees' Powers Act (KSA 58-1201, *et seq.*), which it replaces.

SB 300 would add a requirement that those employees of the Juvenile Justice Authority within the safety and security series on and after July 1, 2001, must be at least 21 years of age, possess no felony convictions, and meet physical agility requirements.

SB 301 would set statutory guidelines for juvenile offenders and trial home visits.

SB 303 would amend the DNA testing requirement to add persons convicted of burglary and aggravated burglary, lengthen the statute of limitations to ten years or one year from the time the identity of the suspect is established by DNA testing, whichever is later, for certain crimes against children or sexually violent offenses. A new section is added permitting persons in custody after conviction to request DNA testing. **Extensive amendments to the DNA testing law were enacted in 2001 HB 2176.**

SB 335 would amend the law regarding the Kansas Parole Board to require all members of the Kansas Parole Board to have a bachelors degree or higher; permit the appointment of pro tem members, permit certain hearings to be conducted by Department of Corrections employees subject to review by a Board member.

SB 339 would establish a process for the early medical release of prisoners requiring approval of the Kansas Parole Board and the sentencing court.

SB 341 would permit a court to order a defendant to pay a domestic violence special program fee and to authorize the expenditure of the moneys by the chief judge in each judicial district for domestic violence programs. **The contents were enacted in 2001 as part of SB 205.**

SB 354 would require the Secretary of Corrections to consult with municipalities and members of the public regarding placement of facilities.

House Bills

HB 2075 would allow the KBI to fingerprint juveniles who commit assault. **The contents were enacted in 2001 as part of HB 2176.**

Sub. For HB 2077 would extend the Protection from Abuse law to cover intimate partners or household members. Authorization is added for protection from abuse orders to be entered into the NCIC and other databases.

HB 2079 would expand the felony theft crime to include theft regardless of property value from three separate merchants within 72 hours as part of the same act or transaction or two or more acts connected together or constituting parts of a common scheme. **The contents were enacted as part of HB 2176.**

HB 2080 would establish the new crime of unlawful possession of a sales receipt or universal product code label (15 or more) or possessing the device which manufactures fraudulent receipts or code labels as a level 9 nonperson felony. **The contents were enacted as part of HB 2176.**

HB 2230 would enact a number of revisions to the DUI law. The contents are similar to SB 215. **Note the enactment of SB 67 in 2001.**

HB 2328 would enact the new crime of abusing toxic vapors and would authorize fines to be imposed on juveniles adjudicated for possession of certain drugs.

HB 2549 would amend the worthless check civil damages law to expand liability to include interest, to permit use of first class mail for notice, to limit service charges to not exceed $30, and to expand the definition of worthless checks to include checks where the maker has not tendered to the holder's agent money demanded within the allowable time. **The contents were enacted in 2001 as part of HB 2296.**

Senate Judiciary Bills in House Judiciary Committee

SB 20 would amend the Charitable Organizations and Solicitations Act by striking the $5,000 bond requirement, raising the civil penalty to $5,000 and to $10,000 for violations against the disabled or elderly.

SB 27 would amend a law dealing with transfer of custody of offenders from sheriffs to the Secretary of Corrections and stipulate when a sheriff may discharge an offender.

SB 30 would change the law regarding preparation of wills and trusts by persons who are also primary beneficiaries. The bill was requested by the Judicial Council Probate Advisory Committee.

SB 66 would make a technical amendment to KSA 38-1507 to correct an error in referencing another statute.

SB 99 would amend the Kansas Offender Registration Act to extend coverage to any person required to register under federal, military, or state law and gives the KBI authority to participate in the FBI's NCIC 2000.

SB 159 would make technical amendments to the Code of Civil Procedure for Limited Actions and would delete forms from the statute.

SB 175 would amend the Consumer Protection Act regarding sequestration of assets and prejudgment liens against a supplier.

SB 197 would extend the time for filing mechanics' liens on other than residential property.

SB 208 would amend the DUI law to cover inhalants.

SB 235 would recodify domestic battery as a separate statute to make it easier to track prior convictions.

SB 236 would make Code of Civil Procedures garnishment procedures the same as limited action garnishment provisions.

SB 291 would create the new crime of causing harm to another by a motor vehicle by leaving a child unattended who then causes harm or death to another.

SB 329 would require SRS to establish a central payment unit for disbursement of support payments and would make other changes. **The contents were enacted in 2001 as part of HB 2508.**