

MINUTES OF THE HOUSE JUDICIARY COMMITTEE.

The meeting was called to order by Chairman Michael R. O'Neal at 3:30 p.m. on March 19, 2003 in Room 313-S of the Capitol.

All members were present except:

Representative Ward Loyd - Excused
Representative Tim Owens - Excused

Committee staff present:

Jerry Ann Donaldson, Legislative Research Department
Jill Wolters, Revisor of Statutes
Cindy O'Neal, Committee Secretary

Conferees appearing before the committee:

Mark Stafford, Kansas Bar Association
Christine Collins, Kansas Medical Society
Gary Reser, Kansas Veterinary Medical Association
Gary Robbins, Kansas Optometric Association

The hearing on **SB 28 - professional corporation law of Kansas**, was opened.

Mark Stafford, Kansas Bar Association, explained that the professional corporation law was enacted in 1965 so professionals could form corporations and could benefit from certain tax advantages. It also allowed professionals to enjoy the benefits of forming a corporation while preserving professional discretion. The proposed bill would delete the list of professions, allow foreign professional corporations to do business in Kansas, and have a choice between forming a limited liability company, limited partnership, general partnership or a professional corporation. (Attachment 1)

Christine Collins, Kansas Medical Society, appeared as an opponent to the bill but supported further study and input from groups that would be effected by it. She was concerned with New Section 16 which has various licensing agencies adopting rules and regulations to determine under what circumstances the professional services could become a corporation. (Attachment 2)

Gary Reser, Kansas Veterinary Medical Association, addressed the committee as an opponent. He believes that the changes in the proposed bill would result in lawsuits from well financed corporate interest that would require Kansas licensing agencies to defend the requirements of rules and regulations when determining who could form a corporation. (Attachment 3)

Gary Robbins, Kansas Optometric Association, requested that section 10 be amended to make it clear that even if a professional corporation converts to a general corporation, all of its shareholders must continue to be licensed professionals and that the licensing agency must not only be informed of, but also consent to the conversion. He strongly opposed new section 16 which allows each licensing agency to adopt its own rules & regulations. (Attachment 4)

The hearing on **SB 28** was closed.

SB 61 - Enacting the Uniform Athlete Agents Act

Representative Long made the motion to report SB 61 favorably for passage. Representative Ward seconded the motion.

Representative Davis made a substitute motion to strike the provisions in the bill regarding looser pay. Representative Swenson seconded the motion. The motion carried.

Representative Pauls made the motion to amend the open records section so that those records which would be used for investigative purposes would be closed. Representative Williams seconded the motion. The motion carried.

CONTINUATION SHEET

MINUTES OF THE HOUSE JUDICIARY COMMITTEE at 3:30 p.m. on March 19, 2003 in Room 313-S of the Capitol.

The committee recommended that staff print the Uniform Law Commissioners comments along with the bill when published.

Representative Klein made the motion to amend New Section 15 to exclude the right of action of an university or college against a former student-athlete when one has violated the act. Representative Ward seconded the motion. The motion carried.

Representative Klein made the motion to report SB 61 favorably for passage, as amended. Representative Patterson seconded the motion. The motion carried.

HCR 5016 - concurrent resolution urging study and recommendations regarding internet and other sales of wines not available in Kansas

Representative Williams made the motion to report HCR 5016 favorably for passage. Representative Crow seconded the motion. The motion carried.

The committee meeting adjourned at 5:30 p.m. The next meeting was scheduled for March 20, 2003, at 3:30 p.m. in room 313-S



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Hon. Michael R. O'Neal
State Representative, 104th District
Chair, House Committee on Judiciary
Statehouse, Room 170-W

Re: 2003 Senate Bill No. 28

Dear Representative O'Neal:

Thank you for the opportunity to appear before the House Committee on the Judiciary regarding Senate Bill 28. This bill proposes several amendments to the professional corporation law of Kansas, appearing at K.S.A. 17-2707, *et seq.* I am appearing on behalf of the Kansas Bar Association.

Senate Bill 28 is the product of a KBA committee formed in response to a request made two years ago by the Senate Judiciary Committee. The Senate committee was concerned that the list of professions authorized to form professional corporations should not be expanded in piecemeal fashion. Also, other sections of the professional corporation law needed modernization. The KBA committee was comprised of attorneys from the private sector and from state agencies. Together, these attorneys represent a wealth of knowledge and experience on the formation, management, filing and regulation of professional corporations.

A. Overview of the professional corporation law

The professional corporation law was originally enacted in 1965. The law allowed certain professionals to form corporations so that they could benefit from certain tax advantages related to qualified retirement plans. Congress later liberalized the rules so that self-employed individuals could also establish these qualified retirement plans. There are no longer any tax advantages associated with incorporation.

The professional corporation law also allows professionals to enjoy the benefits of forming a corporation while preserving professional discretion. As part of our State's common law, corporations are prohibited from performing many personal services of the type requiring a professional license. This does not prohibit the corporation from employing professionals such as attorneys and accountants for the purpose of serving the corporation, but only precludes those persons employed by the corporation from providing the services to others, as customers of the corporation. The reason for the rule is to prevent professional discretion and policy from being directed by non-licensed directors whose duty of loyalty is owed to the shareholders rather than to the patients or clients. This rule has been

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B. Summary of Proposed Amendments

The most noticeable change would be the deletion of the list of professions within the definition of the words "professional service", now located at K.S.A. 2002 Supp. 17-2707. That definition is necessary to determine which of the professions have authority under the professional corporation law to incorporate. The definition is also necessary to determine which professions may be combined in a single professional corporation. Finally, the definition might also now be considered when attempting to determine whether a profession may be practiced in a general corporation. If adopted, SB 28 would delegate authority to the appropriate licensing agency to determine whether a profession it regulates should be practiced in a professional corporation, general corporation, or both, and in combination with other professions. This delegation is not absolute, but rather is made with necessary standards for agency decision-making. These standards appear at New Section 16. Please note that Section 3(d) maintains prior law until, if ever, regulations are adopted. This subsection also requires the Secretary of State to publicize a list of professions that may be provided in a professional corporation. Subsection 3(e) is a savings clause for those organizations formed under prior law.

A second significant change appears in New Section 17, which allows foreign professional corporations to do professional business in Kansas under certain circumstances. This authority does not change any requirement that the person providing the professional service must be appropriately licensed or registered in this state.

Thirdly, Section 2(b) states that, as an alternative, persons may choose to form a limited liability company, limited partnership or general partnership rather than a professional corporation, but that the professional corporation law limitations apply to those types of business organizations.

There are numerous amendments throughout the bill that are clean up. The committee's intent is indicated in the comments appended to this testimony.

C. Conclusion

The current list of professional services in the professional corporation law represents a rather haphazard approach to professional regulation. There has been no decision-making process developed to determine whether a professional service should be provided through a professional corporation. Some professions have been added to the list because there was a hope for a tax benefit. Others were added so that they had equal status to other similar professions. At least one profession seeks to be added to the list this session in HB 2156. SB 28 provides a reasonable decision-making process that is subject to judicial and legislative review. The bill also provides needed modernization for professional corporations. The Kansas Bar Association urges passage of this bill.

Respectfully submitted,

Mark W. Stafford

APPENDIX

The KBA committee drafted the following comments during its discussions when drafting the amendments to the Kansas professional corporation law. The references to sections correspond to sections of Senate Bill 28, as amended by the Senate Committee.

Section 1. K.S.A. 17-2707.

The definition of a professional service is deleted, at the suggestion of the legislature during the 2001 session. The licensing agency will be responsible for designating whether a professional service may be provided through a professional corporation, as stated in new section [16]. The definition of "qualified person" is expanded to clarify that the estate of a deceased profession may continue to hold title for a reasonable period of time.

The April 2002 committee meeting decided to replace references to "regulatory" with the term "licensing". The definition of "qualified person" in subsection (e) was also amended at the April meeting to clarify that a qualifying general partnership, limited liability company, professional corporation, or foreign professional corporation may be a qualified person and may own stock in a professional corporation.

The last clause of subsection (b) was deleted to leave open the possibility that a professional service may be performed through a general corporation, so long as the licensing agency has approved the performance of that service through a general corporation. As drafted, the definition of a "professional service" suggests that no professional service may be performed through a general corporation; rather, the licensing agency would have to conclude that a service is not a "professional service" before the service could be performed through a general corporation. The approach of the act, however, is to provide for the performance of professional services through a general corporation if the licensing agency approves. The definition of "professional service" is more consistent with this approach by deleting the last phrase.

Section 2. K.S.A. 2002 Supp. 17-2708.

The first sentence in subsection (b) is stricken because it causes confusion for those professions that may not be practiced by a general corporation. A person who is a licensed professional may form a general corporation for some purposes, but the corporate purpose may not necessarily include the practice of the profession. That issue is established by individual licensing acts, some of which specify that the profession may be practiced in a general corporation, (see, e.g., K.S.A. 74-7036) or by regulations adopted pursuant to section [16]. In place of the stricken language it is clarified that a qualified person has the option of forming a professional corporation, a professional LLC, LP, or LLP.

Subsection (b) was amended at the April 2002 committee meeting. The changes were technical in nature and intended to conform references to the LLC act and the uniform partnership act to the terminology used in those acts. For example, in sentence two of subsection (b) the term "professional limited liability company" was amended to refer only to a "limited liability company." The LLC act does not provide for the formation of a "professional" LLC; rather, an LLC may be formed for the purpose of

providing professional services permitted to be provided through a professional corporation pursuant to the professional corporation law. See K.S.A. § 17-7668(c). Other technical changes included changes to the names of the LLC act and the uniform partnership act.

Section 3. K.S.A. 17-2709.

(a) The requirement that the licensing board issue a certificate attesting to the incorporator's status as a licensed professional was eliminated, thus allowing any person to serve as incorporator. The licensing board must instead issue a certificate approving the directors and the PA name. The committee recommended that the incorporator's powers end upon filing the articles, which necessitated the naming of the directors in the articles of incorporation.

(b) The statute is amended to eliminate the \$2 cap on the fee charged by the regulatory board for issuing a certificate of good standing.

(d) New section directing the Secretary of State to maintain a list of professions that may form a professional corporation, which is derived from the rules/regulations enacted by the regulatory agencies pursuant to new section [16]. Prior law will establish who may form a professional corporation until such time as the agency takes action.

(e) This new section serves as a grandfather clause, which was needed to protect professional corporations and general corporations organized prior to the act.

Section 4. K.S.A. 2002 Supp. 17-2710.

(a) Deletion of the stricken language is necessary because the list of professions now appearing at K.S.A. 2000 Supp. 17-2707(b) would be repealed. Determination of appropriate combinations is left to the licensing agency, as stated in new section [16]. The committee amended the first clause of the first sentence to clarify that more than one licensing agency may provide rules or regulations that bear on the types of services a professional corporation may provide, because in certain circumstances a professional corporation may be organized to provide two or more professional services.

(c) References to deferred compensation plans and welfare benefit plans were added to (c) during the April 2002 meeting. The committee also concluded that "qualified" should be stricken from subsection (c) to clarify that a professional corporation has the power to establish and maintain both qualified and non-qualified retirement plans.

Section 5. K.S.A. 17-2711.

The committee believes that a professional corporation should be authorized to use the designation "P.C." Allowing foreign professional corporations to perform professional services in Kansas makes this expanded authority appropriate because many of the foreign entities will use the designation "P.C." The committee also clarified that corporate endings without periods are permitted, and substituted the word "each" for "the" to accommodate multiple professions.

Section 6. K.S.A. 17-2712.

The revision to subsection (a) allows an option for the transfer of shares to be restricted by a separate document or the articles of incorporation.

The April 2002 committee meeting decided to move sections (c), (d) and (e) to K.S.A. 17-2707(e)'s definition of "qualified person."

At the June 2002 meeting, the committee decided to replace "regulating board" in the third sentence of subsection (a) with "licensing agency" to conform the language to the definition set forth in K.S.A. 17-2707. The committee also amended the fourth sentence of subsection (a) to clarify that a shareholder in a professional corporation may enter into an agreement affecting the shareholder's stock in the professional corporation, such as a trust agreement, with another person even though that person may not be a shareholder in the professional corporation, so long as the person is licensed to perform professional services authorized by the articles of incorporation of the professional corporation. This change coordinates with changes to the definition of a qualified person in K.S.A. 17-2707(e) that permit a revocable trust holding stock in a professional corporation to have a trustee other than the grantor, so long as the trustee with the power to vote the stock in the professional corporation is a person licensed to perform professional services authorized by the articles of incorporation of the professional corporation.

Section 7. K.S.A. 17-2713.

The committee concluded these changes were appropriate to reflect the possibility that the shareholders, and thus the directors and officers, of a professional corporation may not be individuals. While there was uncertainty whether prior law permitted a holding company structure in which a partnership, limited liability company, professional corporation, or foreign professional corporation owned stock in a professional corporation, the revisions to 17-2707(e) and 17-2712 are intended to clarify that a holding company structure is now permitted, so long as the professional corporation is owned by one or more qualified persons, which may be qualifying partnerships, limited liability companies, professional corporations, or foreign professional corporations.

The committee decided to rewrite this section in the affirmative to state that officers and directors must be both natural persons and qualified persons.

Section 8. K.S.A. 17-2714.

(a) The revision allows greater flexibility in setting forth the method for determining the valuation method for the purchase of shares by the corporation. The stricken portion of the statute is now contained in subsection (c). Subsections (b) and (c) are based on Delaware law, sections 611 and 615, but were substantially altered by the committee.

Section 9. K.S.A. 17-2716.

The amendment to this section is technical only, and is made to conform to the definitions used in this act.

Section 10. K.S.A. 17-2717.

This revision expands section 17-2717 to clarify that a general corporation otherwise qualifying to function as a professional corporation may convert automatically to a professional corporation, rather than reorganizing as a professional corporation by

merger into a new professional corporation or otherwise. This revision formalizes current practices of certain state agencies, which will permit a qualifying general corporation to convert to a professional corporation by amending its articles of incorporation.

The first two sentences of new subsection (b) parallel the language in subsection (a). The third sentence of new subsection (b) is intended to parallel the requirements in 17-2709(a) for filing original articles of incorporation. 17-2709(a) requires a certificate from each appropriate licensing agency that the initial directors are licensed professionals, and new subsection (b) parallels this requirement by requiring a certificate that the directors serving at the time the corporation becomes a professional corporation are licensed professionals. New subsection (b) is not intended, however, to create a requirement that a professional corporation provide a certificate concerning its directors each time it amends its articles of incorporation. The requirement in new subsection (b) that the licensing agency approve the name of the corporation also parallels 17-2709(a).

Section 11. K.S.A. 17-2002 Supp. 17-2718.

The statute requiring annual reports is amended to include foreign professional corporations, which must register with the Secretary of State pursuant to new section [17].

(a)(1) The reporting of the residential address for officers, directors and shareholders is deleted.

(a)(2) A reference to the exception of the office of secretary as given in K.S.A. 17-2713 is added.

(a)(3) Reporting by foreign professional corporations is added to the annual report.

(b) The general statute on executing documents, 17-6003, is referenced instead of specifically designated signing parties.

(c) The duty of the Secretary of State to supply duplicate reports to all regulatory bodies is amended to allow for copies only upon request as not all regulatory bodies want copies of the annual reports.

Section 12. K.S.A. 17-2719.

(a) Antiquated references are eliminated, along with the requirement of forfeiture for any ownership by an unqualified person.

(b) General provisions for forfeiture and penalties for failure to file the annual report or pay the franchise tax are copied from general corporate code.

(c) The right of reinstatement is added.

(d) References to trustees are replaced with references to officers and directors. Reference to joint/several liability is deleted in accordance with recommendation contained in Clayton's 11/6/01 memo, section II.

Section 13. K.S.A. 2002 Supp. 17-7668.

K.S.A. § 17-7668 authorizes organization of a limited liability company to exercise the powers of a Kansas professional corporation. 17-7668(e) defines a "qualified person" for purposes of determining the persons (natural or judicial) that may be members of an LLC formed for a professional purpose. The current definition

parallels the current definition of a qualified person contained in section 17-2707(e) of the professional corporation law. Because 17-2707(e) would be amended significantly by this act, 17-7668(e) should be amended to make corresponding changes. Otherwise it may be unclear whether persons meeting the definition of a qualified person for purposes of the professional corporation law also meet the definition of a qualified person for purposes of the LLC act.

Section 14. K.S.A. 65-1425.

(No committee comment was made. This section was added after the committee had completed its work. This section clarifies the relationship between the dental practice act and the professional corporation law.)

Section 15. K.S.A. 65-1522.

(No committee comment was made. This section was added after the committee had completed its work. This section clarifies the relationship between the optometry practice act and the professional corporation law.)

New Section 16.

The committee believes that there should be a definite statement as to whether there is a prohibition against the general corporate practice for each profession. This determination should be made by the licensing agency or by a statute in the licensing act. Standards for making that determination are provided so that there is not an unlawful delegation of legislative authority.

References to KSA 17-2709(e) were added to clarify that professional associations and general corporations created prior to this act are unaffected by the new rules/regulations.

LPs were added to the list of business entities allowed to provide professional services.

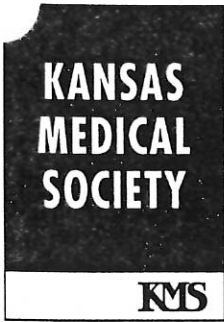
New Section 17.

In recent years several professional corporations organized in other states have registered to do business in Kansas. The new section would allow the foreign professional corporation to do business in Kansas if appropriate conditions are met.

This new section also allows a foreign LLC, LP or LLP to perform professional services in this state.

New Section 18.

The general corporate code, specifically K.S.A. 17-7514, addresses extensions for professional corporations as well as general corporations. The provision relating to professional corporations was cut from the general corporate code and added to this act by addition of this statute.



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TO: House Judiciary Committee
FROM: Christina Collins *Christina Collins*
Director of Government Affairs
DATE: March 19, 2003
RE: SB 28: Corporate Code

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to testify before you today on SB 28. The bill represents a comprehensive revision of the Kansas Professional Corporation Code undertaken by the Kansas Bar Association. The Bar convened some very talented lawyers within the state. They are to be applauded for devoting time and extensive effort in attempting to solve a complex legal challenge. However, the bill proposes some rather extensive changes to the economic and professional relationships of many individuals who practice many professions in Kansas. For this reason, the Kansas Medical Society believes that SB 28 requires further study, deliberation and input from the wide array of groups affected by this legislation. We support the goal of updating the corporation code. However, there does not seem to be a pressing need to pass such comprehensive legislation right away. We would respectfully urge this committee to recommend SB 28 for interim study.

The current law sets forth which individual professionals and which combinations of professionals may form professional corporations. One of the most troubling and substantive policy changes in SB 28 is the elimination of the list of professionals who may form professional corporations. The task of determining who may form PC's and which professions may incorporate together is eliminated from the legislative process and, instead, is delegated to the state licensing agencies of the various professions. This is a concept that has not been adopted by any other state.

New Section 16 charges the various licensing agencies with adopting rules and regulations to determine whether and under what circumstances the professional services

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that an agency regulates may be performed by a general corporation. The agency should rely on the following factors in making that determination (p. 14, line 33 – p. 15, line 13):

- (1) The effect on competition;*
- (2) whether the practice of the profession is governed by ethical rules prohibiting fee splitting or restricting ownership of an entity solely to licensed or registered member of the profession;*
- (3) whether the corporate practice of the profession is consistent with grounds for revocation, suspension or limitation of the professional license;*
- (4) whether implementing corporate policy by persons who are not licensed to engage in the profession unduly interferes with independent professional judgment;*
- (5) whether prohibiting or limiting the corporate practice of the profession is desirable in order to protect the public health safety and welfare;*
- (6) whether prior decisions by the Kansas appellate courts prohibit or limit the corporate practice of the profession; and*
- (7) whether the practice of the profession through a general corporation has customarily and historically been lawful.*

Conversations with members of the KBA task force indicate that the triggering event for considering the adoption of such rules and regulations by a licensing board would probably be an individual licensee's interest in forming a business entity to provide those services. Public hearings would be held before the licensing agency deliberated and adopted or rejected such regulations. In the event that multiple licensees regulated by multiple agencies wanted to jointly form a professional corporation, all of the agencies would have to have enabling regulations for the corporate entity to proceed. Practically, the Secretary of State would be required to ensure that each application for such a corporate entity is authorized by all the interested agencies prior to filing their articles of incorporation. These decisions would be subject to judicial review under the Administrative Procedures Act.

We believe this is a questionable policy decision for many reasons. In particular, we believe it vests an unprecedented amount of authority in licensing agencies to determine which professionals may enter into corporate relationships together. We question whether this is an overbroad delegation of legislative responsibility to the executive branch. In particular, the criteria in the bill a licensing board must consider are vague and provide a board very little in the way of direction. For example, in subsection (1) of New Section 16, would an "effect on competition" be good or bad? How much effect is acceptable? As worded, a strict constructionist could either argue that under this criteria the creation of a monopoly on certain professional services would be acceptable or, conversely, that any change in the current market conditions is reason for denial. It's simply too vague. Likewise, in criteria (4) how much interference with the application of one's professional judgment is undue? Similarly, in criteria (5), what evidence is a

licensing board required to consider in determining that the public health, safety and welfare is at risk by a certain combination of professionals practicing together? Some feel there is simply too much latitude in these criteria to afford any predictability – a crucial element in laws governing economics of business entities.

Professional licensing boards are statutorily created to ensure that the professionals they regulate are safely and adequately applying the standards of their profession. This language vests a tremendous amount of new authority in those licensing agencies to control their licensees' economic relationships. In most instances, the majority of licensing boards are licensees of that board. They are charged with policing themselves and their professional peers. This provides a board undue control over a peer's economic well-being. Conversely, this change could permit the various professions to police themselves too gently and grant them the authority to sit in judgment over the propriety of their own economic relationships in a manner that may not best serve the public good. These kinds of decisions seem better suited to disinterested parties after debate in an open public forum, such as the legislative process provides.

This delegation of power encourages an inefficient use of the state's resources. Delegating this decision creates additional work for the licensing agencies and the Secretary of State that isn't currently required. Board staff will be required to provide guidance in decisions requiring a fairly sophisticated knowledge of corporate law and the laws governing the economics of their profession. Each of the licensing boards will have to adopt several rules and regulations under this law. Likewise, the Secretary of State will have the labor intensive task of ensuring that all of the agencies approve of each multi-professional corporation that files for incorporation. Under the current law, Secretary of State staff may look to two provisions in the corporate code to determine whether the formation of the business entity is proper.

New Section 16 will be costly to professionals and will encourage excessive litigation. People interested in trying to form professional corporations of new combinations of professionals will have an expensive and lengthy task ahead of them. They run a potential gauntlet of agency-level professional politics. They are subject to the legal expense of asking for enabling regulations from each of the licensing agencies. In the event of an adverse determination by one of the licensing agencies, they will be faced with the legally expensive and time consuming task of asking for judicial review of the agency decisions. This uncertain legal climate will frustrate legitimate business interests from moving forward.

The Kansas Medical Society remains supportive of the concept of updating the Kansas Corporation Code. However, we believe that the proposal currently before the committee requires additional consideration. In particular, the bill contains provisions affecting professionals that are unduly confusing, costly and frustrating to the formation of

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legitimate business entities. For these reasons, we would respectfully ask this committee to refer the bill to an interim committee for further study. Thank you for the opportunity to testify today. I would be pleased to stand for questions.

Testimony
House Judiciary Committee
3:30 p.m. Wednesday, March 19, 2003
Room 313 South, State Capitol Building
Topeka, Kansas

Chairman O'Neal and members of the House Judiciary Committee, my name is Gary Reser. I am executive vice president of the Kansas Veterinary Medical Association (KVMA).

The KVMA is the professional association serving the Kansas veterinary medical profession through legislative, regulatory, education, communications, and public awareness programs.

The KVMA appears today in opposition to S.B. 28 and respectfully urges you to vote "no" on the bill.

The veterinary profession is one of 23 professions removed from statute in S.B. 28 and transferred, in the instance of veterinarians, to the Kansas Board of Veterinary Examiners, for the purpose of determining which professions may practice as a general corporation and which must form a professional association.

The overriding concern of the KVMA is that S.B. 28 could possibly open the door to non licensed individuals engaging in the corporate practice of veterinary medicine.

The KVMA was never part of any discussions during or subsequent to the drafting of the proposed legislation that became S.B. 28, nor was the Kansas Board of Veterinary Examiners.

Another concern of the KVMA in regard to S.B.28, and perhaps should be for the Committee, is that by moving the list of professions to their respective licensing boards, some or all legislative oversight may be lost.

There is no provision under Sec. 10 to require a professional corporation converting to a general corporation to notify the appropriate licensing board nor is there a requirement that shareholders of the converted professional corporation only be licensed professionals.

New Sec. 16 will potentially invite law suits from well financed corporate interests against Kansas licensing agencies that will be forced to defend the seven factors they must consider in permitting the corporate practice of veterinary medicine.

Please vote "no" on S.B. 28. Thank your for the opportunity to be here today.

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**OBSERVATIONS ON SENATE BILL 28 (2003) AS IT
WILL OR MAY AFFECT VETERINARY MEDICINE**

There are numerous problems with S.B. 28 (2003). The following are just some.

1. **Section 1(f)(1)**, p. 2, proposes to define a "qualified person" as "any natural person licensed to provide a professional service permitted by the articles of incorporation of the professional corporation"
 - a. This language is *too* loose.
 - b. Does this mean, for example, that if the articles of incorporation of a dental, chiropractic, physical therapy, optometry, *etc.* professional corporation states the corporation can and will perform dental, chiropractic, physical therapy, optometry services on animals—not just humans—that such is, therefore, legally permissible?
 - Even though, K.S.A. 47-816(g) and K.S.A. 47-817 requires a license to practice veterinary medicine to engage in such activities upon an animal?
2. **Section 3**, p. 4, proposes the following new language—"*A professional corporation may be incorporated to provide a professional services or to provide more than one professional service allowed by rules and regulations adopted by the licensing agency having jurisdiction over each professional service to be provided.*"
 - a. Again, this language is *too* loose.
 - b. Does this mean, for example, a non-veterinary licensing board can, by rule or regulation, permit an licensed individual under its jurisdiction to provide care and treatment for animals?
3. **Section 4**, p. 5, proposes to amend K.S.A. 2002 Supp. 17-2710 to read that "*Except as provided by the rules and regulations adopted by the licensing agencies, a professional corporation may be organized only for the purpose of rendering one type of professional service and service ancillary thereto and shall not engage in any other business, . . .*"
 - a. By this language, a non-veterinary licensing board could promulgate a regulation permitting licensed individuals under its jurisdiction—who are not licensed veterinarians—who treat and care for animals.
 - b. By the same token, the Board of Veterinary Examiners could promulgate a rule or regulation permitting veterinarians to perform some or various types of care or treatment upon humans.

4. **Section 7**, p. 7, proposes to amend K.S.A. 17-2713 to read "*Only a natural person who is also a qualified person as defined in this act shall serve as a director or officer, except the offices of secretary and treasurer shall not require a qualified person. If the number of shareholders is less fewer than three the number of directors may likewise be less fewer than three, and the officers may be president, treasurer and secretary only, which offices may be combined in one or more persons.*"

a. By this proposed language, a *non*-licensed individual could become a *shareholder* in a corporation that is engaged in the practice of a profession. The non-licensed individual would only be precluded from serving as a director or president of the corporation.

b. *See also* Section 10, *below*.

5. **Section 10**, p. 9, I agree with Charles T. Engel, of Cosgrove, Webb & Oman, Topeka, Kansas that:

"[t]here is no provision in Section 10 requiring the licensing agency to be informed of the conversion [from professional to general corporation], nor is there a provision that all shareholders of the converted professional corporation only be licensed professionals in the state of Kansas or organizations of licensed professionals in this state, such as limited liability partnerships, limited liability companies, limited partnerships, *etc.* Therefore, I believe § 10 needs to be amended to make it abundantly clear that even if a professional corporation converts to a general corporation, that all of the shareholders must continue to be licensed professionals, and that the respective licensing agencies must not only be informed of this conversion, but also consent." Letter of February 25, 2003, from Charles T. Engel, Cosgrove, Webb & Oman, to Gary Robbins, Executive Director, Kansas Optometric Association, p. 1.

6. **New Section 16(a)**, pp. 14 - 15, in proposing what factors a licensing authority should consider in determining whether to allow a profession to be practiced through a professional corporation, limited liability company, limited liability partnership, limited partnerships, *etc.*, setting, further opens the door to non-licensed individuals being shareholders and/or holding financial interests in a professional corporation and/or engaging in treatment and care of animals without having a license to practice veterinary medicine. For example, among the proposed factors a licensing board would be allowed to consider in drafting its rules and regulations are:

"(4) whether implementing corporate policy by persons who are not licensed to engage in the profession unduly interferes with independent professional judgment;

"(5) whether prohibiting or limiting the corporate practice of the profession is desirable in order to protect the public health, safety and welfare;. . ."

7. **S.B. 28 Invites Litigation:** If the above problems with S.B. 28 were not enough, I also agree with Charles T. Engel, of Cosgrove, Webb & Oman, Topeka, Kansas that New Section 16(a):

a. "...will invite corporate interests to force licensing agencies to defend their rules and regulations regarding the corporate practice of the profession, and will invite lawsuits when the licensing agency determines that that profession cannot be practiced by general corporations. Each licensing agency should just plan on having to defend its decision against well-financed corporate interests.

"If subsection (a) of New Section 16 is not bad enough, then subparagraph (b) finishes it. It essentially says that if the licensing agency does not permit the corporate practice of the profession, then the professional services may be performed in a professional corporation. Here again, the triggering action is a denial of the corporate practice of the profession." Letter of February 25, 2003, from Charles T. Engel, Cosgrove, Webb & Oman, to Gary Robbins, Executive Director, Kansas Optometric Association, pp. 1 - 2.

b. If S.B. 28 is to be Kansas' new law governing corporate practice of professions, then why should a licensing agency have to look at "whether prior decisions [in other words, old law] by the Kansas appellate courts prohibit or limit the corporate practice of the profession"? New Section 16(a)(7), p. 15.

8. **Licensing Agency vs. Licensing Agency:** The potential for litigation that could result from S.B. 28 could also include two licensing agencies suing each other about whether rules or regulations promulgated by one licensing board contravene the practice act and/or regulations of the other. As many state licensing boards are represented by the Attorney General's Office, the A.G. may be conflicted out from representing both licensing boards in such litigation. The state will then have to bear the expense of paying for private attorneys to represent each of the competing boards during the lawsuit.

9. **Conclusion:** S.B. 28 (2003) uses too loose language throughout giving rise to many questions about what would or would not be permitted if it became law.

S.B. 28's considerable grant of broad rule making powers to licensing agencies opens the door for one agency to permitting licensed individuals under that agency's authority, to start treating and caring for animals. Such would clearly not be in Kansas' public health, safety and welfare interests as animal physiology, anatomy, diseases, clinical signs, treatments, drugs, biologics, etc. are not the same as for humans and/or animals respond differently to from humans.

Finally, S.B. 28 opens the door to non-licensed individuals becoming shareholders in corporations that are engaged in the practice of a profession. As such individuals have a financial stake in the business of the practice, they may adversely affect the licensed individual's legal and ethical obligation to make a *bona fide* professional judgment as to a patient's care and treatment.

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BEFORE THE HOUSE JUDICIARY COMMITTEE

Testimony of Kansas Optometric Association Regarding S.B. 28

March 19, 2003

Mr. Chairman and Members of the Committee:

Thank you for this opportunity to discuss provisions of S.B. 28. I am Gary Robbins, executive director of the Kansas Optometric Association. While we have concerns regarding this legislation, our overriding concern is inclusion in the professional corporation statute sections dealing with the general corporate practice of the professions. Mixing those concepts in one bill clearly opens the door for the corporate practice of the professions.

Section 10 permits a professional corporation, which previously received the blessing of its licensing agency to operate as a professional association, to subsequently convert its organizational structure to a general corporation. There is no provision in Section 10 requiring the licensing agency to be informed of the conversion, nor is there a provision that requires all of the shareholders of the converted professional corporation to be licensed professionals in the state of Kansas or organizations of licensed professionals in this state, such as limited liability partnerships, limited liability companies, limited partnerships, etc. Therefore, we believe Section 10 needs to be amended to make it abundantly clear that even if a professional corporation converts to a general corporation, all of its shareholders must continue to be licensed professionals, and that the respective licensing agencies must not only be informed of, but also consent to, this conversion.

There is little in New Section 16 that the Kansas Optometric Association can support. Subsection(a) requires each licensing agency to adopt rules and regulations to determine whether and under what circumstances professional services regulated by that agency may be performed through a general corporation. The subsection enumerates seven factors which each licensing agency must consider before determining whether it will permit the corporate practice of the profession. This subsection will invite corporate interests to force licensing agencies to defend their rules and regulations regarding the corporate practice of the profession, and will invite lawsuits when the licensing agency determines that that profession cannot be practiced by general corporations. Each licensing agency should just plan on having to defend its decision in court against well-financed corporate interests, and the decision will be made by the courts, not

by the legislature. That circumstance will be costly to the professions as license fees will be raised simply to cover legal expenses, and it will not advance the professional climate in Kansas.

Kansas optometrists find Section 15 problematic. As drafted, an optometrist can practice optometry only as a professional corporation if the Kansas State Board of Examiners in Optometry first concludes that it cannot be practiced through a general corporation under New Section 16(a). If the optometrist wants to practice with an ophthalmologist, the KSBEO must also have rules and regulations permitting those two professions to practice together as a professional corporation. Fortunately a "grandfather" clause permits the current professional corporations to continue as established. However, if the Kansas State Board of Examiners in Optometry (KSBEO) or the Kansas Board of Healing Arts (KBHA) should determine that optometrists and ophthalmologists or other MDs cannot practice together in professional corporations, then other issues like Medicare and Medicaid reimbursement will arise.

As drafted this bill stands as a measure that will not advance the practice of the professions in Kansas. Rather, it will cause unnecessary distraction from what our members love to do, i.e., provide essential health care through the practice of optometry. It will needlessly increase costs, foster expensive litigation and cause confusion because each licensing board would need to be consulted to learn which combination of professions can practice together. The Kansas Optometric Association respectfully requests that the bill not be passed.