

MINUTES OF THE SENATE JUDICIARY COMMITTEE.

The meeting was called to order by Chairman John Vratil at 9:30 a.m. on February 20, 2003, in Room 123-S of the Capitol.

All members were present.

Committee staff present: Mike Heim, Kansas Legislative Research Department
Lisa Montgomery, Office of the Revisor of Statutes
Dee Woodson, Committee Secretary

Conferees appearing before the committee:

Tom Whitaker, Kansas Motor Carriers Association
Marc Goodman, Lyon County Attorney
Bill Kennedy, Riley County Attorney
Ann Swegle, Deputy District Attorney-Administration, Sedgwick County (written only)
Ernest H. Richardson, Kiowa County Attorney (written only)
Judy A. Moler, General Counsel/Legislative Services Director, Kansas Association of Counties (written only)

Others attending: see attached list

SB 93 - Traffic diversion agreements

Chairman Vratil opened the hearing on **SB 93**. Conferee Whitaker testified as neutral on behalf of the Kansas Motor Carriers Association. He explained that **SB 93** would standardize requirements for traffic diversion agreements, and that the Federal Motor Carrier Safety Administration issued a final rule that prohibited diversion agreements for disqualifying traffic convictions under the uniform commercial drivers' license act in September 2002. (Attachment 1)

Marc Goodman, Lyon County Attorney, spoke as an opponent of **SB 93**, and provided the Committee with a handout showing items purchased from diversion funds for 2001 through 2003. In addition, he said these funds were used for staff professional training and office operating supplies and equipment. He stated that the diversion funds should be left with the county in order to reduce the need for budget increase requests, and to provide needed support for law enforcement and the community. He concluded that the bill as written, where diversion fees must equal fines, is arbitrary towards lower income persons. (Attachment 2)

Committee discussion followed. Chairman Vratil stated that most counties are following the law and counties will be given a year to correct those not in compliance. He said a post audit may be requested as a follow-up on this subject after a year to make sure the law is being complied with. He stated that it was his intention to not work **SB 93** this year and hold it over till possibly next year in order to give the County and District Attorneys a year to deal with this situation themselves.

Bill Kennedy, Riley County Attorney, testified in opposition of the proposed legislation. He said he thought the amended bill was too restrictive and gave examples of same.

Ann Swegle, Deputy District Attorney-Administration, submitted written testimony on behalf of the District Attorney, Eighteenth Judicial District, Sedgwick County, in opposition to **SB 93**. (Attachment 3)

Ernest Richardson, Kiowa County Attorney, submitted written testimony in opposition to the proposed bill. (Attachment 4)

Judy Moler submitted written testimony in opposition to **SB 93** on behalf of the Kansas Association of Counties. (Attachment 5)

Chairman Vratil closed the hearing on **SB 93**.

CONTINUATION SHEET

MINUTES OF THE SENATE JUDICIARY COMMITTEE on February 20, 2003 in Room 123-S of the Capitol.

SB 187 - Allows Kansas City, Kansas community college forensic laboratory to charge fees for forensic services

Chairman Vratil opened the hearing on **SB 187**. Christopher Schneider, Assistant Wyandotte County District Attorney, spoke in favor of **SB 187** concerning fees to be taxed against criminal defendants who plead or are found guilty in cases where forensic testing is done by the forensic science laboratory at Kansas City Kansas Community College (KCKCC). He said that in December, most testing was again transferred to the KBI laboratory because the use of the KCKCC laboratory was halted due to the cut of demand transfers to local government. He stated that this bill gives the criminal justice system in Wyandotte Count a means of recovering its cost of providing the drug testing necessary to prosecuting drug offenses. (Attachment 6)

Committee discussion followed concerning different uses of the two forensic laboratories located at the KCKCC wherein one is operated by the KBI. The Chairman stated that a balloon amendment will be requested for **SB 187** on the fund usage.

Chairman Vratil closed the hearing on **SB 187**.

Final Action on:

SB 61 - Enacting the uniform athlete agents act

Chairman Vratil reviewed **SB 61**, and said it would have a positive fiscal impact of approximately \$5,000 per year.

Committee discussion concerned the reduction of the cost for registration fee.

Senator Oleen moved to amend SB 61 by setting the registration fee at \$500 annually, seconded by Senator Allen, and the motion carried.

The Chairman directed the Committee's attention to two amendments suggested by the Kansas Trial Lawyers Association, and he explained the amendments. (Attachment 7) The first amendment is on page 8 of the bill, new Section 15, line 35, in which they request the striking of the words "and reasonable attorney fees". He said without amendment the bill allows the judge to have discretion to award attorney fees. No motion was made covering the first suggested amendment by KTLA.

The Chairman explained the second amendment on page 9, lines 5 and 6, where it says any liability of the athlete agent or student-athlete "is several not joint". KTLA requested that the phrase "is several not joint" be stricken because it does not fit the Kansas comparative negligence law, and be replaced with the phrase "shall be subject to K.S.A. 60-258a". He clarified what this change in the terminology meant in conjunction with the referenced statute.

After brief discussion and questions, Senator Oleen moved to amend SB 61 by striking the phrase "is several not joint" and replace it with the phrase "shall be subject to K.S.A. 60-258a". The motion was seconded by Senator Gilstrap, and the motion carried.

Senator Donovan moved to amend the bill and pass it out favorably, seconded by Senator Goodwin, and the motion carried.

The meeting was adjourned at 10:30 a.m. The next scheduled meeting is February 21, 2003.

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: Thurs, Feb. 20, 2003

NAME	REPRESENTING
KEITH R LANDIS	CHRISTIAN SCIENCE COMMITTEE DU PUBLICATION FOR KANSAS
Sheila Walker	KDOR-DMV
TOM Whittaker	KMCA
Debi Hatfield	KDHE
Toby Dougherty	Sen Umberger
Mary Beede Kidd	
Judy Moler	CAC
Amy Bertrand	Judicial Branch
Matthew Pinsky	Sen. Adkins
Adam Gasper	Sen. Adkins
Jan Johnson	KDOC
Donna Doolin	SRS/AAPS
Roger Werheltz	KDOC
Tom Burke	KCKCC
Trista Curzydlo	K8 Bar Assoc.
Barb Coxart	KTLA



KANSAS MOTOR CARRIERS ASSOCIATION

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Executive Director

**Legislative Testimony
by the
Kansas Motor Carriers Association
before the
Senate Judiciary Committee
Senator John Vratil, Chairman
Monday, February 17, 2003**

**MR. CHAIRMAN AND MEMBERS OF THE
SENATE JUDICIARY COMMITTEE:**

I am Tom Whitaker, executive director of the Kansas Motor Carriers Association. I appear here this morning representing our 1,250 member firms and the highway transportation industry to provide additional information relative to Senate No. 93.

Senate Bill No. 93 would standardize requirements for traffic diversion agreements. The Committee should be apprised that on September 27, 2002, the Federal Motor Carrier Safety Administration issued a final rule that prohibited diversion agreements for disqualifying traffic convictions under the uniform commercial drivers' license act. The prohibition on diversion agreements applies to convictions received by the holders of commercial drivers' licenses whether the violation takes place in a commercial or non-commercial motor vehicle.

Legislation to incorporate the federally required provision is contained in House Bill No. 2220, currently scheduled for hearing before the House Transportation Committee on Wednesday, February 19. Language contained in New Section 2 of the bill reads: "(a) A driver may not enter into a diversion agreement in lieu of further criminal proceedings that would prevent such driver's conviction of any violation, in any type of motor vehicle, of a state or local traffic control law, except a parking violation, from appearing on the driver's record, whether the driver was convicted for an offense committed in the state where the driver is licensed or another state."

KMCA believes an amendment to SB 93 to address the CDL issue would be necessary. We thank you for the opportunity to appear before you this morning, and would be pleased to respond to any questions you may have.

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Attachment 1-1

**Summary of Testimony
Opposition to S.B. 93
Marc Goodman, Lyon County Attorney**

- I. Diversion funds are an economic benefit to the Lyon County community, law enforcement, and the Lyon County Attorney's Office. For example:

Date Purchased	Purchased for:	Item	Amount
Diversion Funds – 2001			
06/13/01	KHP/KBI	Handheld radios	\$02,025.00
09/05/01	KHP	Radar detector detectors	\$04,599.00
09/20/01	Lyon County Crime Stoppers	Donation	\$00,500.00
10/18/01	Sheriff's Office	Radars & antennas	\$05,640.00
12/18/01	Americus Police Department	Body armour	\$00,421.97
12/18/01	SOS Child Advocacy Center	Video equipment	\$06,000.00
12/19/01	Sheriff's Office	Partial payment towards purchase of 2001 Ford Crown Victoria	\$11,591.00
12/19/01	Sheriff's Office	Mobile radio	\$01,705.00
Diversion Funds – 2002			
01/11/02	KHP	Handheld radios	\$02,031.50
01/25/02	ESU Police Department	Travel chargers for handheld radios	\$00,271.50
02/15/02	Child Advocacy Center	Video equipment	\$04,818.85
02/15/02	KHP – Turnpike	Handheld radios	\$04,065.00
04/23/02	Emporians for Drug Awareness	Donation	\$01,000.00
04/23/02	DARE	Donation	\$01,000.00
04/23/02	Eddy Eagle Program	Donation	\$01,000.00
06/24/02	Police Department	Contribution towards installation of the Spillman system	\$35,000.00
07/27/02	Sheriff's Office	Projector	\$02,599.00
07/27/02	Newman Hospital	Contribution towards purchase of digital culposcope	\$10,000.00
09/09/02	ESU Police Department	Body Armor	\$06,771.95
Diversion Funds – 2003			
01/03/03	KHP	Lidars	\$07,190.00
01/03/03	Sheriff's Office	2002 Dodge Intrepid	\$13,064.50

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In addition, these funds were used for staff professional training and office operating supplies and equipment.

- II. The bill, as written, where diversion fees must equal fines, is arbitrary towards lower income persons. The Lyon County Attorney's Office's policy allows for waiver of diversion fees.
- III. The Lyon County Attorney's Office currently, through the Clerk of the District Court, remits all fines and costs to the proper recipient.
- IV. Diversion Funds should be left with the county in order to reduce the need for budget increase requests and to provide needed support for law enforcement and the community.



Office of the District Attorney
Eighteenth Judicial District of Kansas
at the Sedgwick County Courthouse
535 N. Main
Wichita, Kansas 67203

Nola Foulston
District Attorney

Ann Swegle
*Deputy District Attorney
Administration*

Thursday, February 20, 2003

TESTIMONY RE: SB 93
SUBMITTED BY ANN SWEGLE, DEPUTY DISTRICT ATTORNEY
ON BEHALF OF NOLA TEDESCO FOULSTON, DISTRICT ATTORNEY
EIGHTEENTH JUDICIAL DISTRICT

Chairman Vratil and Members of the Senate Judiciary Committee:

Senate Bill 93 seeks to amend statutes relating to diversion in criminal cases. The bill would add traffic offenses to the list of diversion eligible offenses authorized under K.S.A. 22-2906 *et seq.*, restrict eligibility for traffic diversion to those offenders who have not been convicted or diverted for a traffic offense within the preceding three years and mandate the payments of certain costs. The bill would also limit the allowable diversion application fee to \$100. The Office of the District Attorney of the Eighteenth Judicial District opposes those eligibility restrictions, certain mandatory costs and a cap on diversion application fees.

Diversion is a privilege granted to certain offenders when doing so serves the interests of justice, the defendant and the community. Diversion programs serve the public interest by allowing qualified individuals to be held accountable for their offenses but be spared the lasting undesirable consequences of a conviction if they successfully complete their diversion contracts and have their charges dismissed. They assist in the conservation of judicial resources by diverting cases from court dockets. Prosecutors are allowed to create and implement programs that meet the needs of their communities and are required to develop written program policies and guidelines for distribution to all defendants.

K.S.A. 22-2908 sets out certain minimum factors to be considered by a prosecutor in determining whether diversion in any particular case would be in the interests of justice and of benefit to the defendant and the community. Included is

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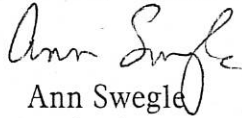
whether the defendant is a first-time offender or has previously participated in a diversion program. This factor is sufficient to help guide prosecutors' determinations as to the appropriateness of diversion in light of past criminal or traffic offense history. Arbitrary timelines may well prohibit otherwise suitable candidates from receiving the benefits of diversion with no overriding benefit to the community. Prosecutors should be allowed flexibility in weighing all relevant factors to determine what is best for their own communities using the framework already established by the Kansas Legislature.

Generally, current law allows the assessment of restitution, court costs and diversion costs in non-DUI diversions. This enables victims to be compensated, the courts to receive funds for the initial handling of the case and counties to be compensated for specific expenses associated with diversion services. The diversion programs run by this office require restitution where appropriate, collect court costs that are paid directly to the district court and diversion fees or costs. Senate Bill 93 would require the inclusion of court costs in all diversion agreements and a diversion fee not to exceed the amount of the fine authorized for the underlying offense in all traffic diversion agreements. This fee would be deposited, as are fines, into the state general fund. Such a fee would be permitted in other diversion agreements, but not required. In addition, the bill caps the permissible diversion application fee at \$100 and allows for diversion costs. Both payments would go into the county general fund.

Many generally law-abiding Kansans find themselves, sometimes unknowingly, in violation of our traffic laws by virtue of the well-known "lead foot" syndrome. These citizens derive great benefit from traffic diversion programs that allow them to keep a clean driving record and avoid increased insurance premiums that frequently result from convictions of moving violations. They are pleased that the justice system works for them in a manner that deals with them fairly and allows them to escape financially harmful collateral consequences. While the promise of having a traffic offense case dismissed is an inducement to seek diversion, the power of such an inducement is clearly lessened if high costs are associated with the programs. Faced with mandatory court costs, a required fee not to exceed the standard fine, and necessary diversion costs and application fees, it is easy to understand why a citizen would opt to go to trial rather than on diversion when, if found guilty, they would likely pay just the court costs and standard fine; or, alternatively, plead guilty with the expectation a portion of the fine would be remitted. In essence, if enacted as written, Senate Bill 93 may well price traffic diversion programs out of existence, increase costs to the courts and effectively place a public benefit out of the reach of deserving citizens. While the proposed cap on application fees may help hold costs in line, it may preclude the operation of programs whose associated expenses exceed the cap. Application fees should not be limited to an arbitrary amount. Program expenses should dictate the amount of fees.

Based on the foregoing, we urge you to reject Senate Bill 93 as currently written.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Ann Swegle".

Ann Swegle
Deputy District Attorney
Eighteenth Judicial District

ERNEST H. RICHARDSON
KIOWA COUNTY ATTORNEY

211 EAST FLORIDA
GREENSBURG, KANSAS 67054

PHONE: (620) 723-2721
FAX: (620) 723-3481

February 19, 2003

VIA FAX ONLY

Senator John Vratil
Senate Judiciary Committee
Topeka, Kansas

I am writing in regard to Senate Bill 93 and proposed modifications to the statutes governing diversion agreements and disposition of diversion fees. I am opposed to any modifications to the diversion statutes that are proposed in that bill because of the negative impact it will have on county attorney offices and I urge you to oppose them as well.

By far, most criminal or traffic cases in most counties are disposed of by plea agreements or diversions without the necessity of a trial or other contested hearings - at a considerable savings to the taxpayer. Contested hearings are expensive because they are frequently lengthy, clog the court system, require overtime pay for officers, take officers off the street to come to court, require payment of witness fees, juror fees, additional court-appointed attorney fees, and lost time and wages of and inconvenience to civilian witnesses and victims.

There are many factors too numerous to enumerate here that are considered in evaluating the appropriateness of pleas and convictions or diversions but they include the gravity of the offense, the record of the offender, and the deterrent effect of a well drafted diversion agreement. In Kiowa County, we have approximately 2,000 traffic cases a year in addition to the approximately 125-150 criminal cases annually. If every case was fully contested at every level, our system here would shut down.

Very few criminal cases are diverted but a good number of traffic infraction cases are diverted because of concerns about costs, clogged courts, and staff time issues. As a part-time county attorney (as most county attorneys are in our area), diversion agreements are a necessary and valuable tool in managing caseloads and providing a means of funding staff to administer the program. Without diversions as a readily available tool for disposing of cases, we will have more cases that are contested as defendants seek to avoid convictions and the collateral consequences of convictions.

In my office, I have two support staff consisting of one full-time secretary that is on the county payroll as an ordinary county employee and one full-time secretary that is our diversion

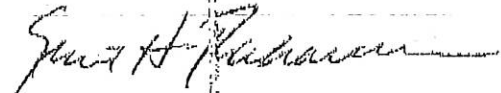
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officer and is paid through the county with funds from diversion fees. With our case load, we cannot function efficiently with only one secretary and under SB 93, the diversion fees would no longer be able to be used as they are now to fund the second position. I fear that this proposal is an effort by the State to help balance its budget on the backs of counties and I urge you to oppose it.

Thank you for your time. I wish you well as you make many difficult decisions in the days ahead. If you should have any questions, please feel free to contact me.

Sincerely,



Ernest H. Richardson



KANSAS
ASSOCIATION OF
COUNTIES

WRITTEN TESTIMONY
Before the Senate Judiciary Committee
SB 93

February 11, 2003

By Judy A. Moler, General Counsel/Legislative Services Director

Thank you Chairman Vratil and Members of the Senate Judiciary Committee allowing the Kansas Association of Counties to provide written testimony on SB 93.

The Kansas Association of Counties is opposed to the portion of the bill which caps diversion fees charged by the county/district attorney. This is taking away the ability of the locally elected official in each individual care before him/her. In this case, the district/county attorney decision would be supplanted the decision with one made by the legislature.

The Kansas Association of Counties opposes the passage of SB 93.

The Kansas Association of Counties, an instrumentality of member counties under K.S.A. 19-2690, provides legislative representation, educational and technical services and a wide range of informational services to its member counties. Inquiries concerning this testimony should be directed to Randy Allen or Judy Moler by calling (785) 272-2585.

6206 SW 9th Terrace
Topeka, KS 66615
785•272•2585
Fax 785•272•3585
email kac@ink.org

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Remarks of Christopher L. Schneider, Assistant Wyandotte
County District Attorney, Concerning S.B. 187

Before the Committee on the Judiciary of the Kansas Senate
February 20, 2003

Mr. Chairman and members of the committee:

I appear today to urge that you send to the floor and recommend for approval S.B. 187.

S.B. 187 would amend K.S.A. 28-176 by allowing the \$400.00 laboratory fee to be taxed against criminal defendants who plead or are found guilty in cases where forensic testing is done by the forensic science laboratory at Kansas City Kansas Community College.

K.S.A. 28-176 originally authorized the fee in cases where the K.B.I. laboratories provided testing. Last year, the legislature amended the statute to raise the fee and allow the it to be assessed in cases where testing was performed by the Johnson County Crime Laboratory and the Sedgwick County Regional Forensic Center.

Over the years, Wyandotte County law enforcement, particularly my office and the Kansas City Kansas Police Department, have endeavored to reduce the number of drug cases sent to the K.B.I. Laboratory from Wyandotte County. The last two years, we have prosecuted approximately 400 drug cases at the district court level, in addition to numerous cases in municipal court. Given that the K.B.I. Lab must service 102 other counties, the backlog has extended up to three months on occasion. From the early '90s until 1998, the laboratory at Bethany Medical Center did drug testing for us. Federal Byrne grant money seeded this project. When Bethany began cutting back its operations (eventually the hospital closed), we reverted to using the K.B.I. Laboratory. They have performed admirably for us. We try to send only the items for testing that we actually need to them, and they go out of their way to make sure we get results in a timely manner. The major problem is the availability of the chemists to testify at trial on short notice.

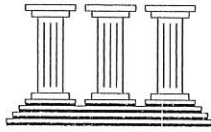
Last year, the forensic science department of Kansas City Kansas Community College approached us about doing drug testing for us as a means of enhancing their program. A contract, or interlocal agreement, for drug testing services was reached between the Unified Government and the Board of Trustees of the community college. The Unified Government identified funding to make this happen. In March, the junior college began testing for our cases. This arrangement solved most turnaround and chemist availability problems for us. In December, most testing was again transferred to the K.B.I. laboratory.

The reason for halting use of the KCKCC lab was simple--Governor Graves, for understandable reasons, cut demand transfers to local governments. The approximately \$5.2

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million resulting shortfall in the local budget for FY2003 and FY2004 caused this service to be one of those cut way back.

The legislation before you would give the criminal justice system in Wyandotte County a means of recovering its costs of providing the drug testing necessary in prosecuting drug offenses.



KANSAS TRIAL LAWYERS ASSOCIATION

Lawyers Representing Consumers

*Proposed
Amends*

To: Senate Judiciary Committee

From: Gary D. White, Jr., Vice President of Legislation
Kansas Trial Lawyers Association

Re: 2003 SB 61

Date: February 13, 2003

Chairman Vratil and members of the Senate Judiciary Committee. Thank you for the opportunity to submit comments regarding SB 61. My name is Gary White and I currently serve as Vice President of Legislation for the Kansas Trial Lawyers Association.

KTLA has no objection to the substantive provisions of SB 61. We recognize the concerns of educational institutions in this state and the abuses that have occurred that the institutions feel necessitate this legislation. We are concerned, however, that the remedial provisions of this legislation violate longstanding principles of American law.

Specifically, Section 15(a) allows an educational institution to pursue a cause of action against an athlete agent or former student-athlete for damages. This section goes on to provide that "[i]n an action under this section, the court may award to the prevailing party costs and reasonable attorney fees." This attorney fee provision is known as the "English Rule" or "Loser Pay Rule" and has been rejected by American courts since a decision by the United States Supreme Court in 1796.

Historically, American courts have rejected the English rule in favor of the "American Rule" in which both parties are responsible for their own attorney fees. In the 1796 decision in *Arcambel v. Wiseman*, the United States Supreme Court rejected the English Rule stating that "the general practice in the United States is in opposition to the [English rule]." In 1967, in *Fleischmann Distilling Corp. v. Maier Brewing Co.*, Chief Justice Warren wrote:

In support of the American rule, it has been argued that since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit . . .

The American rule is a longstanding principle of American law and we respectfully request that the phrase "and reasonable attorney fees" be stricken from Section 15(a).

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Terry Humphrey, Executive Director

As model legislation, SB 61 does not address Kansas law or attempt to conform to existing Kansas law. For instance, Section 15(d) provides that the liability of the athlete agent or student-athlete "is *several not joint*." This phrase is apparently designed to reject the common law principles of joint and several liability so that each defendant is responsible for the damages caused by their own actions. Kansas calls this principle "comparative fault" and has codified the principle in K.S.A. 60-258a. Rather than use terminology that is not otherwise utilized in Kansas statutes, we request that the phrase "is several not joint" be stricken and replaced with the phrase "shall be subject to K.S.A. 60-258a."

Neither of the concerns that we have raised today effect the substantive provisions of SB 61 or an educational institutions ability to make a damage claim against an athlete agent or former student-athlete. Rather, the amendments merely conform the remedial provisions of the bill to current Kansas law.

Thank you again for the opportunity to express our concerns about SB 61. We have attached a balloon with our proposed amendments, which we request you approve.