

MINUTES OF THE HOUSE HEALTH AND HUMAN SERVICES COMMITTEE

The meeting was called to order by Chairman Jim Morrison at 1:33 p.m. on February 23, 2004, in Room 526-S of the Capitol.

All members were present except Representative McLeland, who was excused.

Committee staff present:

Dr. William Wolff, Legislative Research Department
Renaë Jefferies, Office of Revisor of Statutes
Gary Deeter, Secretary

Conferees appearing before the committee:

Kevin Fowler, Kansas Health Care Association
Frank Allison, Kansas Trial Lawyers Association
Jerry Wells, Director of Governmental Affairs, Kansas Insurance Department

Others attending:

See Attached List.

The Chair opened the hearing on **HB 2820**, an act concerning the Kansas Board of Healing Arts, and welcomed Lawrence Buening, Executive Director, Kansas Board of Healing Arts, who stated that the Board now regulates 13 professions, and the bill makes the statutory language consistent among the various professions. (Attachment 1)

A fiscal note from the Division of the Budget was included. (Attachment 2)

The Chair closed the hearing on **HB 2820**. A motion was made and seconded to recommend the bill favorable for passage. The motion passed

Representative Kirk opened the hearing for **HB 2867**, a bill establishing a medical review panel for adult care homes.

Kevin Fowler, Kansas Health Care Association, spoke as a proponent for the bill (Attachment 3) He said that the statutes do not include adult care homes under the definition of a health-care provider, which means that the medical malpractice review process is not applicable for care homes; therefore, the bill establishes a simple dispute resolution mechanism to precede any court action. He stated that a claimant may submit a request to the Kansas Department of Insurance, who will select a panel to review the claim and make specified determinations, thus in many cases obviating the need for a lawsuit. He noted that a claimant was free to pursue the claim in court, but the bill made it mandatory to first submit the claim to the medical review panel, stating that a mediation panel would help defuse the emotional components often present in adult care home claims of abuse or injury, a third-party recommendation being an appropriate way to bring about informal resolution.

CONTINUATION SHEET

MINUTES OF THE HOUSE HEALTH AND HUMAN SERVICES COMMITTEE at 1:30 p.m. on February 23, 2004, in Room 526-S of the Capitol.

Answering questions, Mr. Fowler said the proposed care home medical review panel is different from a medical malpractice review panel, in that the former panel is mandatory, the latter is optional. He said the process is similar in that both panels provide independent, third-party findings that assess economic and non-economic components and make non-binding recommendations. He compared the proposed panel to domestic dispute mediation, a process which is helpful in defusing the emotional content accompanying the dispute. He replied that there is no time element for the panel; he estimated a panel finding to take between 90 and 180 days, noting that the statute of limitations does not begin until after the panel completes its work, commenting that the findings of the panel are admissible in court except for any recommended settlement amount. He stated that the bill was requested by members of the long-term care industry to slow the trend of higher liability insurance premiums and minimize the likelihood of large judgments against care homes, admitting that to date there have been no large claims and punitive damages against Kansas care homes. A Committee member noted that Kansas has a \$250,000 cap on such judgments.

Frank Allison, Kansas Trial Lawyers Association, spoke as an opponent to the bill. (Attachment 4) He began by responding to questions directed to the previous conferee, saying that the medical malpractice review panel is unworkable, is seldom used, is disliked by physicians, and results in cursory conclusions. He then reviewed the constitutional objections to the bill: that it violates due process, violates equal protection under the law (protects one class, but dilutes the rights of another class), violates the right to trial by jury, and violates access to the courts. He questioned whether a panel made up of medical staff could determine damages accurately, and he said the panel's immunity from deposition or testimony in a later court case denies a plaintiff the right of cross-examination of a witness. He questioned the validity of an insurance liability crisis, noting that the bill diverts attention from the real cause of rising insurance costs—the mismanagement of the insurance industry.

Answering questions, Mr. Allison said that nationally, ½ of 1% of claims filed are for medical negligence, and only 10% of that .5% go to trial. He defended contingency fees, saying that without such an arrangement, poor clients would never be able to afford a lawyer.

Jerry Wells, Director of Governmental Affairs, Kansas Insurance Department, said the Department would work to fulfill the provisions of the bill if it passes. (Attachment 5)

The Division of the Budget provided a fiscal note. (Attachment 6)

Not appearing but submitting written testimony were:

- Debra Zehr, Vice President, Kansas Association of Homes and Services for the Aging, a proponent; (Attachment 7)
- Monte Coffman, Executive Director, Windsor Place, a proponent; (Attachment 8)
- Paul Wurth, Director, Gatewood Care Center, a proponent; (Attachment 9) and
- Deanne Bacco, Kansas Advocates for Better Care, an opponent; (Attachment 10)

CONTINUATION SHEET

MINUTES OF THE HOUSE HEALTH AND HUMAN SERVICES COMMITTEE at 1:30 p.m. on February 23, 2004, in Room 526-S of the Capitol.

- Further documentation was later provided by conferee Frank Allison. (Attachment 11)

The Chair closed the hearing on **HB 2867**.

Chairman Morrison resumed discussion on the proposed amendment to **HB 2306** from a previous meeting.

Representative Patterson reminded the Committee that even without the stipulation of the amendment, the judge, through a *motion in limine*, already has the discretion to include or exclude relevant information from inspection reports. Another member commented that inspection surveys appear to be inconsistent, and the provisions of the bill might be helpful.

Representative Kirk explained her amendment, saying nothing shall prevent the judge from including relevant excerpts from any inspection report; it simply excludes the general and indiscriminate use of items in reports.

The question was called. The amendment passed.

The vote to recommend **HB 2306** passed with one dissenting vote.

The Chair informed members that the staff briefing on **HB 2735** and **HB 2760** would be placed in the Liberty Document Management System for their perusal in preparation for the next day's meeting.

The meeting was adjourned at 3:01 p.m.

**HOUSE HEALTH AND HUMAN SERVICES COMMITTEE
GUEST LIST**

DATE: FEBRUARY 23 2004

| NAME | REPRESENTING |
|-------------------------|---------------------|
| LARRY BUENING | BO OF HEALING ARTS. |
| Tom Brown | KPSC |
| Lindy Luxem | KHCA |
| DEBORAH STERN | KMA |
| Stephanie Dudley (Page) | Page |
| Linde Allison | Page |
| Stephanie Morrow | Page |
| Molly Allison | Page |
| Barbara Gibson | KDHE |
| Kevin Fowler | KHCA |
| Chip Wheeler | Osteopathic Assn |
| TJan Murray | Federico Consulting |
| Kevin Bogan | Hem. Law firm |
| Heidiway Campbell | Intem |
| Tom Brown | KPSC |
| FRANK ALLISON | KILA |
| Barb Corant | KTRA |
| Twila Drybread | Div. of Budget |
| | |

KANSAS BOARD OF HEALING ARTS

LAWRENCE T. BUENING, JR.
EXECUTIVE DIRECTOR



KATHLEEN SEBELIUS, GOVERNOR

MEMO

TO: House Committee on Health and Human Services

FROM: Lawrence T. Buening, Jr.
Executive Director

DATE: February 17, 2004

RE: HOUSE BILL NO. 2820

Thank you for the opportunity to provide testimony introduced at the request of the Board and amends 10 of the health care professions the Board regulates. statutes that are being amended, the amendments pr and are intended to make the statutes for these various professions more similar and more easily administered by the Board.

in support of House Bill No. 2820. This bill was statutes administered by the Board relating to six While the bill is sizeable due to the length of the oposed by this bill are primarily technical in nature

Section 1 amends K.S.A. 65-2005 which is part of th licensed by the Board that are regulated under statutes th its enactment in 1957, the Healing Arts Act has only a chiropractors. By Executive Reorganization Order the State Podiatry Board of Examiners was abolishe to the Board. Legislation for the licensure and re Healing Arts Act and is located at K.S.A. 65-2001 identical to that in the Healing Arts Act at K. podiatrist's license for non-renewal if the licensee receiving two notices. Currently, the Kansas Ad opportunity for hearing after mailing two notices.

e Podiatry Act. Podiatrists are the only doctors at are not part of the H ealing Arts Act. Since plied to medical doctors, osteopathic doctors and No. 8 issued by the Governor on February 10, 1975, d and the powers, duties and functions transferred gulation of podiatrists has been separate from the et seq . The language inserted at Page 1, Line 42 is S.A. 65-2809(c) and allows the Board to cancel a has failed to meet the renewal requirements after ministrative Procedure Act requires notice and an

MEMBERS OF THE BOARD
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235 S. Topeka Boulevard, Topeka, Kansas 66603-3068
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Attachment 1
HHS 2-23-04

Section 1 further amends K.S.A. 65-2005 on Page 2 by authorizing the issuance of a postgraduate permit. K.S.A. 65-2003(a) has required postgraduate training as a condition of licensure since July 1, 1988. The current language makes no differentiation between a temporary permit issued to those who have met all the requirements for licensure and are awaiting final Board action from those who obtain a temporary permit to engage in an approved postgraduate training program in Kansas.

New subsection (i) and (j) create the designations of inactive license and federally active license for those individuals who are not engaged in the active practice of podiatry in Kansas and who are employed by the United States government. The language in these two subsections is almost identical to those license designations created for healing arts licensees under K.S.A. 65-2809(g) and (h). An individual holding an inactive license designation will not be allowed to engage in any practice in Kansas and will not be required to maintain professional liability insurance or obtain continuing education. Persons with a federally active license designation must meet all the requirements imposed upon those with a license to actively practice, with the exception of professional liability insurance since their coverage is provided by the Federal Tort Claims Act.

New subsection (l) sets forth the process for reinstatement of a revoked license with language almost identical to that located in the Healing Arts Act at K.S.A. 65-2844.

Section 2 of the bill amends K.S.A. 65-2012 relating to the statutory maximums of fees that can be established by the Board. This subsection makes provision for the newly-created license designations of inactive and federally active and establishes the statutory maximums of fees for podiatrists identical with that in the Healing Arts Act at K.S.A. 65-2852.

Section 3 of the bill substantially amends K.S.A. 65-28a03 relating to physician assistants. The current language which is stricken on page 6 creates separate grounds for removal from the registry of those physician assistants who may engage in "private" practice from the grounds for revoking a license set forth in K.S.A. 65-28a05. The new language beginning at Page 6, Line 43 simplifies the process by which a physician assistant may engage in active practice. Changes made on Page 7, Lines 17, 24-28, 31 and 35 make the renewal process similar to that for other professions regulated by the Board. New Section (e) and (f) create inactive and federally active license designations. Current language does not provide for any difference in license designations for those who may actively engage in practice and those who do not currently practice and do not have a responsible physician. Further, there are those individuals employed by the Federal government that do not have a person licensed by the Board as their responsible physician. Finally, subsection (g) provides statutory maximums for the newly-created license designations and for conversion of these designations to a license that entitles the physician assistant to engage in practice in Kansas.

Section 4 creates an inactive license designation for physical therapists who may not be currently practicing and, therefore, are not maintaining professional liability insurance as required by K.S.A. 2003 Supp. 65-2920. This statute requires that a policy of professional liability insurance be maintained by each physical therapist "actively practicing in this state".

Section 5 of the bill relates to occupational therapists and occupational therapy assistants. Amendments are made to K.S.A. 65-5410 to expand the disciplinary sanctions that can be imposed for unprofessional conduct. The ability to assess a fine for unprofessional conduct is also added.

Section 6 amends K.S.A. 65-5412. These changes relate to the expiration of licenses and the process for renewal and make such similar to other professions regulated by the Board. Since the Board began the registration of occupational therapists and occupational therapy assistants in 1986, the expiration date has been established by rule and regulation to be the same for all holders of an OT or OTA credential. However, when the Board attempted to amend the rule and regulation due to the change in credentialing status made by the 2002 Legislature, we were advised that the current language of K.S.A. 65-5412 required that each license, when issued, be for a period of one year. This would result in all licenses expiring at different times throughout the year.

Section 7 amends K.S.A. 65-5510 relating to respiratory therapists. Like the amendments to K.S.A. 65-5410 in Section 5, these amendments expand the disciplinary sanctions that can be imposed for unprofessional conduct and allow the Board to assess a civil fine.

Section 8 amends K.S.A. 65-5512 and deals with the expiration of licenses for respiratory therapists in the same manner as Section 6 deals with occupational therapists and occupational therapy assistants.

Similarly, Section 9 expands the disciplinary sanctions that can be imposed on naturopathic doctors for unprofessional conduct and authorizes imposing a civil fine.

Section 10 amends K.S.A. 65-7209 relating to naturopathic doctors and makes the expiration date and renewal process similar for this process as Sections 6 and 8 do for occupational therapy and respiratory therapy.

I apologize for the length of this testimony. The changes being requested by House Bill No. 2820, although not substantive in nature, will greatly assist the Board in its administration of the laws relating to these six professions and we ask the Committee to take action to consider this bill favorably for passage by the House as a whole.

February 23, 2004

The Honorable Jim Morrison, Chairperson
House Committee on Health and Human Services
Statehouse, Room 171-W
Topeka, Kansas 66612

Dear Representative Morrison:

SUBJECT: **Fiscal Note for HB 2820** by House Committee on Health and Human Services

In accordance with KSA 75-3715a, the following fiscal note concerning HB 2820 is respectfully submitted to your committee.

HB 2820 would establish regulations for practitioners of podiatry, establish regulations for inactive licenses, and clarify procedures relating to actions the Board of Healing Arts could take when a licensee is accused of unprofessional conduct. The bill would also make other technical changes to create more consistency among the statutes that affect the professions that are licensed by the Board.

The passage of HB 2820 would not have a fiscal effect on the Board of Healing Arts.

Sincerely,

Duane A. Goossen
Director of the Budget

cc: Betty Johnson, Kansas Board of Healing Arts

Attachment 2
HHS 2-23-04

LAW OFFICES OF
FRIEDEN, HAYNES & FORBES
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

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ALL OTHERS ADMITTED IN KANSAS

**Testimony Before the House Committee on Health and Human Services
in Support of House Bill No. 2867
by Kevin M. Fowler of Frieden, Haynes & Forbes
on Behalf of the
Kansas Health Care Association, Inc.**

February 23, 2004

Chair Morrison and members of the Committee, my name is Kevin Fowler. I am a partner in the Topeka law firm of Frieden, Haynes & Forbes and I have been licensed to practice law in Kansas for nearly 22 years. During the past decade, a significant amount of my professional time and attention has been devoted to legal matters affecting the interests of Kansas adult care homes and their residents. I am appearing before the Committee on behalf of the Kansas Health Care Association, Inc., and I am pleased to support House Bill No. 2867.

This bill provides for a medical review panel procedure for any aggrieved person who seeks to formally pursue a personal injury claim against a Kansas adult care home based on any alleged act or omission in the rendition of care or treatment at the facility.

During the 1970s, the Legislature first enacted a Medical Malpractice Screening Panel procedure designed to encourage the nonjudicial resolution of medical malpractice claims against Kansas health care providers. See K.S.A. 65-4901 et seq. (L. 1976, ch. 249). The Legislature subsequently amended this statutory procedure in various respects during 1979, 1986, 1999 and 2001. See, e.g., L. 1979, ch. 206, § 1; L. 1986 ch. 229, §§ 48-50; L. 1999, ch. 57, §§ 63-65; L. 2001, ch. 6, § 2. Since Kansas adult care homes are not defined as "health care providers" under K.S.A. 40-3401, however, the Medical Malpractice Screening Panel Procedure is not available to encourage the nonjudicial resolution of personal injury claims against long term care facilities in Kansas.

*Attachment 3
HAS 2-23-04*

As the Committee may be aware, Kansas adult care homes have recently begun to experience what may be properly characterized as a professional and general liability insurance crisis. The escalating cost of professional and general liability insurance currently causes approximately 20% of all facilities to operate without such insurance. Facilities which are "going bare" face an increased risk of financial ruin and expose their residents to the risk that meritorious personal injury claims will not be redressed. For those long term care facilities still able to afford liability insurance, rates have climbed dramatically in recent years. Indeed, some Kansas adult care homes have seen rate increases of 1000%, from around \$100 a bed to more than \$1,000 a bed. The Kansas Health Care Association reasonably anticipates that this liability insurance crisis will only worsen, thereby further jeopardizing the interests of adult care homes and their clientele, without prompt remedial action.

This bill draws on the Medical Malpractice Screening Panel procedure currently available to doctors and hospitals and recent experience with various alternative dispute resolution techniques to provide for a mandatory Medical Review Panel (MRP) as a condition precedent to legal action in order to encourage the nonjudicial resolution of both meritorious and non-meritorious personal injury claims against Kansas adult care home providers.

This bill does not preclude a claimant from taking action against a provider. It simply requires that before a case can be commenced in court, the claimant's complaint must be first presented to the MRP and an opinion rendered.

The Panel would provide an independent, third-party assessment of alleged acts or omissions in the provision of care and treatment to determine whether an adult care home breached any duty to the resident, whether any breach of duty caused personal injury and, if a claim merits compensation, to recommend a monetary amount for settlement. This review procedure would clearly encourage the early and inexpensive disposition of claims without the initiation of formal legal action. Advantages include:

- Early withdrawal or dismissal of claims without merit
- Findings of MRP admissible as evidence in subsequent court action
- Quick and inexpensive for claimants to use
- Relieve overburdened court dockets
- Reduce financial burden on state Medicaid program

By reducing liability insurance premiums, Kansas' precious, limited Medicaid resources will be better utilized as those dollars go to direct residence care. This is a change that is needed immediately as currently Medicaid dollars only fund about 89% of allowable costs. Another unsettling trend is that for the years 2001 over 2002:

- Liability Insurance/Medicaid day increased 45%*
- Food /Medicaid day increased 0.9%

We accordingly urge the Committee to give this bill favorable consideration. Your attention to this matter of vital importance to Kansas adult care homes, their residents and clientele is greatly appreciated.

February 23, 2004

To: Health and Human Services Committee

From: Kansas Trial Lawyers Association

Re: **HB 2867**/An act concerning adult care homes; providing for a medical review panel.

*Frank Allison
presenter*

Honorable Chairman Morrison and members of the Health and Human Services Committee
The Kansas Trial Lawyers Association strenuously opposes HB 2867. During this legislative session there have been a number of bills introduced with the obvious goal of **protecting the nursing home industry** in this state **from the legal consequences of its often substandard services.** This bill is of the same ilk. To date, only one bill actually goes to the root of the problem and seeks to improve the quality of nursing home care in this state and thus protect nursing home residents. That bill is the laudable proposal by the Kansas Board of Adult Care Home Administrators to strengthen the state standards for licensed administrators.

We know from the national and state insurance and nursing home industry associations that Kansas, as a result of national and international insurance rate-setting, is facing a crisis. Therefore, **we respectfully urge this committee** not to waste time on wild shots and piecemeal approaches, but rather **to recommend a legislative interim study to determine the real causes of the crisis.** Armed with a broad and fact-based analysis from a Kansas perspective, there is no doubt that a comprehensive solution can be crafted to the crisis of insurance coverage and poor nursing home care, tailored to the needs and experience of Kansans.

It has been widely reported that a rise in the number of lawsuits has precipitated this insurance crisis. But it has been actually shown that **the fiscal mismanagement of the insurance industry is at fault for the present crisis.** The other well known fact is that insurance rates are based upon a national experience and not just the Kansas cohort. In a state where stringent caps on non-economic and wrongful death damages have been in place since the late 1980s, **the argument that out-of-control law suits in Kansas are causing the problem is simply a misrepresentation of facts.**

Congressional studies and inquiries on the issue of substandard care in the nursing home industry are many and the problems have been well-documented in recent years and since at least the 1970's. **Our state only requires nursing homes to have 2.0 hours of direct care staff time per person per 24-hour period. Even the industry has acknowledged that this figure is shockingly low.** In fact, most will say they exceed it. The common estimate today is that to meet basic quality of care **at least 3.5 to 4.00 hours per resident per day is required.** It is no wonder preventable injuries and abuse occur in nursing homes.

Do we really want to protect negligent owners of nursing homes, many of which are corporate, out-of-state chain operators? Remember also that **in most cases our tax dollars have paid the corporation to provide** the very same **negligent care.** If we want fiscal responsibility, the Kansas legislature **should be holding our government contractors, the nursing homes, more accountable for poor care,** rather than less so. When a plaintiff is successful, Kansas Medicaid must be directly reimbursed from the settlement or judgment proceeds for injuries caused by the defendant corporation if Medicaid has paid providers to

*Attachment 4
HHS 2-23-04*

diagnose or treat the injuries. **State dollars can be recouped by these lawsuits.**

If a new panel is established, let us **suggest a panel to review all unexpected deaths and suspicious or unexplained serious injuries of residents in Kansas nursing homes**; let us require systematic coroner reviews of unexpected deaths; let us determine whether the state should initiate legal action against providers to recoup Medicaid monies.

The bias against plaintiffs in this bill is clear; the number of problems in this bill is great, a few of the most blatant problems are outlined below:

1. Parties already have the opportunity to attempt resolution of claims through techniques such as mediation prior to or subsequent to the filing of the lawsuit; thus, private parties, not the government, pay these costs. **This bill would essentially shift the private costs of dispute resolution to the government.**
2. The bill deals with medical care provided in nursing homes by physicians, and as such, is **redundant of medical malpractice laws.**
3. **Section 1(a) of the bill is not accurate nor complete.** If anything, it is a biased, partisan opinion about a national problem facing the insurance and nursing home industries, not caused by and completely disconnected from the Kansas experience of law suits against nursing homes.
4. The bill will not accomplish its alleged goals as stated in Section 2. The bill provides nothing to “identify” the early resolution of meritorious claims. **Neither injured victims’ “best interests” nor those of the state of Kansas are served by this bill.**
5. The composition of the panel is too vague: **what is a “geriatric-trained clinician”**-- a nurse? A doctor? A physical therapist?
6. The bill has a **Loser Pays provision** in section 9. This violates the long-standing principles of American law, forcing litigants to risk paying the opposing party’s attorney fees in order to access the judicial system for resolution of disputes. Most plaintiffs don’t have the economic power to fight corporate insurance money.

Most importantly **the bill seems to be loosely patterned after K.S.A. 60-3501, et seq., without the fair balance of that existing law, and without the protections against runaway costs to the government for these panels.**

Thank you for the opportunity to express our strong opposition to HB 2867. Again, let us stress that protection of the interests and rights of consumers of nursing facility care should, and must, be paramount to the protection of the self-interest of the nursing home industry. KTLA strongly urges you to reject HB 2867.

COMMENTS
ON
HB 2867

HOUSE COMMITTEE ON HEALTH AND HUMAN SERVICES
February 23, 2004

Mr. Chairman and Members of the Committee:

The Kansas Insurance Department has carefully reviewed HB 2867. Although many procedural questions remain concerning implementation of the proposed medical review panel, the Kansas Insurance Department stands ready to do its part should the will of the legislature dictate passage of the bill.

Jerry Wells
Director of Governmental Affairs
Kansas Insurance Department

Attachment 5
HHS 2-23-04

February 23, 2004

The Honorable Jim Morrison, Chairperson
House Committee on Health and Human Services
Statehouse, Room 171-W
Topeka, Kansas 66612

Dear Representative Morrison:

SUBJECT: **Fiscal Note for HB 2867** by House Committee on Health and Human Services

In accordance with KSA 75-3715a, the following fiscal note concerning HB 2867 is respectfully submitted to your committee.

HB 2867 would establish a medical review panel for adult care homes under the jurisdiction of the Commissioner of Insurance. Before residents could sue an adult care home for medical malpractice, they would have to file a complaint with the Insurance Commissioner. HB 2867 defines the following terms: adult care home, health care, health care provider, medical malpractice, and resident.

Within ten days of receiving the medical malpractice claim, the Commissioner would start the resolution process and select the panel. The selected review panel would include the following: a geriatric-trained clinician from a state accredited school; a health care provider; a licensed physician of medicine and surgery from the same medical field as the individual against whom the claim is filed; and an attorney with personal injury experience who will serve as the non-voting panel chairperson. The health care provider named in the claim would have ten days to respond. If the medical review panel's decision supports the claimant, a settlement statement would be issued. The provider could then make a settlement offer. If the offer is rejected, or no

*Attachment 6
HHS 2-23-04*

The Honorable Jim Morrison, Chairperson
February 23, 2004
Page 2—2867

offer is made, the claimant could file a court action. Also, if the panel's decision fails to support the claim, the claimant could file a court action.

Passage of HB 2867 would have no fiscal effect on the Kansas Insurance Department.

Sincerely,

Duane A. Goossen
Director of the Budget

cc: Kathy Greenlee, Department on Aging
Jackie Aubert, SRS
Jarrod Forbes, Insurance Department
Susan Kang, Department of Health & Environment

Testimony in Support of House Bill 2867

To: Chairman Jim Morrison and Members,
House Health and Human Services Committee
From: Debra Zehr, Vice President
Date: February 23, 2004

Written only

Thank you, Mr. Chairman and Members of the Committee for this opportunity to offer support for House Bill 2867. The Kansas Association of Homes and Services for the Aging (KAHSA) represents 160 not-for-profit nursing homes, retirement communities, hospital long-term care units, assisted living facilities, senior housing and community service providers serving over 15,300 older Kansans every day.

The long-term care provider community is experiencing a liability insurance crisis. What started with skyrocketing lawsuits in Texas, Florida and California has caused increased insurance premiums for liability coverage for Kansas nursing homes by 300% or more, to \$1,000 per bed in some cases. As a result, Medicaid costs are being driven up, residents paying for their own care are being financially stressed with rate increases, and scarce dollars are siphoned away from improving quality care.

House Bill 2867 would create a process by which allegations of medical malpractice are screened by an expert panel appointed by the Commissioner of Insurance prior to commencement of action against a long-term care health care provider. We believe this is a prudent and advisable to institute this process in order to mitigate escalating liability insurance costs, while protecting the rights of persons who have meritorious claims against a health care provider.

Thank you for your favorable consideration of House Bill 2867. I would be happy to answer questions.

*Attachment 7
HHS 2-23-04*

**Written Testimony to the House Health and Human Services Committee
on H.B. 2867**

**By Monte Coffman, Executive Director
Windsor Place
February 23, 2004**

Thank you mister chairman and members of the committee for the opportunity to submit written testimony today in support of H.B. 2867. My name is Monte Coffman and I'm representing Health Management of Kansas d/b/a Windsor Place.

Windsor Place is a Southeast Kansas long-term care organization, which operates 246 nursing facility beds, 44 Assisted Living Facility units and provides in-home service to 1000 HCBS clients. We greatly appreciate your interest and leadership in considering a course of action to curb skyrocketing long-term care liability insurance premiums. Action is necessary and long overdue.

Our Recent Premium History

| <u>Dates of Renewals</u> | <u>Cost of Coverage</u> | <u>Limits/Type of Coverage</u> | <u>Umbrella Deductible</u> | <u>Coverage (\$2M)</u> |
|--------------------------|-------------------------|--------------------------------|--------------------------------|------------------------|
| May 1, 1998 | \$31.35/Bed | \$1M/\$3M - occurrence | \$2500 | \$4760 (annually) |
| May 1, 1999 | \$48.91/Bed | \$1M/\$3M - occurrence | \$2500 | \$4760 (annually) |
| May 1, 2000 | \$146/Bed | \$1M/\$3M - occurrence | \$2500 | not available |
| May 1, 2001 | \$200/Bed | \$1M/\$3M - occurrence | \$2500 | not available |
| May 1, 2002 | \$402/Bed | \$1M/\$3M - claims made | \$25,000 | not available |
| May 1, 2003 | \$410/Bed | \$1M/\$3M - claims made | \$50,000 | not available |

Our premiums went up 1300%. Our deductibles were up 2000%. And this is with an exemplary claims history.

Current Marketplace

Currently, too many lawsuits, many without merit, are being threatened. Insurance companies are settling out of court for \$50,000 - \$100,000 as a "nuisance" settlement rather than face a public jury who already holds a negative view of nursing facilities. This practice is far too widespread and far too impacting on premiums. This is why deductible amounts have increased 2000%... to cover "nuisance" settlements

The impact of continued status quo will be:

- The continued practice of facilities going without insurance. (Estimated now to be 25%.)
- The bankruptcy of facilities that cannot afford premiums but are required contractually to have insurance.
- The continued lack of access to capital investment markets in new or improvement projects, due to the high cost of insurance or insurance not being available. Threats of lawsuits keep certain lenders from committing loans to nursing facilities

Attachment 8
HHS 2-23-04

Our Request

We would ask for your support of HB 2867. The impact of the bill make complete sense.

1. A method of removing frivolous law suits yet does not keep legitimate cases from going to court.
2. A mechanism to reduce crowded courts.
3. Removal of financial burden on state Medicaid program due to high cost of liability insurance... 60% will be paid by the state.
4. With some protection and process, insurance companies who now do not do business in Kansas would or could return. Competition would lower the cost.

HB 2867 would bring some structure to a system which has operated on fear and chaos.

Again, thank you for your proactive efforts on this issue. It will lead to desperately needed financial resources being re-allocated from liability insurance premiums to frontline nursing home staffing.

Written Testimony to the Kansas House
Health and Human Services Committee on
HB 2867

By Paul Wurth, Director and Owner
Gatewood Care Center
Nursing Home Facility
February 23, 2004

Mister Chairman and Members of the Committee:

Thank you for the opportunity to submit written testimony today in support of H.B. 2867.

Gatewood Care Center is a licensed 46-bed facility in Russell, Kansas. We are so pleased that your Committee is considering action that could stem the current tide of the increased costs of Liability Insurance. Action is necessary on this issue as it truly threatens the viability of our facility.

Our recent premium history is as follows:

| | |
|-------------|-------------|
| 02/01/00-01 | \$ 7,559.00 |
| 02/01/01-02 | 5,207.00 |
| 02/01/02-03 | 5,007.00 |
| 02/01/03-04 | 25,577.72 |
| 02/01/04-05 | \$48,000.00 |

We have not had any liability claims made or paid at Gatewood Care Center. We have an excellent survey history – no level “G” deficiencies. We are a total Medicaid facility with rates of \$69.00 per day. We have no way to pass these increased costs on to our clients. As the Committee is aware, our rates were fixed as of 12/31/01 and our only avenue of increase comes from a state determined inflation factor.

Our dilemma is this: we are forced to choose between either to not insure for liability or to close the facility. These are not good choices for us to have to consider. If we choose not to insure, we would join some 25% of the Nursing Homes in Kansas who do not have insurance. And, if we close, the lives of our 46 residents will be compromised.

Attachment 9
HHS 2-23-04

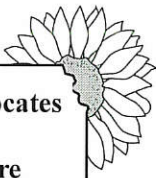
February 23, 2004

Page 2

Written Testimony on H.B. 2867

We believe that if this Bill (H.B. 2867) or a bill similar in content were passed, then we may find a renewed interest on the part of Liability Carriers to come back to Kansas. With competition, rates should decrease. This bill should also reduce the number of filed suits that have no merit. Certainly the State's Medicaid Program would be assisted as they pay the lion's share of all the Liability Insurance costs of Adult Care Home in Kansas.

Again, thank you for your efforts in this matter. Liability Insurance is truly a problem that could direct the future of Kansas Nursing Homes.



HB 2867

**requiring all legal actions against a health care provider
be first presented to a medical review panel to render an opinion**
February 23, 2004

Honorable Chairman Morrison and
House Health and Human Services Committee Members:

Kansas Advocates for Better Care (KABC) opposes HB 2867.

Consumers are wary of an additional layer of bureaucracy, particularly one that is not part of the judicial system, such as the proposed panel that would be administered by the Commissioner of Insurance.

The proposed panel would provide for an inequitable composition of members. The panel is proposed to include a "health care provider", which would be a peer of the "defendant", but the panel does not provide for a "consumer" member to be a peer of the "claimant".

The initiation of and purpose of a medical review panel would force any claimant to make a "case" before the review panel before being allowed to proceed with a legal action.

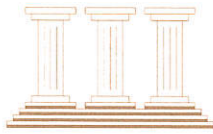
Consumers are aware of the fiscal problems with the state government budget. The medical review panel will be an additional expense to the state government (which is the people of Kansas.)

The panel is proposed to be an expert advisory board that renders opinions which are not under any judicial authority nor are binding on any party. The initiation of a paid panel that renders non-binding opinions appears, on the surface, to NOT be logical and sensible, particularly when one notes the elaboration for handling settlement offers (that are non-binding).

KABC requests the Committee to **NOT pass HB 2867.**

Thank you very much for allowing these comments.

Deanne Bacco, Executive Director, KABC



KANSAS TRIAL LAWYERS ASSOCIATION

Lawyers Representing Consumers

Feb. 23, 2004

TO: House Health & Human Services Committee
FROM: Frank Allison
Kansas Trial Lawyers Association
RE: HB 2867 Additional Information

Written only

Honorable Chairman Morrison and members of the Health & Human Services Committee, The Kansas Trial Lawyers Association strenuously opposes HB 2867. In addition to the information already submitted, I would like to outline other important reasons why this bill should be rejected.

Current Malpractice Medical Review Panel Does Not Work:

Currently, Kansas' malpractice review panel as contained in K.S.A. 60-3501, et seq. has many flaws which would continue to exist with passage of HB 2867. The malpractice review panel currently in place calls for an ad hoc panel of three physicians to render an opinion on the issue of malpractice. It is a voluntary system in which either party may request a panel to convene. However, it is mandatory if the defendant request it. Since inception of the law approximately ten years ago, it has been seldom used. The main reason the medical review panels do not work is that physicians are unwilling to submit their name to the panel list, and those that do, will give only a cursory review of a claim based on the fact that they are paid a nominal fee for reviewing the claim. In addition, when cases have been submitted to a panel the medical review that follows is not completed on a timely basis, and further delays access to the courts. As you can imagine if the system worked, defendants would be demanding that such reviews take place, however, as mentioned, few are asking for such reviews. It simply does not work, and neither would HB 2867.

Apart from the current system not working, the bill as proposed also violates certain constitutional guarantees.

Violation of Constitutional Guarantees:

✓ **Violation of Procedural & Substantive Due Process:**

This bill does not address any time requirements regarding when hearings should take place. To quickly illustrate this problem, in Florida, the clerk of the court was to set a time and place for a hearing before the medical review panel. The clerk was to set a hearing time within 10 months from the date of application, and if the matter was not heard within that time, the case could be filed directly to the proper court. In addressing the issue of establishing a proper time to have a hearing, i.e. a due process issue, the Florida Supreme Court ruled that the legislative scheme, i.e. a 10-month deadline, to be arbitrary, and in violation of a citizen's constitutional right to due process, and in addition, ruled that to allow a longer jurisdictional time period acted essentially as a denial of access to the courts.

Terry Humphrey, Executive Director

*Attachment 11
HHS 2-23-04*

✓ **Violation of Equal Protection:**

As to violations of equal protection, the current bill benefits a group of doctors at the expense of medical negligent plaintiffs. In Wyoming, the Supreme Court applied the “reasonable basis” standard to determine if the plaintiff’s claims that one group was being favored over another group were correct. The court found that there was not a reasonable basis, i.e. a sufficient link between medical panels and the issue of public health. The court stated that they could not condone the legislature’s use of a law to protect one class of people, i.e. doctors, from financial difficulties, while it diluted the rights under the constitution of another class of people, those citizens injured by negligent physicians. Moreover, the court determined that medical negligence actions served the public by enhancing the quality of care for its citizens.

✓ **Violation of a Right to a Jury:**

This bill seemingly says that it does not violate a citizen’s right to a jury. However, in another state, it was established that medical review panels do just that. In Pennsylvania, the Supreme Court held that provisions of a medical review panel bill did violate a citizen’s right to a jury. The court relied on a statistical study that examined how the medical panel review system worked for the previous two years. The study cited delays of one to four years between filings and completion of the arbitration period. The court concluded that the grant of “original jurisdiction” to the medical review panel violated the state’s constitutional guarantee of a right to a jury.

✓ **Violation of Access to the Courts:**

The bill again seemingly purports to say that juries, not the panel made the final decision, and that delays were not sufficiently long to deny access to the courts. This issue has not been uniformly decided by any courts to-date. In fact, in Missouri, the Supreme Court decided long ago that on its face, a medical review panel invalidated a constitutional right to have its citizens afforded the “right to seek immediate redress in the courts”.

Other Important Considerations:

✓ **Panel Composition & Evidence:**

The current bill consists of three voting physicians and one non-voting attorney. First, the panel is too vague. What is a geriatric-trained clinician – a nurse, a doctor, a physical therapist?

Also, the panel composition cannot adequately address issues regarding the nature of damages and the amount of damages. Simply put, the panel composition does not have the expertise to address the issue of damages, and is unfairly biased in favor of physicians. In other words, the bill calls for three voting physicians to make the call on damages, since the attorney on the panel is a non-voting member. Simply put, the issue of damages will not be in tune with the actual harm done.

In the current bill, it calls for the panel’s conclusions to be admissible at a subsequent trial, and that the panel shall sit as an expert advisory board. However, the bill proposes that no member on the panel shall be deposed for or testify at a subsequent trial of the same claim. This violates the constitutional guarantee of being able to confront witness for and against you at trial. What the bill wants a jury to do, is to accept the panel recommendations as simply just another piece of evidence. This places a substantial burden on a jury, i.e. to simply accept a panel’s conclusions

as just another piece of evidence, with no opportunity whatsoever to ask questions or better understand the panel's conclusions through the constitutional right of cross-examination.

✓ **Loser Pay Provision or the Substantial Improvement Provision:**

Currently the bill calls for a provision that states that if the claimant does not obtain a judgment at least 25% higher than the amount offered at settlement by defendant, the claimant shall be liable for the defendant's reasonable costs and attorney fees incurred in the court action. This 25% is not only arbitrary, but unreasonable. This violates the long-standing principle of American law, forcing litigants to risk paying the opposing party's attorney fees in order to access the judicial system for resolution of disputes. Most plaintiffs do not have the economic power to fight corporate insurance money. At 25%, this provision essentially denies plaintiffs their constitutional right to access the courts.

Conclusions:

The committee has heard testimony from the insurance industry time again that the State of Kansas is facing an insurance crisis. Yet time again when asked to produce relevant information supported by real documented evidence as to this crisis, they cannot or will not produce it. Instead, time and again, they offer up information that tells only part of the story. When asked to produce documentation about their own fiscal management or mismanagement, they balk and divert such requests, and instead make the argument that out-of-control lawsuits in Kansas are causing the problem. This is simply a misrepresentation of the facts.

Parties already have the opportunity to attempt resolution of claims through mediation prior to or subsequent to the filing of a lawsuit; thus private parties, not the government, pay these costs. This bill would essentially shift the private costs of dispute resolution to the government. And as has already been mentioned, a bill, like the one at hand, would not help the current system, but rather increase delays and increase costs. This bill does not serve the "best interests" of injured victims, nor the state of Kansas.

This bill offers a piecemeal approach to a problem that needs real study and real solutions. The citizens of Kansas deserve the real facts through a comprehensive study of the real causes of the problem.

HB 2867, as it currently stands, violates many constitutional guarantees. The constitutional rights of: Due Process, Equal Protection, Right to a Jury, Access to Courts, and the Right to Cross-Examination should not be easily diverted as this bill seeks to do.

Thank you for the opportunity to express our strong opposition to HB 2867. The protection of the interests and rights of consumers of nursing care should, and must, be first and foremost versus the protection of the self-interests of the nursing home industry. KTLA strongly urges you to reject HB 2867.