Approved: April 25, 2007
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman John Vratil at 9:36 A.M. on February 6, 2007, in Room 123-S of the Capitol.

All members were present except:
David Haley arrived, 9:42 A.M.
Derek Schmidt arrived, 9:45 A.M.

Committee staff present:
Athena Anadaya, Kansas Legislative Research Department
Bruce Kinzie, Office of Revisor of Statutes
Nobuko Folmsbee, Office of Revisor of Statutes
Karen Clowers, Committee Assistant

Conferees appearing before the committee:
Mark Tallman, Assistant Executive Director, Kansas Association of School Boards
Mark Desetti, Director, Legislative & Political Advocacy, Kansas National Education Association
Kevin Tubbesing, Stag Commercial
Bob Reader, Kansas Bar Association
Margaret Farley, Kansas Trial Lawyers Association
Bill McKean
Marlee Carpenter, Vice President of Governmental Affairs, The Kansas Chamber

Others attending:
See attached list.

Bill Introductions

Senator Nick Jordan requested the introduction of a bill which would amend statutes relating to house arrest. Senator Umbarger moved, Senator Donovan seconded, to introduce the bill. Motion carried.

Linden Appel, Chief Legal Counsel, Kansas Department of Corrections, requested the introduction of a bill relating to the admission of offenders during a pandemic. Senator Bruce moved, Senator Goodwin seconded, to introduce the bill as a committee bill. Motion carried.

The Chairman communicated the desire of Brad Smoot to rescind the bill introduced last week by the committee concerning anti-trust action. Senator Bruce moved, Senator Allen seconded, to rescind the committee's action introducing the bill. Motion carried.

The hearing on **SCR 1601–School finance; amount of funding and distribution thereof determined by the legislature** was opened.

Senator Phil Journey testified in support, providing background on development of the resolution. Senator Journey indicated the intent of **SCR 1601** is to clarify the original intent of Article 6, Section 6 of the Kansas Constitution (Attachment 1).

Mark Tallman appeared in opposition, stating public education is too important leave the allocation of funds solely to the Legislature. Mr. Tallman feels that **SCR 1601** would weaken the rights provided in Article 6 of the Kansas Constitution (Attachment 2).

Mark Desetti spoke in opposition. The Kansas National Education Association believes **SCR 1601** will endanger the needs of Kansas schools for future generations (Attachment 3).

There being no further conferees, the hearing on **SCR 1601** was closed.

The hearing on **SB 139–Civil actions; prevailing party recovers reasonable attorney fees; exceptions** was opened.

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

MINUTES OF THE Senate Judiciary Committee at 9:36 A.M. on February 6, 2007, in Room 123-S of the Capitol.

Kevin Tubbesing appeared as a proponent, distributing a balloon amendment (Attachment 4) which would provide clarification and definition of the scope of **SB 139**. Mr. Tubbesing stated his belief that the bill will improve the conduct of business in Kansas by discouraging frivolous and nuisance lawsuits (Attachment 5).

Bob Reader spoke as an opponent, claiming **SB 139** would create a mandatory system without regard to equality and justice. Enactment of this bill would penalize the poor, who do not have the resources to fight legal battles or cover costs should they lose (Attachment 6).

Margaret Farley testified in opposition, indicating the Kansas Trial Lawyers Association believes that the current system in Kansas makes sense. **SB 139** would favor those with financial resources and be a substantial barrier to the Court system for many Kansans (Attachment 7).

Written testimony in support of **SB 139** was submitted by:
Marlee Carpenter, Vice President of Government Affairs, The Kansas Chamber (Attachment 8).

Written testimony in opposition of **SB 139** was submitted by:
Bill McKean (Attachment 9)

There being no further conferees, the hearing on **SB 139** was closed.

The meeting adjourned at 10:31 A.M. The next scheduled meeting is February 7, 2007.

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 2/6/07

NAME	REPRESENTING
Linden Appel	KS Dept. of Corrections
Kathy Olsen	Ks Bankers Assn.
Gelene Savage	Ks Dept. of Trans.
Margaret Farley	KTLA - Attorney
Callie Denton Hartle	KTLA
JIM CLARK	KBA
Bob Reader	KBA
JOYCE GROVER	KCSDV
Bob HAYES	HCSF
Gary Zorah	HCSF
Bill Brady	SFFF
Marlee Carpenter	KS Chamber
MARK DESETTI	KNEA
Mark Tallman	KASB
Scott Heidner	KAOC
Lance Wells	OJA
Kathy Sexton	Kearney & Associates
BILL McKEON	CITIZEN

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 2-6-07

NAME	REPRESENTING
Randy M. Hearrell	Ks. Judicial Council
Derrick Sontag	NFIB
Kevin Tubbesing	Business Owner
Brian Vazquez	KHPA
Doug Smith	Pinegar, Smith & Associates
DAN MORIN	KS MEDICAL SCTY.
Derek Hein	Hein Law Firm
Natalie Bright	Via Christi Health System
Michael Johnston	Kansas Turnpike

STATE OF KANSAS

SENATOR PHILLIP B. JOURNEY
STATE SENATOR, 26TH DISTRICT
P.O. BOX 471
HAYSVILLE, KS 67060

STATE CAPITOL—221-E
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TOPEKA

SENATE CHAMBER

COMMITTEE ASSIGNMENTS
MEMBER: SPECIAL CLAIMS AGAINST THE STATE (JOINT), CHAIR.
HEALTH CARE STRATEGIES
JUDICIARY
PUBLIC HEALTH AND WELFARE
TRANSPORTATION

CORRECTIONS AND JUVENILE JUSTICE OVERSIGHT (JOINT)

SOUTH CENTRAL DELEGATION, CHAIR

Testimony Before the Kansas Senate Judiciary Committee
in Support of Senate Concurrent Resolution 1601
February 6, 2007

On June 3rd, 2005, the Kansas Supreme Court issued the opinion in the case Montoy v. Kansas, et. al. In that case the Kansas Supreme Court interpreted Article 6, Section 6 of the Kansas Constitution which states that the Legislature "make suitable provision for finance of the educational interests of the state" gave it specific authority to demand the Legislature appropriate a certain sum of monies or else. In the system of checks and balances created under our federal Constitution which are emulated in many respects in the Kansas Constitution, our founding fathers created a brilliant scheme of government in which the two active branches of government, legislative and executive, could be restrained by a passive branch of government, the courts.

One of our founding fathers in his writings regarding the creation of powers given by the people to their government in the United States Constitution declared that the judiciary was the least dangerous branch of government. "The judiciary...has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever." This inherent limit on judicial power has been breached and criticism of court actions in a proactive vein have been described in modern public discourse as legislating from the bench. Prior to this special session that many of us participated in in the summer of 2005, I researched this topic at length and came to the conclusion after researching the original legislative intent in passing a concurrent resolution putting the amendment of Article 6, Section 6 of the State Constitution on the ballot in the 1960's that the word "suitable" modifies the phrase "the provision for finance" not as some might read into the meaning of this phrase, amount to be appropriated.

SCR 1601 only seeks to clarify the original intent of the voters who in the 1960's amended the state Constitution to include our current provision in Article 6, Section 6. While many of you might agree with the statement that, we have avoided the greatest constitutional conflict that Kansas had witnessed in many generations, by the fortunate happenstance that sufficient funds were available without the need of an economically debilitating tax increase. In my humble opinion, the truth is that we have only delayed this constitutional crisis until economic circumstances dictate a renewal of the discussion. Some of our fellow legislators also feel as I do that we have set a dangerous precedent and that it is incumbent upon every member of the Legislature to jealously guard the constitutional authority of the purse and clarify this section of the Kansas Constitution by putting this amendment on the ballot.

I thank the committee for its attention.

Respectfully submitted,

Senator Phillip B. Journey
State Senator 26th District

1-2

KANSAS
ASSOCIATION

OF
SCHOOL
BOARDS
1420 SW Arrowhead Road • Topeka, Kansas 66604-4024
785-273-3600

Testimony on **SCR 1601**
before the
Senate Committee on Judiciary

by

Mark Tallman, Assistant Executive Director/Advocacy
Kansas Association of School Boards

February 6, 2007

Mr. Chairman, Members of the Committee:

Thank you for the opportunity to appear today on **SCR 1601**, which removes the language in the Kansas Constitution requiring the Legislature make "suitable provision" for finance of the educational interest of the state and instead allow the Legislature to solely determine educational finance. We strongly oppose this proposal.

Over the past several years, KASB members have become acutely aware of the constitutional issues regarding school finance. These issues were debated extensively over the years at our Fall Regional Meetings, and resulted in the adoption of several policy statements by our members.

In December, our Delegate Assembly adopted the following position: "KASB supports the role of an independent judiciary in enforcing constitutional provisions." Our Board of Directors also adopted as a priority for the 2007 session to "Maintain the current system of checks and balances that allow the courts to enforce constitutional rights in the education article." Finally, we have a long-standing position that universal public education is fundamental right.

Certainly, not all of our members agreed with the goals or outcomes of the *Montoy* lawsuit and Supreme Court decision in that case, or in previous cases. But the majority of our members believe public education is too important to leave either the level or funding or the allocation of funds solely to shifting majorities of the Legislature. We believe there should be a higher standard of appeal for basic rights, and our members understand that under our judicial system, that is the appropriate role of the judiciary.

We believe **SCR 1601** would weaken the rights provided in Article Six of the Kansas Constitution and the ability of the Courts to enforce those rights, and therefore urge you to reject this concurrent resolution.

Thank you and I would be happy to answer any questions.

Senate Judiciary
2-6-07
Attachment 2

KANSAS NATIONAL EDUCATION ASSOCIATION / 715 SW 10TH AVENUE / TOPEKA, KANSAS 66612-1686

Mark Desetti, Testimony
Senate Judiciary Committee
February 6, 2007
SCR 1601

Mister Chairman, members of the Committee, thank you for the opportunity to appear before you today to share our thoughts on **SCR 1601**.

The constitutional amendment proposed in SCR 1601 is an inappropriate response to one decision of the Kansas Supreme Court that has frustrated some legislators.

Proponents of this measure would have one believe that the Supreme Court has taken on the task of "appropriating" funds or "raising taxes." Neither statement is true. The Supreme Court has ruled that the action taken during the 2005 legislative session did not meet the earlier ruling by the Court to increase school funding and to do so in an equitable manner based on actual costs.

Proponents also claim that the Kansas Supreme Court is "out of control" and that the ruling is a violation of the balance of powers inherent in our system of checks and balances. This also is simply not true. A review of the Supreme Court actions that have brought us to this point reveals a conservative Court that has tried to give maximum discretion to the legislature.

When Judge Terry Bullock ruled that the school finance system was unconstitutional he did so forcefully. Bullock ordered the schools closed. *The Supreme Court stayed Judge Bullock's order, keeping our schools open.*

The Legislature chose to appeal the case to the Supreme Court and requested that the Court take the case on an expedited schedule. *The Court respected the request of the Legislature.*

In the first Supreme Court ruling, 2/3 of Judge Bullock's ruling was overturned. The Supreme Court took a much more conservative view of the situation. They did, however, rule that the Legislature had failed to adequately fund public education using as credible evidence the Legislature's own cost study conducted by Augenblick and Myers. This was the only cost evidence submitted at trial and the State did not refute it.

The Supreme Court at that time gave the legislature full authority and complete discretion over bringing the school finance system into constitutional compliance. In response the Legislature passed HB 2247, a bill that funded only 1/6 of the level of funding in the Augenblick and Myers study and ignored an additional survey of costs done by Dale Dennis at the request of the Senate. In addition, HB 2247 held a variety of provisions that further exacerbated inequities in the school finance formula.

Throughout the 2005 legislative session, legislators complained that the Court had failed to provide appropriate direction to the Legislature and failed to indicate how much money it would take to adequately fund the formula.

Senate Judiciary
2-6-07
Attachment 3

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Upon review of HB 2247, the Court ruled that the act failed to address the constitutional issues raised in their earlier decision and, in response to the Legislature, gave explicit direction. The Court ordered that the Legislature provide 1/3 of the increase in funding called for in the Augenblick and Myers study. *The Court acted conservatively in that they allowed the legislature to conduct a new cost study (called for in HB 2247) and gave the legislature discretion in implementing the new findings of the new study.* At no time did the Court indicate that the Legislature had to implement the Augenblick and Myers Study. They did, however, state that should the Legislature fail to complete the new study or ignore the study, the Court reserved the right to direct the expenditure of the remaining 2/3 of Augenblick and Myers funding.

The Court has acted conservatively at all times and given the Legislature maximum discretion and authority to deal with the issue. In 2005 the Legislature failed to do so.

In 2006, however, the Legislature passed SB 549, the three year school finance bill that you are working to secure funding for in this session. *In response to that action, the Court dismissed the school finance lawsuit despite the fact that the funding for the first year fell well short of the funding levels called for in either Augenblick and Myers or the LPA study.* It is not until the third year that the funding approaches the level suggested for this year.

Some legislators continue to complain that the Court has no right to give them direction and they wish to change the constitution of our State in such a way as to strip courts of the ability to use funding as a remedy.

A further concern within this amendment is the striking of the words "make suitable provision." The implication here is that the Legislature has no responsibility for funding schools at a "suitable" or "appropriate" level. Striking this language implies that excellence and improvement shall no longer be hallmarks of our public schools. Under this new construct the Legislature is off the hook so long as they are providing something.

Passage of SCR 1601 will put this Legislature on record as the one that determined the status quo is good enough – we no longer need to care about striving to be the best in the nation. For future generations of Kansans, that's just plain wrong.

This constitutional amendment has come from a sense of frustration and anger by legislators who have chosen to ignore the needs of schools for a number of years.

Constitutional amendments are not to be taken lightly. Such actions are difficult to reverse. They should be addressed in such a way as to allow maximum public discourse and debate.

SCR 1601 should be defeated.

SENATE BILL No. 139

By Committee on Judiciary

1-22

z139c1

Senate Judiciary
2-6-07
Attachment 4

9 AN ACT concerning civil procedure; relating to attorney fees; amending
10 K.S.A. 60-2003 and repealing the existing section; also repealing K.S.A.
11 60-2006.
12
13 *Be it enacted by the Legislature of the State of Kansas:*
14 New Section 1. (a) Notwithstanding any other provision of law to the
15 contrary and subject to the provisions of this section, in any civil action
16 ~~of any nature~~ commenced or appealed in any court in this state, the court
17 shall award reasonable attorney fees to the prevailing party as part of the
18 courts judgment and taxed as part of the costs of the action in addition
19 to any costs otherwise assessed pursuant to K.S.A. 60-2003, and amend-
20 ments thereto. Such costs and fees shall be paid by the nonprevailing
21 party or parties. If more than one party is responsible for costs and fees,
22 such costs and fees shall be equitably apportioned by the court among
23 the responsible parties.
24 (b) As used in this section:
25 (1) "Civil action" shall not include a personal injury action.
26 (2) "Personal injury action" means any action seeking damages for
27 personal injury or death.
28 (c) The provisions of this section shall apply to civil actions based on
29 causes of action accruing on or after July 1, 2007.
30 Sec. 2. K.S.A. 60-2003 is hereby amended to read as follows: 60-
31 2003. Items which may be included in the taxation of costs are:
32 (1) The docket fee as provided for by K.S.A. 60-2001, and amend-
33 ments thereto.
34 (2) The mileage, fees, and other allowable expenses of the sheriff,
35 other officer or private process server incurred in the service of process
36 or in effecting any of the provisional remedies authorized by this chapter.
37 (3) Publisher's charges in effecting any publication of notices author-
38 ized by law.
39 (4) Statutory fees and mileage of witnesses attending court or the
40 taking of depositions used as evidence.
41 (5) Reporter's or stenographic charges for the taking of depositions
42 used as evidence.
43 (6) The postage fees incurred pursuant to K.S.A. 60-303 or subsec-

[Amendment inserted after "civil action" in line 15:]

, where all parties are for-profit business entities and the civil action is

[Amendment inserted after line 24:]

(1) "Business entity" means any company, or person doing business as a company, including individuals who file a schedule C (profit or loss from business) with their federal income tax return and shall also include the following for-profit entities:
(A) Corporation, as described in K.S.A. 17-6001, and amendments thereto;
(B) foreign corporation, as described in K.S.A. 17-7301, and amendments thereto;
(C) professional corporation, as described in K.S.A. 17-2707, and amendments thereto;
(D) limited liability company, as described in K.S.A. 2006 Supp. 17-7663, and amendments thereto;
(E) business trust, as described in K.S.A. 17-2028, and amendments thereto;
(F) limited partnership, as described in K.S.A. 56-1a101, and amendments thereto;
(G) limited liability partnership, as described in K.S.A. 56a-101, and amendments thereto; and
(H) partnership, as described in K.S.A. 56a-101, and amendments thereto.

And by renumbering the remaining subsections accordingly

[Amendment inserted after "personal injury action" in line 25:]

or an eminent domain action

1 tion (e) of K.S.A. 60-308, and amendments thereto.
2 (7) Alternative dispute resolution fees shall include fees, expenses
3 and other costs arising from mediation, conciliation, arbitration, settle-
4 ment conferences or other alternative dispute resolution means, whether
5 or not such means were successful in resolving the matter or matters in
6 dispute, which the court shall have ordered or to which the parties have
7 agreed.
8 (8) Such other charges as are by statute authorized to be taxed as
9 costs.
10 *(9) Reasonable attorney fees awarded to the prevailing party pursu-*
11 *ant to section 1, and amendments thereto.*
12 Sec. 3. K.S.A. 60-2003 and 60-2006 are hereby repealed.
13 Sec. 4. This act shall take effect and be in force from and after its
14 publication in the statute book.

4-2

TESTIMONY FOR	Kansas Senate Judiciary Committee
DATE	February 6, 2007
FROM	**Kevin Tubbesing**, Entrepreneur; owner of several Kansas businesses Volunteer Chairman of KS NFIB

Members of the committee, I thank you for this opportunity to speak with you this morning. I am before you today to ask that you consider and pass SB 139. Before I read the rest of my testimony, I'd like to introduce an amendment to the original bill that better clarifies and defines the scope of this legislation.

SB139 will help improve the conduct of business in Kansas. It will rightfully put the burden of bad debt and willful non-payment back into the laps of dead-beats and the dishonorable. It will discourage frivolous and nuisance lawsuits brought against just defendants by bullies and disreputable companies. It will significantly reduce the burden of civil actions upon Kansas courts as businesses chose to use good judgment vs. defiance and obstructionist attitudes and to settle disputes.

Every day around Kansas, attorneys get The Call from their clients, "I have a company that owes me $5,000 and they won't pay, what should I do??". The inevitable response, "I'll send 'em a letter but it will cost you way more than $5,000 to win this in court, just walk away". So the letter is sent - and of course ignored – because the dead-beats know that in this State, they will owe you no more money after they lose a court case than the money they owe you today. This needs to change, SB139 will change that.

I have personally been involved in a land rights lawsuit where an adjacent land owner sued my company because our development in an office park was going to block his view of the street. The land had sat vacant for over 2 years and the plaintiff was on record that he wanted to buy the land we had purchased, but that he had been "waiting out" the previous land owner trying to pay a lower price. He privately told us he knew he was wrong, but that by suing he knew he could delay our development so he had more time to decide what to do with his property. We won, of course, after 2 years and $25,000 in legal bills.

I do not purport to be an expert on the lingo and terms used in the Kansas Legislature. But I believe you all use the dreaded phrase, "fiscal note", when drafting legislation that will cost money. Nothing but experience and time will tell us the fiscal effect of this bill on Kansas & County governments, but I think we can all agree that it will be a cost savings. This bill will lower the burden to our over encumbered courts, lowering operating costs and/or freeing the courts to apply their time towards more important matters.

For those of you that have concerns, I ask this: Please give us for what WE ARE ASKING. WE are the business community and WE are asking for this law. This law only affects businesses. You will hear or have entered into the record today, supporting testimony from most of the largest business groups in the State. 90% of the membership from The National Federation of Independent Business voted to support this measure. The Kansas Chamber of Commerce and dozens of local chambers including mine in Shawnee, Kansas are strongly in support of this bill.

Inevitably when laws of this nature are discussed, some legislators feel the need to run to the defense of the infamous "little guy". Please remember that groups like the local chambers & NFIB are <u>little guys</u> and stand every day in defense and support of the little guy. <u>The little guys are asking you to pass this bill.</u>

The courts are imperfect and there will be times that the righteous will be maltreated by the effects of this bill. But consider the current alternative. Today it is the dead-beats and debtors that rule the day knowing there is no penalty for disregarding their obligations. I ask that you <u>bring back justice</u> to our law, and place of burden of willful disregard and furious law suits back in the lap those who dishonor our systems of commerce.

KANSAS BAR
ASSOCIATION

Testimony in Opposition to
Senate Bill No. 139

Presented to the Senate Judiciary Committee
February 6, 2007

The Kansas Bar Association is a voluntary, professional association of over 6,700 members dedicated to serving Kansas lawyers, their clients, and the people of Kansas.

The KBA has a long-held opposition to any legislative change to the current litigation system that would require the loser to pay the attorney fees of an opposing party. Within the current system, courts have the flexibility to award attorney fees as a matter of equity and justice. SB 139 would create a mandatory system without regard to equity and justice in its wording that "*in any civil action of any nature ... the court shall award reasonable attorney fees to the prevailing party.*"

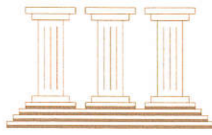
The State of Kansas should not abandon equity and justice for a system of mandatory awards, which would penalize any citizen, whether an individual or a business entity, that has an issue or legal claim of merit to take up with the courts, but for any number of legitimate reasons may not win on the merits of the case, but rather lose on perhaps technicalities or other reasons, and then have to pay the opposing party's fees.

The burden of SB 139 would fall squarely on the middle-class. The poor do not have the resources to fight such legal battles, nor to cover any costs should they lose. The large entities and upper-class tend to have attorneys on retainer, and use them as a matter of routine and "cost of doing business." It is the middle class that may have a meritorious claim against another party that will most likely be deterred from filing suit out of fear of bearing the costs of the opposing counsel's fee.

Consequently, the Kansas Bar Association opposes any change in the awarding of attorney fees, such as those proposed by SB 139. We urge the Committee to take no further action on the bill.

Bob Reader
KBA Legislative Committee Member
Vice-President Licensing, NISTAC, affiliated with Kansas State University
Adjunct Law Professor, Washburn Law School
785.532.3903

* * *



KANSAS TRIAL LAWYERS ASSOCIATION

Lawyers Representing Consumers

To: Senator John Vratil, Chairman
Members of the Senate Judiciary Committee

From: Margaret Farley
Kansas Trial Lawyers Association

Date: February 6, 2006

Re: 2007 SB 139 Concerning civil procedure; relating to attorney fees

Chairman Vratil and members of the Senate Judiciary Committee, thank you for the opportunity to testify regarding Senate Bill 139. I am Margaret Farley, an attorney in private practice in Lawrence and a member of the Kansas Trial Lawyers Association (KTLA). KTLA is a statewide, nonprofit organization of attorneys who serve Kansans who are seeking justice. We appreciate the opportunity to appear before you today to offer testimony in opposition to SB 139.

First, KTLA and I are concerned about New Section 1 of SB 139. The new provisions would require courts to assess the prevailing party's attorneys' fees against the losing party in civil litigation, not including personal injury actions. This would reverse the long-standing "American Rule" concerning responsibility for attorney fees that Kansas has always had, and substitute the "English Rule." This would be a very major departure from long-standing legal principles of American jurisprudence.

KTLA is mindful that New Section 1 contains a provision specifically excluding the application of the bill to personal injury actions. However, KTLA continues to believe that the current system in Kansas—the American Rule, with a few exceptions that are grounded in the public policy goal of consumer protection—makes sense. According to the Annual Report of the Courts of Kansas, only 2% of civil and domestic relations cases filed in Kansas are torts, or personal injury cases. The vast majority of civil cases—63%--involve contract disputes and represent business litigation and collections. Therefore, the impact of excluding personal injury cases is really very small. The majority of civil cases would be affected by the significant changes in SB 139.

The American Rule is based on sound policy principles. Litigation is inherently uncertain, and it would be unjust to punish litigants for exercising their right to file or defend a law suit. The poor would be discouraged from vindicating their rights, not based on the merits of their cases, but for fear of being penalized with their opponents' attorney fees.

The American Rule has been favored in the United States virtually since its independence. The United States Supreme Court in the 1796 case of *Arcambel v. Wisemen*, 3

Senate Judiciary
2-6-07
Attachment 7

Terry Humphrey, Executive Director

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E-Mail: triallaw@ink.org

U.S. 306, rejected the English Rule. More recently, in 1967, the Supreme Court held in *Fleischman Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, that:

> 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, and the poor might be unjustly discouraged from instituting action to vindicate their rights if the penalty for losing included the fees of their opponents.

Also, the time, expense, and difficulties of proof inherent in litigating the question of what constitutes reasonable attorney's fees would pose substantial burdens for judicial administration. See *Oelrichs v. Spain*, supra, 15 Wall. 211 at 231 (1872).

The Florida Legislature adopted a version of the English rule in 1980 when the Florida Medical Association asked that "loser pays" legislation be passed for medical malpractice cases. However, in 1985 the doctors asked that the law be repealed because, after experiencing it for five years, they believed it was a lose-lose for their profession. As a result, the Florida Legislature repealed their "loser pays" provisions five years after their enactment. Florida legislative staff analysis of the Florida legislation noted:

> "[I]t is possible that the bill would have an inhibiting effect on the filing of malpractice suits, and those of moderate income are the most likely to be deterred. The poor are judgment proof and statutorily exempted from the proposal; the rich will be financially able to weigh and assume such risks. However, the middle income individual with assets may be deterred from filing a malpractice suit, regardless of the merit of his claim because of the possibility of losing the suit and becoming liable for the substantial legal fees of the prevailing party."

There are general workability concerns with SB 139. According to the Annual Report of the Courts of Kansas, 19% of civil and domestic relations cases filed in Kansas deal with domestic relations—for example, divorces, child custody, and adoption cases. Who is the "prevailing party" and the "nonprevailing party" in such cases, and how is the court to make such determination? Currently, the court has the discretion to award attorney fees where it is just and equitable. Under, SB 139, award of attorney fees is mandatory.

We note that SB 139 is identical to a 2006 bill, SB 445, which was heard by this committee. In the fiscal note for 2006 SB 445, the Director of the Budget wrote on February 8, 2006, that "the passage of this bill has the potential to have significant effects on the budgets of any state agencies that routinely commence or appeal civil actions, such as the Department of Social and Rehabilitation Services, the Department of Revenue, and the Department of Administration."

I believe the adoption of the English Rule would have the unintended consequence of chilling the Kansas small business's access to the Courts as it would the individual's. Faced with litigating a case against a large out-of-state corporation, represented by a large, big-city law firm,

the Kansas small business owner might well be discouraged from pursuing or defending its position, regardless of its merit, because of the potential liability for very large attorney fees.

Statutory deviations from the English Rule have historically been implemented with the public policy purpose of providing greater access to the courts for the less privileged, not to restrict access. That is the second concern that KTLA and I have concerning SB 139. It repeals the whole of K.S.A. 60-2006. K.S.A. 60-2006 allows recovery of attorney fees in small property damage automobile negligence cases in certain situations. The current law has the laudatory effect of protecting Kansas consumers by making insurance companies play fairly with claimants who would otherwise find it impossible to obtain legal counsel to pursue their claim if a reasonable settlement were not offered. Further, it has the safeguard of not allowing attorney fees in every case, but only those where the claimant is able to recover more than the amount offered in settlement of the claim.

There are other exceptions in current law that permit the recovery of attorney fees in certain situations. Although they deviate from the American Rule system, we believe there are compelling policy reasons for maintaining these long-standing exceptions. Permitting or requiring the court to order attorney fees levels the playing field with the multi-billion dollar insurance industry and protects ordinary Kansans, assuring that the system works fairly for everyone. For example, Kansas currently does not have a "first party bad faith" cause of action that would allow consumers to recover damages from an insurance company that refuses to pay claims to which the insured is entitled. Therefore, K.S.A. 60-2006—and other limited exceptions to the American Rule—protect Kansas consumers, and must be retained.

In summary, the English Rule favors those with financial resources—big insurance companies and other large corporations--who are financially able to assume the risk of attorney fees, to the detriment of every other litigant whose very financial survival could be jeopardized if the lawsuit were lost. It would be a substantial barrier to the Court system for many Kansans if applied on a mandatory basis. Therefore, I encourage you to oppose SB 139.

I appreciate the opportunity to appear before the Committee and I thank you for your attention.

Legislative Testimony

SB 139

February 6, 2007

Testimony before the Kansas Senate Judiciary Committee
By Marlee Carpenter, Vice President of Government Affairs

THE KANSAS CHAMBER

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Chairman Vratil and members of the committee;

The Kansas Chamber and it's over 10,000 member's support reforming the legal system and improving the business climate. The bill before you today will discourage frivolous lawsuits and provide for faster justice for many Kansans. The proposal would require that the prevailing party be awarded reasonable attorney fees. The Kansas Chamber and the business community believe that this will encourage parties to settle and think twice about frivolous lawsuits against any Kansas business.

In our most recent CEO and Business Owner's Poll, 85% of the 300 respondents believe that frivolous lawsuits increase the cost of doing business in the state. Our November 2004 poll of Registered Voters found the same firmly held belief. Nearly 65% of those participating believe that our current legal system should be reformed and 61% believe that lawsuit reform will contribute to economic growth.

The Kansas Chamber believes that this legislation encourages settlements, encourages speedier justice and reduces frivolous lawsuits. Thank you for your time and we encourage you to act favorably upon SB 139.

TESTIMONY OF BILL MCKEAN IN OPPOSITION TO SENATE BILL 139

My name is Bill McKean and I have driven up from Wichita to testify in opposition to Senate Bill 139. It is a terrible bill because citizens representing themselves on a pro se basis will be afraid to protect their constitutional rights if they believe that they will forced to pay the opposing attorneys fees because a corrupt judge is likely to rule against them.

Once again my testimony will focus on the REAL underlying issues which are if the attorneys and judges act honestly and ethically and if the Supreme Court, Kansas Bar Association, Office of Judicial Administration, Kansas Judicial Council and Commission on Judicial Qualifications and Washburn University & University of Kansas law schools condone attorneys betraying their clients to reduce the docket load in the family law courts..

I would like to cite three specific examples of corruption by distinguished family law experts which support my argument that it is unfair to require a Party to pay the opposing attorneys fees..

For my first example I have listed Court of Appeals Case 85418 concerning the abuse of power by a family law case manager, Kathy Kirk and a Johnson County District Judge Janice Russell. The Supreme Court conveniently refused to designate the case for publication to avoid embarrassment for the Russell & Kirk. Because the father was concerned about his 4 year old son's emotional well being and continually complained about the care he was receiving from the child psychologist, the case manager, Kathy Kirk, recommended to Judge Russell that father be treated like a criminal and perform community service ***"because he had too much time on his hand***" and to encourage him to "***get a life***." Judge Russell also forced the father to pay for the fees of the opposing attorney. Because the father hired a new attorney, Ron Nelson, to appeal the case, the Appellate court reversed Kirk's order that he perform community service. However the Court required him to pay the attorneys fees.

About 2 years ago I spoke to the appellant, Ray Jagoda. He was able to get full custody of his son in a Missouri court room due to his ex-wife's emotional problems. I have attached also attached information about Judge Russell from a website from the Committee for Judicial Ethics which makes several allegations of judicial misconduct by Russell including sexually harassed male attorneys. Russell will never feel threatened to be voted out of office because she will never be opposed by a challenger because she is a "merit appointed" Johnson County Judge.

I also listed documentation that Kathy Kirk received the outstanding service award from the KBA in 2005. Even more alarming was the fact that Kathy Kirk was the Director for Alternative Dispute Resolution for the Office if Judicial Administration in 1996 & 1997 who wrote all of the ADR rules for the Supreme Court. Once again my testimony proves

that the Kansas Bar Association routinely recognizes attorneys and judges that act arrogantly and unethically.

My second example to support my argument that Senate Bill 139 should be defeated so that the losing party should not be required to pay legal fees because the judges are dishonest comes form the Sedgwick County District Court's local rules for its family law court. If a party becomes upset at a dishonest case manager and refuses to pay their attorneys fees, the party may never fie a motion in court again. An even more dangerous is the ability for the case manger to suspend case management services for the Party that is not paying the case manager fees while continuing to provide services for the other Party. As demonstrated in the Jagoda case , a dishonest case manager like Kirk may require one party to pay all of the fees. If Jagoda lived in Wichita and had not paid his fees, his ex-wife could continue to request Kirk to issue orders against Jagoda and bill Jagoda for Kirk's fees to rule against him. The case management system is truly evil because it encourages case managers to arbitrarily punish one party to beat them into submission and give up trying to protect the best interests of their children so every one can "***move on with their lives***" so that the district court judges do not have to be bothered with a busy family law docket.

I discovered an even more disturbing unwritten local rule when I attended the Wichita Bar Association's family law seminar last year. The morning presenter, David Johnson who was in a leadership position on the WBA's family law committee with Lynn Ward, informed the family law bar that the district court judges had instructed the attorneys not to advocate for their clients if their clients disagreed with the negative recommendations made by a court-appointed custody evaluator. A lively discussion ensued in which 4 – 5 attorneys complained that the new local unwritten rule was contrary to their s\required code of ethics. When the 3 incoming family law department judges (Fleetwood, Pilshaw & Wilbert) addressed the seminar at the end of the afternoon, no attorney had the courge to ask the judges to confirm the unwritten local rule that David Johnson had articulated.

It is extremely troubling that the judges conspired to suspend the citizens' constitutional rights to due process to enable forensic psychologists and case managers to serve as private subcontractors-expert witness-judge to settle all visitation & custody issues so that the judges only have to deal with property issues. If Senate Bill 169 is passed, a judge intimidate a pro se party by threatening to make him pay the opposing parties legal fees.

At the seminar, I sat next to a young attorney, John Rapp, whose father, David Rapp, has been the long-time chairman of the WBA's ethics committee. Also in attendance were Lynn Ward & Sheila Floodman who are among the 16 divorce attorneys in Kansas Per the website for Superlawyers:

http://www.superlawyers.com/index.php?keyword=&city%5B%5D=0&practice_code%5B%5D=529&Itemid=35&code=KS&action=SL&option=com_superlawyers&task=results

David Rapp is also listed as a super attorney who works at Elkouri Hinkle where Lynn Ward's husband, Dale Ward, serves as the managing partner of Rapp's law firm. Per the firm's website Rapp has made several presentations on professional ethics for attorneys.

http://www.hinklaw.com/attorneys/rapp.html

I am troubled that the family law Superlawyers , Floodman & Ward did not ask for clarification from the judges. I am disturbed that the David Rapp did not report the Sedgwick County judges to the Commission on Judicial Qualifications. I assume that his son, John Rapp would have told his father about the judges' instructions that the attorneys roll over against their clients..

The obvious explanation is that Superlawyers are probably just as undeserving as the award winning judges like Rebecca Pilshaw and attorneys like Kathy Kirk. At the end of this memo I have enclosed an article that the New Jersey Supreme Court outlawed attorneys from using Superlawyer ratings to advertise so hat the committee can investigate if legislation should be enacted outlawing commercial ratings..

My last example to support my argument that Senate Bill should be defeated is my personal experience dealing with 6 different judges, 2 case manages, 3 child psychologists and 4 dishonest attorneys that I hired in a 4 year period because my civil liberties had been taken away at preliminary hearings based on here say evidence from a court-appointed psychologist or case manger that I could not cross-examine. I have spend approximately $100,000 to protect my children fighting to protect my parental rights and my children's right to see an unbiased mental health provider selected recommended by my family rather than a dishonest court-house whore case manager.

I documented dishonest and unethical acts by several individuals. Similar to Ray Jagoda's story, the judges, attorneys, case managers, forensic psychologists and court-appointed child psychologists conspired so that my 6 year old son was misdiagnosed and required to take Zoloft and Depacote. Because I continued to complain, I was able to document on a pro se basis the dishonesty of the following individuals:

Sheila Floodman – Superlawyer - dishoensty

Charlie Harris – Chairman of the Family law advisory committee for the Zkansas Judicial Council – Perjury & failure to advocate for me

Ann Sodeberg – Chairman of the Wichita Bar Association Family Law Committee – lying to a judge, conspiracy to obstruct justice by filing a motion to documenting that something occurred before it happened.

John Foulston – President of the Wichita Bar Association –lying to a judge under oath. Lying to a pro se party.

Kim Kadel – court-appointed case manager – obstruction of justice by fabricating statements that were not true.

David Seifert – child psychologist chosen by Kadel over my objections – Perjury and intentional misdiagnosis of my son

Marc Quillen – forensic psychologist and spouse of Kansas Legal Services Director, Marilyn Harp – unethical behavior by failing to inform me about a material financial conflict of interest

Judge Terry Pullman – obstruction of justice by losing court records.

Judge Eric Yost – obstruction of justice by intentionally withdrawing my motions with out my permission

Columbus Bryant – 2nd child psychologist chosen by Kadel over my objections – obstruction of justice

Elaine Reddick – 3rd attorney – failure to advocate for me.

Sean Shores – last attorney – Perjury , lying to his client and intentionally failing to file motions to meet a deadline, failing to advocate for me.

Judge Janet Pilshaw – obstruction of justice by trying to intimidate me by telling me not to file any motions to fight her order that I not have unsupervised visitation

Judge Tim Lahey – judicial prejudice by refusing to allow me to present evidence to prove that the opposing counsel, Ann Soderberg, was intentionally proffering false statements to gain approval for her motion.

CONCLUSION

Senate Bill 130 should be defeated because unethical judges should be even more empowered to violate the constitutional rights of individuals by forcing the losing party to pay the opposing attorneys fees.