Approved: April 25, 2007
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman John Vratil at 9:34 A.M. on February 15, 2007, in Room 123-S of the Capitol.

All members were present.

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:
John McCabe, Legal Counsel, national Conference of Commissioners on Uniform State Laws
Katy Olsen, Kansas Bankers Association
Jim Clark, Kansas Bar Association
Ed Collister
Kyle Smith, Deputy Director, KBI
Capt. Glenn Kurtz, Sedgwick County Sheriff's Office
Ed Klumpp, Kansas Association of Chiefs of Police

Others attending:
See attached list.

The hearing on **SB 183--Uniform commercial code, article 1, general provisions** was opened.

John McCabe appeared in support, indicating that modification and revisions of other articles in the Uniform Commercial Code (UCC) require the revision of Article 1 of the UCC (Attachment 1). Mr. McCabe reviewed the changes and urged enactment for consistency with the rest of the UCC.

Kathy Olsen spoke in favor, suggesting a friendly amendment with regard to the choice of law provisions found in New Section 15 (Attachment 2). Such a change would require a connection to either the location of the parties or with the transaction.

The Chairman requested Ms. Olsen work with Mr. McCabe on language for a balloon amendment to be ready when the bill is discussed for final action.

Written testimony in support of Ms. Olsen's amendment to **SB 183** was submitted by:
David A. Hanson, Attorney, Glenn, Cornish, Hanson & Karns (Attachment 3)
Matthew Goddard, Vice President, Heartland Community Bankers Association (Attachment 4)

There being no further conferees, the hearing on **SB 183** was closed.

The hearing on **SB 308--Uniform commercial code, article 7, revisions** was opened.

John McCabe testified in support, indicating the proposed changes to the Uniform Commercial Code, Article 7, will clarify and update existing rules of law to include electronic documents of title (Attachment 5). With the increased use and reliance upon electronic documents of title, enactment would ensure that the law remains consistent with the demands of developing technology.

There being no further conferees, the hearing on **SB 308** was closed.

The hearing on **SB 237--Collection of certain specimens, probable cause determination** was opened.

Jim Clark appeared as a proponent, stating that the collection of DNA samples constitutes a search of that person and proposes that a magistrate be involved with the taking of samples from a person arrested without a warrant (Attachment 6).

Kyle Smith testified in opposition, indicating the collection of DNA is fundamentally no different than the collection of fingerprints (Attachment 7). It is basically an identification tool and the inclusion of a probable cause determination would strengthen the argument that the collection of a DNA sample is a search, not an administrative action.

Capt. Glenn Kurtz, opponent, provided data regarding the development of collection procedures, sample packaging, and personnel training (Attachment 8). Capt. Kurtz also addressed the issue of workflow as currently required by statute and the effect of delaying collection until a magistrate finds probable cause. He suggested amending the language so that DNA samples would be collected upon conviction which would minimize court challenges.

Ed Klumpp appeared in opposition, stating that the requirement of finding probable cause prior to the collection of DNA samples will create inconsistencies and difficulties in the collection of samples (Attachment 9). Collection of DNA samples produces a record that can positively identify a person, the same as fingerprints. Potential problems with **SB 237** as written include:

- arrests with a warrant occur after a probable cause finding but an "on view" or "probable cause" arrest would require waiting for the submission of the sample, and
- difficulties in collecting samples after a probable cause hearing if the defendant is out on bond.

There being no further conferees, the hearing on **SB 237** was closed.

Final action on **SB 88--Restoration of spouse's name after divorce is final** continued.

Senator Allen distributed a balloon amendment providing a re-wording of language on page 8, line 15 of the bill (Attachment 10). The Chairman verified that it is Senator Allens' intent with this amendment that there would be no new preceding required, no filing fee, the spouse would use a form prepared by the Judicial Council and there would be no need to hire an attorney.

Senator Journey moved, Senator Allen seconded, to adopt the balloon amendment. Motion carried.

Senator Allen moved, Senator Goodwin seconded, to recommend **SB 88**, as amended, favorably for passage.

The meeting adjourned at 10:30 A.M. The next scheduled meeting is February 16, 2007.

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.

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 2/15/07

NAME	REPRESENTING
Richard Samaniego	Kearney & Assoc.
Kathy Olsen	Ks Bankers Assn.
Ed Klumpp	KS Assoc. of Chiefs of Police
John A. Donley	KS Lvstk. Ass'n
GLENN KURTZ	SEDGWICK COUNTY SHERIFF
Brenda Harmon	KSC
Kyle Smith	KBI
Kathy Damron	KDJA
JIM CLARK	KBA
Ed Collister	KBA

WHY STATES SHOULD ADOPT
THE REVISED UNIFORM COMMERCIAL CODE,
ARTICLE 1 – GENERAL PROVISIONS (2001)

Article 1 serves all other articles of the Uniform Commercial Code with definitions and general provisions. Revised Article 1 improves old Article 1 in the following ways:

- **Modernization.** The UCC has entirely been amended or revised between 1985 and 2003. Most states have enacted these revisions and amendments. It is time to bring Article 1 as up-to-date as the rest of the UCC.

- **Narrower Scope.** The intentionally narrowed scope of the substantive rules in Article 1 prevent them from being applied outside the UCC with potentially serious unintended consequences.

- **Clarifies When Non-UCC Rules Apply.** Other law will clearly supplement, but does not supplant UCC rules. This reduces interpretation problems and the opportunities for litigation.

- **Course of Performance Added.** Absent express terms, evidence of "course of performance" (a concept currently utilized only in Articles 2 and 2A of the UCC) may be used in court to interpret a contract along with course of dealing and usage of trade. Courts will have more complete evidence on the meaning of contracts and the intent of the parties to them.

- **Statute of Frauds Deleted.** General writing and signature requirements are deleted to make way for the specific provisions for electronic records and signatures that are contained in the substantive UCC articles.

UNIFORMITY

Modifications and revisions of other articles in the Uniform Commercial Code require the revision of Article 1 of the UCC. This required harmonization of Article 1 with the other revised articles as well as the need to reflect in Article 1 recent changes and developments in law are both expressed in Revised Article 1. It is important for every state to adopt Revised Article 1 of the Uniform Commercial Code.

Amendments to Article 1 of the Uniform Commercial Code

-A Summary-

Article 1 of the Uniform Commercial Code (UCC) provides definitions and general provisions which, in the absence of conflicting provisions, apply as default rules covering transactions and matters otherwise covered under a different article of the UCC. As other parts of the UCC have been revised and amended to accommodate changing business practices and development in the law, these modifications need to be reflected in an updated Article 1. Thus, Article 1 contains many changes of a technical, non-substantive nature, such as reordering and renumbering sections, and adding gender-neutral terminology. In addition, over the years it has been in place, certain provisions of Article 1 have been identified as confusing or imprecise. Several changes reflect an effort to add greater clarity in light of this experience. Finally, developments in the law have led to the conclusion that certain changes of a substantive nature needed to be made.

The first substantive change is intended to clarify the scope of Article 1. Section 1-102 now expressly states that the substantive rules of Article 1 apply only to transactions within the scope of other articles of the UCC. The statute of frauds requirement aimed at transactions beyond the coverage of the UCC has been deleted. Second, amended Section 1-103 clarifies the application of supplemental principles of law, with clearer distinctions about where the UCC is preemptive. Third, the definition of "good faith" found in 1-201 is revised to mean "honesty in fact and the observance of reasonable commercial standards of fair dealing". This change conforms to the definition of good faith that applies in all of the recently revised UCC articles except Revised Article 5. Finally, evidence of "course of performance" may be used to interpret a contract along with course of dealing and usage of trade.

Article 1 impacts every transaction governed by the UCC, including any sale of goods, any transfer of any negotiable instrument or check, any commercial electronic funds transfer, any letter of credit, any warehouse receipt or bill of lading, any transfer of an investment security, and any credit transaction in which a security interest is taken in specific collateral. These are the transactions governed by specific articles of the UCC and encompass the bulk of commercial activity in the American economy. Although its rules and definitions are often overlooked in rank of importance and are frequently considered mundane, it is truly the "hold together" article of the UCC, binding the other articles into one code. Therefore, it is very important to have it up-to-date and consistent with the rest of the UCC for smooth economic function in the United States.

A Few Facts About

REVISED UNIFORM COMMERCIAL CODE ARTICLE 1, GENERAL PROVISIONS (2001)

PURPOSE: Updates the general provisions section of the Uniform Commercial Code, to harmonize with ongoing UCC projects and recent revisions.

ORIGIN: Completed by the National Conference of Commissioners on Uniform State Laws and the American Law Institute in 2001.

APPROVED BY: American Bar Association

STATE ADOPTIONS:

Alabama
Arizona
Arkansas
California
Colorado
Connecticut
Delaware
Hawaii
Idaho
Kentucky
Louisiana
Minnesota
Montana
Nebraska
Nevada
New Hampshire
New Mexico
North Carolina
Oklahoma
Texas
U.S. Virgin Islands
Virginia
West Virginia

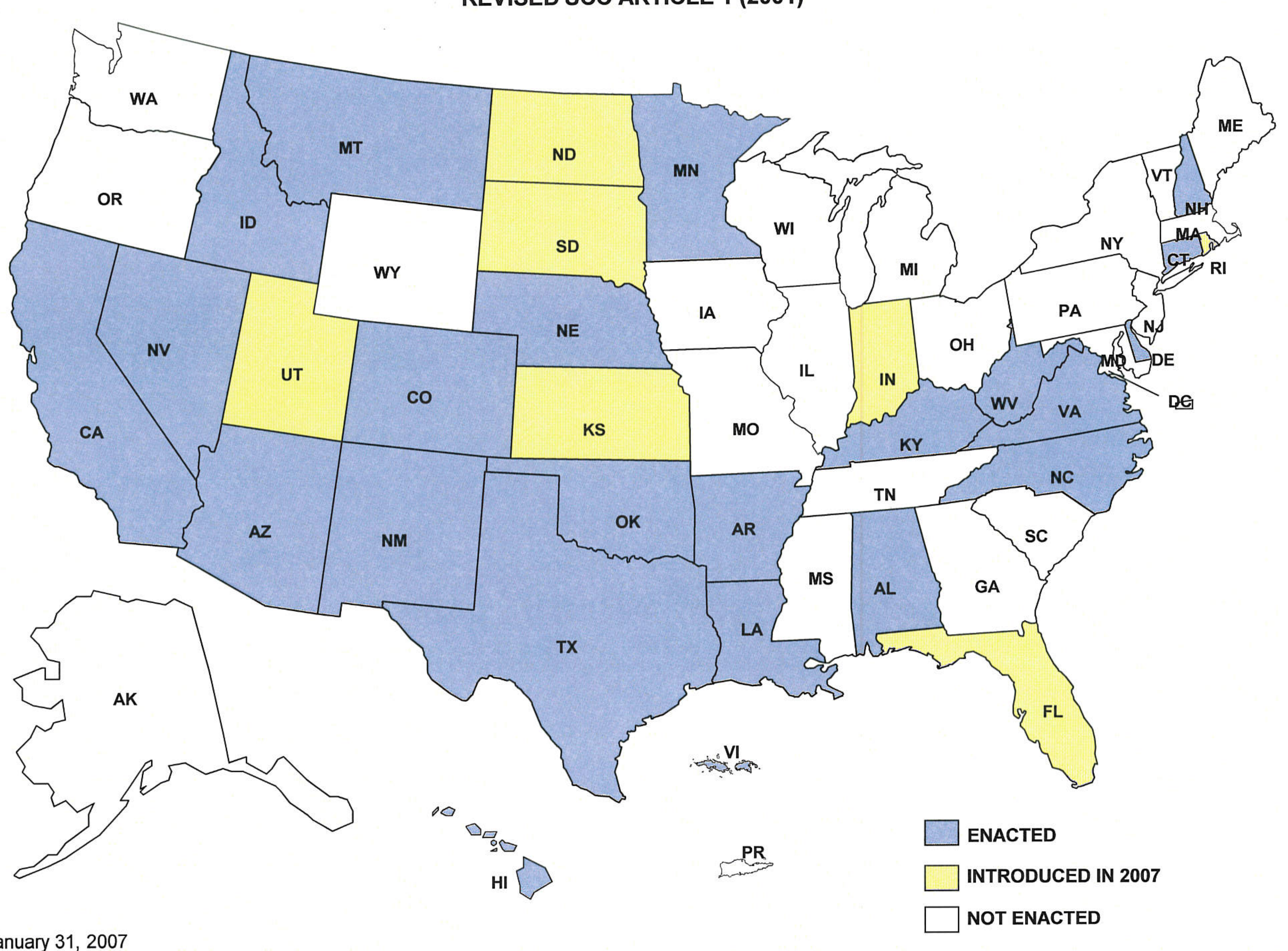
2007 INTRODUCTIONS:

Indiana
North Dakota
Rhode Island
South Dakota
Utah

For any further information regarding the Revised UCC Article 1, please contact John McCabe or Katie Robinson at 312-915-0195.

(1/25/07)

REVISED UCC ARTICLE 1 (2001)



January 31, 2007

February 15, 2007

To: Senate Committee on Judiciary

From: Kathleen Taylor Olsen, Kansas Bankers Association

Re: SB 183: UCC Revised Article 1

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to appear before you today with regard to **SB 183**, a revision of the UCC's Article 1. While generally supportive of most of its provisions, we would like to ask for your consideration of an amendment with regard to the choice of law provisions found in New Section 15.

According to the information we have received, there are twenty-two states that have enacted Revised Article 1. Of those twenty-two states, none of them have enacted the provisions regarding choice of law as they exist in **SB 183**. Rather, states have chosen to retain the current choice of law provisions found in K.S.A. 84-1-105.

Currently, the choice of law section in K.S.A. 84-1-105 (attached) allows parties to a transaction to designate by agreement, which state law governs as long as the transaction bears a "reasonable relation" to that state.

The revised choice of law section proposes a bifurcated approach with one rule for business-to-business transactions and another rule for consumer transactions. For business-to-business transactions, the revision proposes that parties to a transaction may agree which state law governs without regard to whether the transaction bears a relation to the state designated. For consumer transactions, the revision's proposal requires a reasonable relation to the state law agreed to by the parties, but also provides that the agreement may not be effective if the state in which the consumer resides has a law that is more protective of consumers and which could not be varied by agreement.

We believe the current choice of law section is better because we believe that all transactions should be governed by the laws of a state where there is a reasonable relation – a nexus to that transaction. It represents a good compromise as it does not allow businesses to "forum shop", but requires there to be a connection either with the location of the parties or the transaction.

610 S.W. Corporate View 66615 | P.O. Box 4407, Topeka, KS 66604-0407 | 785-232-3444 | Fax 785-2:
kbaoffice@ksbankers.com | www.ksbankers.com

Senate Judiciary
2-15-07
Attachment 2

We also belive the current law is very clear and understandable and promotes certainty to entities and people doing business across state lines. Kansas entities should be able to rely on the fact that Kansas law will govern agreements they enter into. It would be almost impossible in this age of interstate commerce for a Kansas business to begin to know all of the nuances of the laws in other states where they may have customers.

The revised version is much more complex and would generate more litigation. Right now, litigation under the current provision is mostly limited to whether there is a "reasonable relation" to the state, and we have case law providing precedent on that issue. It is foreseeable that under the revised version, litigation over which state's laws are more protective of consumers will occur, as will litigation over whether a state's laws "may not be varied by agreement".

Finally, ironically, with every other state that has considered this body of law opting to not adopt the proposed choice of law provisions, for Kansas to do so would make our state's law nonuniform with both the current and thus-far revised Article 1 choice of law sections in every other state.

In conclusion, the KBA would respectfully request the adoption of the balloon amendment that is attached to this testimony which would maintain the current status of the choice of law provisions for UCC transactions. With that amendment, the KBA would fully support adoption of **SB 183**.

Proposed Balloon of the Kansas Bankers Association
SB 183

New Sec. 15. (UCC 1-301.) Territorial applicability; parties' power to choose applicable law. ~~(a) In this section:~~
~~(1) "Domestic transaction" means a transaction other than an international transaction.~~
~~(2) "International transaction" means a transaction that bears a reasonable relation to a country other than the United States.~~
~~(b) This section applies to a transaction to the extent that it is governed by another article of the uniform commercial code.~~
~~(c) Except as otherwise provided in this section:~~
~~(1) An agreement by parties to a domestic transaction that any or all of their rights and obligations are to be determined by the law of this state or of another state is effective, whether or not the transaction bears a relation to the state designated; and~~
~~(2) an agreement by parties to an international transaction that any or all of their rights and obligations are to be determined by the law of this state or of another state or country is effective, whether or not the transaction bears a relation to the state or country designated.~~
~~(d) In the absence of an agreement effective under subsection (c), and except as provided in subsections (e) and (g), the rights and obligations of the parties are determined by the law that would be selected by application of this state's conflict of laws principles.~~
~~(e) If one of the parties to a transaction is a consumer, the following rules apply:~~
~~(1) An agreement referred to in subsection (c) is not effective unless the transaction bears a reasonable relation to the state or country designated.~~
~~(2) Application of the law of the state or country determined pursuant to subsection (c) or (d) may not deprive the consumer of the protection of any rule of law governing a matter within the scope of this section, which both is protective of consumers and may not be varied by agreement:~~
~~(A) Of the state or country in which the consumer principally resides, unless subparagraph (B) applies; or~~
~~(B) if the transaction is a sale of goods, of the state or country in which the consumer both makes the contract and takes delivery of those goods, if such state or country is not the state or country in which the consumer principally resides.~~
~~(f) An agreement otherwise effective under subsection (c) is not effective to the extent that application of the law of the state or country designated would be contrary to a fundamental policy of the state or country whose law would govern in the absence of agreement under subsection (d).~~
(a) Except as other provided in this section, when a transaction bears a reasonable relation to this state and also to another state or country, the parties may agree that the law of either this state or of such other state or country shall govern their rights and duties. In the absence of such agreement, this act applies to transactions bearing an appropriate relation to this state.

KBA Proposed Balloon
SB 183, cont.

(g) To the extent that the uniform commercial code governs a transaction, if one of the following provisions of the uniform commercial code specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law so specified:
(1) K.S.A. 84-2-402, and amendments thereto;
(2) K.S.A. 84-2a-105 and 84-2a-106, and amendments thereto;
(3) K.S.A. 84-4-102, and amendments thereto;
(4) K.S.A. 84-4a-507, and amendments thereto;
(5) K.S.A. 84-5-116, and amendments thereto;
(6) K.S.A. 84-8-110, and amendments thereto;
(7) K.S.A. 2006 Supp. 84-9-301 through 84-9-307, and amendments thereto.

Law Offices
GLENN, CORNISH, HANSON & KARNS
CHARTERED

800 SW Jackson – Suite 900
Topeka, Kansas 66612
785-232-0545

Testimony on SB 183
February 15, 2007

TO: **Senate Judiciary Committee**

RE: Senate Bill No. 183

Mr. Chairman and Members of the Committee:

Thank you for this opportunity to present information to the Committee on behalf of PCI, the Property Casualty Insurers Association of America, which has over 1,000 member insurance companies in the U.S., and whose member companies have a significant business presence in Kansas writing over 40% of the property-casualty premiums in Kansas.

As the law stands now in Kansas, there is a "reasonable relation" requirement for the parties' choice of applicable law in commercial transactions under the UCC. SB 183 proposes to eliminate the "reasonable relation" requirement, thereby drastically changing the choice of law provision of the UCC, as shown on attached page 9 of SB 183, lines 20-28.

Kansas law is reflected in K.S.A. 2006 Supp. 84-1-105, which is attached hereto, stating that parties may agree as to which state law will control a particular transaction, but it is required that such choice of state law must bear a reasonable relation to the transaction. Such a requirement is consistent with other Kansas choice of law statutes and Kansas case law. Besides being consistent with other choice of law provisions, the "reasonable relation" requirement offers practical protections to the citizens of Kansas, both consumers and businesses. Without the "reasonable relation" requirement, Kansans could be forced to litigate a dispute in any state in the nation regardless of the fact that state had no interest or relation to the transaction. Removing the "reasonable relation" requirement will also make contract review more complicated, time consuming and costly. Right now, individuals are able to determine which of several states have a reasonable relation to the contract and are able to determine the effect of the law in each of those states prior to entering into the contract. Without the "reasonable relation" requirement, this would become an extremely burdensome undertaking.

At this time, it does not seem such a drastic modification to the UCC is justified, especially without further extensive study to determine any and all possible ramifications such a change would cause. We would therefore request that the "reasonable relation" standard be retained in Kansas. Thank you for your consideration.

Respectfully,

[signature]

DAVID A. HANSON

Senate Judiciary
2-15-07
Attachment 3

1 New Sec. 13. (UCC 1-205.) Reasonable time; seasonableness. (a)
2 Whether a time for taking an action required by the uniform commercial
3 code is reasonable depends on the nature, purpose, and circumstances of
4 the action.
5 (b) An action is taken seasonably if it is taken at or within the time
6 agreed or, if no time is agreed, at or within a reasonable time.
7 New Sec. 14. (UCC 1-206.) Presumptions. Whenever the uniform
8 commercial code creates a "presumption" with respect to a fact, or pro-
9 vides that a fact is "presumed," the trier of fact must find the existence
10 of the fact unless and until evidence is introduced that supports a finding
11 of its nonexistence.
12 New Sec. 15. (UCC 1-301.) Territorial applicability; parties' power
13 to choose applicable law. (a) In this section:
14 (1) "Domestic transaction" means a transaction other than an inter-
15 national transaction.
16 (2) "International transaction" means a transaction that bears a rea-
17 sonable relation to a country other than the United States.
18 (b) This section applies to a transaction to the extent that it is gov-
19 erned by another article of the uniform commercial code.
20 (c) Except as otherwise provided in this section:
21 (1) An agreement by parties to a domestic transaction that any or all
22 of their rights and obligations are to be determined by the law of this
23 state or of another state is effective, whether or not the transaction bears
24 a relation to the state designated; and
25 (2) an agreement by parties to an international transaction that any
26 or all of their rights and obligations are to be determined by the law of
27 this state or of another state or country is effective, whether or not the
28 transaction bears a relation to the state or country designated.
29 (d) In the absence of an agreement effective under subsection (c),
30 and except as provided in subsections (e) and (g), the rights and obliga-
31 tions of the parties are determined by the law that would be selected by
32 application of this state's conflict of laws principles.
33 (e) If one of the parties to a transaction is a consumer, the following
34 rules apply:
35 (1) An agreement referred to in subsection (c) is not effective unless
36 the transaction bears a reasonable relation to the state or country
37 designated.
38 (2) Application of the law of the state or country determined pursuant
39 to subsection (c) or (d) may not deprive the consumer of the protection
40 of any rule of law governing a matter within the scope of this section,
41 which both is protective of consumers and may not be varied by
42 agreement:
43 (A) Of the state or country in which the consumer principally resides,

Kansas Legislature

84-1-105

Chapter 84.--UNIFORM COMMERCIAL CODE
Part 1.--SHORT TITLE, CONSTRUCTION, APPLICATION AND SUBJECT MATTER OF THE ACT
Article 1.--GENERAL PROVISIONS

84-1-105. Territorial application of the act; parties' power to choose applicable law. (1) Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this act applies to transactions bearing an appropriate relation to this state.

(2) Where one of the following provisions of this act specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law (including the conflict of laws rules) so specified:

Rights of creditors against sold goods. K.S.A. 84-2-402 and amendments thereto.

Applicability of the article on leases. K.S.A. 84-2a-105 and 84-2a-106, and amendments thereto.

Applicability of the article on bank deposits and collections. K.S.A. 84-4-102 and amendments thereto.

Applicability of the article on investment securities. K.S.A. 84-8-110 and amendments thereto.

Governing law in the article on funds transfers. K.S.A. 84-4a-507 and amendments thereto.

Letters of credit. K.S.A. 84-5-116 and amendments thereto.

Law governing perfection, the effect of perfection or nonperfection, and the priority of security interests and agricultural liens. K.S.A. 2006 Supp. 84-9-301 through 84-9-307 and amendments thereto.

History: L. 1965, ch. 564, § 5; L. 1975, ch. 514, § 1; L. 1991, ch. 294, § 1; L. 1991, ch. 295, § 81; L. 1992, ch. 302, § 9; L. 1996, ch. 202, § 20; L. 2000, ch. 142, § 135; L. 2002, ch. 159, § 29; May 23.

3-3

Matthew S. Goddard, Vice President

700 S. Kansas Ave., Suite 512
Topeka, Kansas 66603
Office (785) 232-8215 • Fax (785) 232-9320
mgoddard@hcbankers.com

To: Senate Judiciary Committee

From: Matthew Goddard
Heartland Community Bankers Association

Date: February 15, 2007

Re: Senate Bill 183

The Heartland Community Bankers Association appreciates the opportunity to share our concern regarding Senate Bill 183 with the Senate Committee on Judiciary.

Senate Bill 183 would adopt Revised Article 1 of the Uniform Commercial Code. Our specific concern with this legislation is Revised Section 1-301 dealing with a new "choice of law" rule. Most other states which have adopted Revised Article 1 have not adopted the new language of 1-301 and have instead chosen to leave "old" Section 1-105 intact. We would respectfully encourage this Committee and the Legislature to follow a similar path for Kansas.

Under current law, K.S.A. 84-1-105 provides that state law chosen to govern a contract must bear a "reasonable relationship" to the transaction. Revised Section 1-301, as it appears in Senate Bill 183, removes the requirement for non-consumer transactions that the state law governing a UCC contract must bear a reasonable relationship to the transaction. Instead, the bill allows the law of any unrelated state to govern the contract. We are concerned that the Revised Article will lead to forum shopping and the application of state law that is prejudicial to one party at the expense of another. In a worse case scenario, a law passed in a single state could suddenly be applicable to contracts covered under the UCC in the other 49 states.

While the focus for most Kansas financial institutions and other businesses is the choice of law as it relates to the 50 states, Revised Section 1-301 applies its dubious standard to international transactions as well. In an international transaction, Revised Article 1 would allow the laws of any nation to govern a UCC contract without any requirement of a reasonable relationship between the applicable law and the parties involved in the transaction.

In reviewing the negative reaction from around the country to Revised Section 1-301, there is a considerable amount of concern that the Uniform Computer Information Transactions Act, enacted in only Maryland and Virginia, would suddenly find much greater applicability. Regardless of what "Trojan horses" may be lurking about, waiting for the enactment of Revised Article 1 and Section 1-301, we are unaware of a pressing need for a change in choice of law rules and the subsequent legal uncertainties that would come from its enactment.

The Heartland Community Bankers Association appreciates the consideration of our concerns with Senate Bill 183 by the Senate Committee on Judiciary.

Senate Judiciary
3-15-07
Attachment 4

WHY STATES SHOULD ADOPT REVISED ARTICLE 7 OF THE UNIFORM COMMERCIAL CODE (2003)

Article 7 of the Uniform Commercial Code governs rights to goods during commercial storage and shipment of goods (held by a bailee). In particular, rights in goods transfer by transferring the documents of title. Key to any Article 7 discussion is the concept of "negotiation" of documents of title. Negotiation enables parties to transfer goods without fear that a third person may have a claim against the transferee of goods. Negotiation of documents of title presupposes paper documents. Electronic documents of title require different concepts and terms to provide the same transfer effect as negotiable paper documents of title. Revised Article 7 introduces electronic documents of title to the fundamental commercial law.

Revised Article 7 contains these necessary changes which every state should adopt:

- **Control** – Control of an electronic document of title is the conceptual equivalent to possession and indorsement of a tangible document of title. The concept of "control" is the alternative adopted by the revisions and defined in Section 7-106. A person has "control" of a document of title for Article 7 purposes "if a system employed for evidencing the transfer of interests in the electronic document reliably establishes that person as the person to which the electronic document was issued or transferred." There is more than one way to meet this set of standards, unlike negotiation of a paper document.

- **Statute of Frauds** – Revised Article 7 extends statute of fraud requirements to include electronic records and signatures by creating new definitions of "record" and "sign." The new definitions recognize information stored in electronic format and electronic symbols, respectively. The term "writing" is replaced with the term "record" wherever used in the Article.

- **Interchangeability** - Revised Article 7 permits the conversion of electronic documents to tangible documents and vice versa. An electronic document may be converted when the person in control surrenders control to the issuer, which then issues a tangible document of title containing a statement that it substitutes for the electronic document. A similar process is in place for converting a tangible document to an electronic one. Section 7-105 lists the minimum requirements that must be filled to give effect to the substitute document.

The revisions to UCC Article 7 clarify and update existing rules of law to include electronic documents of title. They have been endorsed widely. They bring state law in line with federal law. With the increased use and reliance upon electronic documents of title, the new rules are necessary to ensure that the law remains consistent with the demands of developing technology.

REVISED ARTICLE 7 OF THE UNIFORM COMMERCIAL CODE

- A SUMMARY -

Revision in 2003

The original Article 7 of the Uniform Commercial Code, "Warehouse Receipts, Bills of Lading and Other Documents of Title," combined two earlier uniform acts, the Uniform Warehouse Receipts Act (1906) and the Uniform Bills of Lading Act (1909), with some principles from the Uniform Sales Act (which became Article 2-Sales of the UCC). Article 7 had not been revisited after the 1951 promulgation of the original Uniform Commercial Code until 2003, a period of 52 years. The longevity of the principles of warehouse receipts and bills of lading suggests very successful law and law-making as it pertains to the commercial storage and shipment of goods. The basic principles do not change basically in the 2003 revision. But there are reasons to readdress this area of the commercial law in 2003, which shall be discussed a little later. First, it is necessary to establish some of the basics.

Introduction to Documents of Title

The storage and shipment of tangible goods for commercial purposes has been going on for centuries. The physical side of the business is carried on by entities that provide warehouses (warehousemen) and entities that carry the goods from place of origin to destination (common carriers). These are tangible, visible businesses. What is not tangible and visible is the transfer of rights in the goods while they are stored and/or shipped. The common law provided the rules of bailment. The terminology of bailor and bailee is still incorporated in the Uniform Act. As the law developed, the transfer of rights came to depend upon the transfer of specific documents of title. The transfer of the documents from one person to another became the transfer of the rights. The title documents were warehouseman's receipts on the storage/warehouse side, and the bill of lading on the carrier side. The original uniform acts and the 2003 revision all incorporate these basics.

One of the important principles carried forward into the 2003 revision is that of negotiability. Free transfer of interests is an important policy norm throughout the UCC. In Article 7, documents of title may be negotiable. Whether a document is negotiable or non-negotiable depends upon how it identifies the transferee and how it is transferred. A negotiable document may be one of two kinds of paper documents, bearer paper or order paper. A document made out to bearer may be transferred from one person to another by simple delivery of possession. The delivery transfers the rights to the goods (therefore the title) to the transferee. Order paper is made out to a specific person. After initial delivery to the person named on the document, it may be negotiated to another person by the indorsement of the named person and delivery of possession to that other person. The rights to the goods (and therefore the title) pass with the negotiation to the transferee.

Documents of title may also be made non-negotiable. This is primarily done by a statement on the face of the instrument. Non-negotiable documents of title may also be assigned or transferred. The difference between negotiable and non-negotiable documents is the rights

that they may transfer. A non-negotiable document of title transfers only the actual interests of the transferor. A negotiable document of title may transfer more than the actual interests of the transferor. If negotiated, for example, it transfers free of any claims against the issuer of the document. A non-negotiable document is not free of such claims.

Negotiation as a concept exists to make commerce in goods possible. Goods would not be transferred if the purchaser always has to look behind the transaction to see who may come after the goods after the transfer is complete. Negotiation erases the peril. The principle enunciated in Article 7 is consistent with other parts of the UCC governing notes, drafts, checks and investment securities.

Electronic Documents of Title

Article 7 governs other important aspects of the transfer of rights in goods when stored or shipped, such as the liens of warehousemen and carriers and their enforcement and allocation of risk of loss of the goods either in storage or transit, but the issue of negotiation has been its single most important aspect, up to the revisions in 2003. Something very important has happened to change the way we look at the principle of negotiation. That something is computers, electronic communications and the ability to create electronic documents of title. Computers have been accused and applauded for their impact on commerce and business. Their impact on storage and shipment of goods is profound. Federal law has actually recognized electronic documents for some time, but electronic documents of title cannot be substituted one to one with tangible documents of title. Their characteristics in electronic form are not the same as their characteristics in tangible form.

The tangible form is a written document on paper with signatures of issuers and subsequent transferors. The individual document is a unique token of the rights and interests it represents. Even if there is a copy, there is always the original. This is not so with electronic documents. Originals and copies are indistinguishable from each other in electronic form. Signatures in the sense of an individual's scribing them uniquely on a piece of paper cannot be equally duplicated in an electronic document. Transferors and transferees, who are remote from each other when tangible documents are transferred, are not remote from each other in electronic media. Electronic communications can occur between any two persons anywhere in the world. Yet, it is difficult for each participant in an electronic communication to verify or authenticate the identity of the other party. To have the effective electronic documents that commerce demands, new concepts have to be introduced into the law. The concept of negotiation as we have known it in American law cannot apply in electronic media. The great addition to Article 7, therefore, is the new rules for electronic documents of title.

These rules must deal with distinct issues: recognition of electronic documents of title, statute of fraud extensions, establishment of the unique original in electronic form (sometimes thought of as authentication), and interchangeability between electronic and tangible documents of title. In addition, the rules for electronic documents of title must fit as seamlessly as possible into the existing system governing tangible documents of title. The law should avoid skewing the choice between tangible and electronic documents of title in the favor of either form. Only

the actual marketplace should determine users' choices. Revised Article 7 deals with these issues and meets the test of seamless insertion into the existing law.

Recognition of Electronic Documents of Title

Recognition of electronic documents of title begins in the definition of "Document of Title:" "An electronic document of title is evidence by a record consisting of information stored in an electronic medium." Other definitions have been modified to accord with this root definition. For example, "Holder" is defined to include: "a person in control of a negotiable electronic document of title." Electronic documents of title become the equal to tangible documents of title.

Statute of Frauds Requirements

Revised Article 7 extends statute of fraud requirements to include electronic records and signatures. Any writing requirement that relates to enforceability of a document is a statute of frauds requirement. Article 7 treats electronic records and signatures as the equivalent of paper documents and written, manual signatures. This initially occurs in new definitions of "record" and "sign." A record is "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form." The term "sign" is defined to "execute or adopt a tangible symbol" and "to attach or logically associate with the record an electronic sound, symbol or process." Within Revised Article 7, wherever the term "writing" or an equivalent may have been used before revision, the term "record" is uniformly used. When a document is required to be signed anywhere in Revised Article 7, electronic signing meets the test.

In addition, Revised Article 7 provides language stating expressly that it modifies, limits and supersedes the federal Electronic Signatures in Global and National Commerce Act. This express language, permitted in the federal act, avoids any issue of federal preemption. The federal statute allows specific tailoring for the purposes of incorporating electronic records and signatures into state law.

Establishing the Unique Token

It is not possible to transfer an electronic document of title in the same manner as a tangible document of title, particularly in terms of negotiating it. It cannot be guaranteed that a transfer directly from one person to the next by delivery and/or signature will transfer the authentic original document of title. An electronic alternative to the tangible system is necessary. To accomplish the equivalent system for electronic documents of title, Article 7 adapts the concept of "control" to the purpose. It is not a brand-new concept. It initially was developed in Article 8 of the Uniform Commercial Code for investment securities in the indirect holding system. The 1999 revisions to Article 9 adapted the concept further for secured transactions. Further adaptation of the concept occurred in Section 16 of the Uniform Electronic Transactions Act for promissory notes. This latter adaptation is most important for Revised Article 7, because the issues of negotiation for promissory notes are very similar to those for documents of title.

A person has control of a document of title for Article 7 purposes "if a system employed for evidencing the transfer of interests in the electronic document reliably establishes that person as the person to which the electronic document was issued or transferred." Such a system exists when it establishes a "single authoritative copy ...which is unique, identifiable and ... unalterable." The authoritative copy must identify the person in control or the next person to whom the document has transferred. The person in control determines to whom the document is next transferred. Further, the standard requires that copies that are not authoritative, including copies of the authoritative copy, must be readily identifiable as not being the authoritative copy.

There is more than one way to meet this set of standards, unlike negotiation of a paper document, which occurs in one way only. One way to establish the single authoritative document is to have a single custodian of the electronic record, who enters all transfers of the document and identifies the person in control on its records, records that for all who want to know is the source of the single authoritative copy. In such a system, the person in control notifies the custodian of any transfer or authorized change in the document, who then notates its records appropriately and notifies the person in control and other relevant parties of the action. A transfer would obviously shift control from transferor to transferee. The transferee would become the new person in control.

Encryption technology may provide other methods for meeting these standards. Some kind of hybrid system of encryption and custodian may arise. UCC Article 7 prescribes no system per se and more than one system may develop over time. It is not possible to predict what technology may finally bring to electronic transfer systems. Revised Article 7 allows the technology to develop without need to amend it later when a new kind of technology comes along.

Interchangeability

UCC Article 7 provides for an electronic system of transfer for electronic documents of title and for the traditional paper system of documents of title which includes negotiable documents of title. There are dual tracks. Control is the operative term with electronic documents and negotiation is the operative term for tangible documents of title. With respect to the transfer of rights in a particular group of goods, can electronic documents be converted to tangible documents and vice versa? UCC Article 7 provides for such conversions. An electronic document may be converted when the person in control surrenders control to the issuer, which then issues a tangible document of title containing a statement that it substitutes for the electronic document. The same kind of process will convert a tangible document to an electronic one. The person entitled to enforce a tangible document surrenders possession to the issuer. The electronic document must also state that it is a substitute for the tangible document. Without the ability to convert from tangible to electronic documents, this system would not work.

Other Benefits to Revision

The revisions to UCC Article 7, beyond making way for electronic documents of title, primarily update or clarify existing rules of law. There are references to tariffs and regulations in

original UCC Article 7 that no longer exist with deregulation. These have been eliminated in the revision. There is nothing as significant as the rules for electronic documents of title. But these rules alone make it imperative for the states to enact the revision to UCC Article 7 as soon as practicable. Documents of title are fundamental to the transfer of goods in interstate commerce. The new rules are wholly commerce friendly and every state needs them as soon as possible.

A Few Facts About
REVISED UNIFORM COMMERCIAL CODE ARTICLE 7 (2003)

PURPOSE: The 2003 Revision of UCC Article 7 updates the original UCC7 to provide a framework for the further development of electronic documents of title, and to update the article for modern times in light of state, federal and international developments.

ORIGIN: Completed by the National Conference of Commissioners on Uniform State Laws and the American Law Institute in 2003.

APPROVED BY: American Bar Association

ENDORSED BY: International Association of Refrigerated Warehouses
International Warehouse Logistics Association

STATE ADOPTIONS:

Alabama
Arizona
California
Colorado
Connecticut
Delaware
Hawaii
Idaho
Maryland
Minnesota
Mississippi
Montana
Nebraska
Nevada
New Hampshire
New Mexico
North Carolina
North Dakota
Oklahoma
Rhode Island
Texas
Utah
Virginia
West Virginia

2007 INTRODUCTIONS: Indiana

For any further information regarding UCC Article 7, please contact John McCabe or Katie Robinson at 312-915-0195.

(1/16/07)

REVISED UCC ARTICLE 7 (2003)

WA OR CA NV ID MT WY UT AZ CO NM ND SD NE KS OK TX MN IA MO AR LA WI IL MI IN OH KY TN MS AL GA FL SC NC VA WV PA NY VT NH ME MA RI CT NJ DE MD DC AK HI VI PR

ENACTED

INTRODUCED IN 2007

NOT ENACTED

January 16, 2007

FYI

International Association of Refrigerated Warehouses

Warehousing■Distribution■Transportation■Information■Logistics■

REC'D NOV 14 2003

November 10, 2003

National Conference of Commissioners
on Uniform State Laws
Attn: William H. Henning
211 East Ontario Street
Chicago, IL 60611

Re: Revision of Article 7 of the Uniform Commercial Code

Dear Mr. Henning:

The International Association of Refrigerated Warehouses (IARW) is the trade association representing 230 companies in the United States. These members operate several hundred warehouses throughout the country dedicated to the handling and storage of frozen and refrigerated products. The products stored are mostly foodstuffs for major producers and distributors, but also include items such as pharmaceuticals and other commercial products that require temperature controlled storage. Our membership is composed almost entirely of companies that store goods for merchants. We estimate that our members operate nearly 85% of such frozen and refrigerated public storage space in the United States.

IARW supports the efforts to revise Article 7 of the U.C.C., the basic law governing warehouses throughout the United States. We urge its adoption by all of the states.

The principal change in the revision is the introduction of provisions that would allow warehouse receipts to be issued electronically. Since the introduction of EDI, and especially with the advent of the Internet, our members have experienced a

European Division
Theo W.M. van Sambeeck, Director
P.O. Box 679
NL-8000 AR Zwolle, The Netherlands
+31 38 8504180 • +31 38 8504181 fax
iarweuro@worldonline.nl

International Headquarters
J. William Hudson, President and CEO
1500 King Street, Suite 201
Alexandria, VA 22314-2730, USA
(703) 373-4300 • (703) 373-4301 fax
www.iarw.org • email@iarw.org

South Asia Division
Keith Sunderlal, Director
K-3/17 DLF Phase II, Gurgaon (HR)
New Delhi Metro, India 122 002
+91-124-504-4401 • +91-124-504-4402 fax
india@iarw.org

significant change in the way they do business. Increasingly the use of written documents is being replaced with the transfer of information electronically. Thus it is essential for the future of the industry, as well as that of its customers, that the governing law provide for electronic warehouse receipts.

The other changes in Article 7, although of less significance, are similarly beneficial. They address issues that have arisen in the almost 50 years since the statute was first introduced. We support those revisions.

One reservation should be noted. In some states the uniform statute has been modified at the request of the warehouses in those states. In such instances it is the position of IARW that those modifications should be incorporated in the enactment of the revised Article 7.

Thank you for your consideration of these important business issues.

Sincerely,

J. William Hudson
President and CEO

International Warehouse Logistics Association

President and CEO
JOEL R. HOLLAND
Elected Leadership
Chairman
GARY N. OWEN
Ozburn-Hessey Logistics
Vice Chairman
ANTHONY R. BECKER
Port Jersey Logistics
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Dominion Warehousing & Distribution Services, Ltd.
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The Olson Company
GARY R. KIMBALL
Ozburn-Hessey Logistics
LANSDELL C. McROBERTS
Airfreight Warehouse Corporation
RICHARD T. MURPHY, JR.
Murphy Warehouse Company
DAVID J. PETTIT
American Distribution Centers, Inc.
GARY T. SHIMBASHI
Andlor Logistics System, Inc.
JERE VAN PUFFELEN
Prism Team Services, Inc.
PAUL T. VERST
Verst Group Logistics
CLAUDE M. WALKER
Standard Corporation Integrated Logistics
JOHN J. ZEVALKINK
Columbian Logistics Network
Association Counsel
Vice President & General Counsel - Regulatory Affairs
ANN E. CHRISTOPHER
General Counsel - Legal Affairs
WILLIAM H. TOWLE
Washington Representative
PATRICK C. O'CONNOR
Kent & O'Connor
Customs and Bonded Counsel
THOMAS G. TRAVIS
Sandler, Travis & Rosenberg

IWLA • PHOENIX • 2004
Annual Convention
March 28-31, 2004

November 10, 2003

REC'D NOV 14 2003

National Conference of Commissioners
on Uniform State Laws
Attn: William H. Henning
211 E. Ontario St.
Chicago, IL 60611

Dear Mr. Henning:

Re: Revision of Article 7 of the Uniform Commercial Code

The International Warehouse Logistics Association (IWLA) is a trade association for companies engaged in public and contract warehousing and third-party logistics services. The Association's 550 member companies operate in more than 2,000 locations in the United States, representing approximately 400 million square feet of warehouse space. The Association represents most of the public and contract warehouses in the industry today.

IWLA urges the adoption of the revised Article 7 of the U.C.C. by all of the states.

During the past decade, and particularly with the advances in the internet, the warehouse industry has seen a seminal shift in the way that business is transacted. Paperless transactions are replacing the printed warehouse receipt. Thus it is imperative that Article 7, which governs warehouse/depositor relationships, should recognize these changes. It is in this area that the revision of Article 7 will produce a great benefit to the industry. It is the major reason that IWLA supports the revision.

Also, the existing Article 7 contains a number of areas that have created uncertainty. The revision deals with these issues. Examples are claiming the warehouse lien in an agreement rather than only in a warehouse receipt as presently required; clarifying the status of the lien in relation to other lien interests; laying to rest the problem of courts interjecting mandatory requirements for a valid warehouse receipt; permitting a limitation of liability provision that accords with current industry practices; and similar appropriate revisions. These revisions are a benefit to the industry and should be adopted.

2800 River Road, Suite 260 • Des Plaines, Illinois 60018
Telephone: 847-813-4699 • Facsimile: 847-813-0115 • email@iwla.com
www.iwla.com

In sum, IWLA urges the enactment of the revised Article 7 as a positive benefit to the warehouse industry.

One important qualification must be made to IWLA's endorsement. There are states that have modified the existing provisions of Article 7 at the behest of the warehouse industry in that state. We want to make it clear that those modifications should be incorporated into the enactment of the revised Article 7.

Sincerely,

JOEL R. HOILAND
President & CEO

KANSAS BAR ASSOCIATION

Testimony in Support of
Senate Bill No. 237

Presented to the Senate Judiciary Committee
February 15, 2007

The Kansas Bar Association is a voluntary, professional association of over 6,900 members dedicated to serving Kansas lawyers, their clients, and the people of Kansas.

The KBA once again raises its objection to the collection of DNA samples upon arrest of an adult, or upon a juvenile being taken into custody. Such authority was passed in the 2006 Legislative Session as part of **HB 2554**, even as **SB 261**, the Judicial Council's revision of the Juvenile Offender Code prohibited even fingerprinting and photographing juveniles until after adjudication. Our objections are as follows:

First, removing a DNA sample from a human being is a search of that person, unlike the taking of fingerprints and photographs, In the Matter of the Welfare of C.T.L., Juvenile, A06-874, Minnesota Court of Appeals, October 10, 2006 (portions attached).

Second, a DNA sample is a much more intrusive collection. DNA holds medical and biological clues as well as identification clues, and can be kept forever. The fact that such an invasion of privacy can occur without the intervention of a magistrate is poor public policy. Kansas law on arrests without a warrant clearly allows law enforcement officers to arrest an individual when the officer has probable cause to believe the individual is committing or has committed a felony. See K.S.A.2005 Supp. 22-2401(c)(1); ***Gerstein*** *v. Pugh,* 420 U.S. 103, 113, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975). But after such an arrest, a suspect may be held in custody pending trial only so long as a judicial determination of probable cause is made within 48 hours of the arrest. See K.S.A.2005 Supp. 22-2901(7); ***County of Riverside*** *v. McLaughlin,* 500 U.S. 44, 56, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991). If a person being held for trial, either within 90 days if in custody, or 180 days when released on bond, must have a determination of probable cause within 48 hours of arrest, there should also be a determination of probable cause before a DNA sample is taken upon a warrantless arrest, as a DNA sample lasts forever.

We should point out that in addition to **SB 26**, in **SB 53**, release of dormant judgments, and **SB 54**, signing of arrest warrants, the district court clerks realize that a district judge should be required to perform these acts. The Kansas Bar Association proposes that a magistrate should also be involved with the taking of a DNA sample from a person arrested without a warrant, and we urge the committee to pass **SB 237** out favorably.

James W. Clark
KBA Legislative Counsel

* * *

Senate Judiciary
2-15-07
Attachment 6

722 N.W.2d 484; IN RE WELFARE OF C.T.L.;

722 N.W.2d 484 (MN 2006)
IN RE WELFARE OF C.T.L.

In the Matter of the WELFARE OF C.T.L., Juvenile.

No. A06-874.

Court of Appeals of Minnesota.

October 10, 2006

Page 485

This Page Contains Headnotes.

Appeal from the District Court, Washington County, Elizabeth Martin, J.

Page 486

Mike Hatch, Attorney General, St. Paul, MN, and Douglas H. Johnson, Washington County Attorney, Mary M. Pieper, Assistant County Attorney, Stillwater, MN, for appellant.

John M. Stuart, State Public Defender, Lawrence Hammerling, Deputy Assistant Public Defender, Minneapolis, MN, and Megan H. Schlueter, Assistant Washington County Public Defender, Stillwater, MN, for respondent.

Considered and decided by RANDALL, Presiding Judge; KALITOWSKI, Judge; and PETERSON, Judge.

OPINION

PETERSON, Judge.

A delinquency petition was filed alleging that respondent aided and abetted first-degree aggravated robbery and committed fifth-degree assault. Appellant moved for an order requiring respondent to provide a biological specimen for the purpose of DNA analysis pursuant to Minn.Stat. § 299C.105 (Supp.2005). Respondent challenged the constitutionality of Minn.Stat. § 299C.105 and moved for an order certifying the issue of the statute's constitutionality to this court as an important and doubtful question. The district court held that the statute's "compulsory DNA profiling of criminal defendants prior to conviction" is unconstitutional and certified as important and doubtful the question of whether the provisions of Minn.Stat. § 299C.105 that require charged defendants to provide a DNA sample upon a judicial finding of probable cause, but before any conviction on the charged offense, is an unconstitutional search in violation of the Fourth Amendment to the United States Constitution and Article I, Section 10, of the Minnesota Constitution. We answer the certified question in the affirmative.

FACTS

6-2

Respondent C.T.L., a juvenile, was charged with one count each of fifth-degree assault, in violation of Minn.Stat. § 609.224, subd. 1(1)(2) (2004), and aiding and abetting first-degree aggravated robbery, in violation of Minn.Stat. § 609.245, subd. 1 (2004). Appellant State of Minnesota moved for an order requiring C.T.L. to report to the sheriff's office immediately after his initial appearance in district court to provide a biological specimen for the purpose of DNA analysis pursuant to Minn.Stat. § 299C.105 (Supp. 2005). Respondent then moved for an order finding that the provisions of Minn.Stat. § 299C.105 that require law-enforcement personnel to obtain biological samples from certain defendants before any finding of guilt violate the Fourth Amendment to the United States Constitution and Article I, Section 10, of the Minnesota Constitution. Respondent also moved for an order certifying the issue of the statute's constitutionality to this court as an important or doubtful question.

Following a hearing, the district court issued an order holding unconstitutional the statute's "compulsory DNA profiling of criminal defendants prior to conviction" and certifying the issue to this court as important and doubtful because of its "broad and far reaching implications for all defendants charged with crimes in the state of Minnesota."

ISSUE

Do the portions of Minn.Stat. § 299C.105, subd. 1(a)(1) and (3) (Supp. 2005), that direct law-enforcement personnel to take a biological specimen from a person who has been charged with an offense, but not convicted, violate the Fourth Amendment to the United States Constitution

Page 487

and Article I, Section 10, of the Minnesota Constitution?

ANALYSIS

"This court accepts certification of questions regarding criminal statutes as important and doubtful when the challenged statute has statewide application and the question has not previously been decided." *State v. Mireles*, 619 N.W.2d 558, 561 (Minn.App.2000), *review denied* (Minn. Feb. 15, 2001). Whether Minn. Stat. § 299C.105 (Supp.2005) directs law-enforcement personnel to conduct unconstitutional searches in violation of the Fourth Amendment to the United States Constitution and Article I, Section 10, of the Minnesota Constitution(fn1) has not been addressed by Minnesota appellate courts, and an answer to this question will have statewide application. Therefore, the district court properly certified the question.

The constitutionality of a statute is a question of law, which this court reviews de novo. *State v. Wright*, 588 N.W.2d 166, 168 (Minn.App.1998), *review denied* (Minn. Feb. 24, 1999). Minnesota statutes are presumed to be constitutional, and a court's power to declare a statute unconstitutional "should be exercised with extreme caution and only when absolutely necessary." *State v. Machholz*, 574 N.W.2d 415, 419 (Minn.1998) (quoting *In re Haggerty*, 448 N.W.2d 363, 364 (Minn. 1989)). A party challenging a statute has the burden of demonstrating beyond a reasonable doubt that the statute is unconstitutional. *Id.* (quotation omitted).

The statute that C.T.L. challenges directs law-enforcement personnel to take a biological specimen from C.T.L. for the purpose of DNA analysis. The statute states:

> Sheriffs, peace officers, and community corrections agencies operating secure juvenile detention facilities shall take or cause to be taken biological specimens for the purpose of

6-3

DNA analysis as defined in section 299C.155, of the following:

. . . .

(3) juveniles who have appeared in court and have had a judicial probable cause determination on a charge of committing . . .

(iv) robbery under section 609.24 or aggravated robbery under section 609.245[.]

Minn.Stat. § 299C.105, subd. 1(a)(3)(iv).

Minn.Stat. § 299C.155, subd. 1 (Supp. 2005), defines "DNA analysis" as "the process through which deoxyribonucleic acid (DNA) in a human biological specimen is analyzed and compared with DNA from another human biological specimen for identification purposes." The Bureau of Criminal Apprehension (BCA) is required to "adopt uniform procedures and protocols to maintain, preserve, and analyze human biological specimens for DNA" and "establish a centralized system to cross-reference data obtained from DNA analysis." Minn.Stat. § 299C.155, subd. 3 (Supp. 2005). The BCA is also required to "perform DNA analysis and make data obtained available to law enforcement officials in connection with criminal investigations

Page 488

in which human biological specimens have been recovered." Minn.Stat. § 299C.155, subd. 4 (Supp. 2005). Biological specimens taken under Minn.Stat. § 299C.105, subd. 1(a), must be forwarded to the BCA within 72 hours. Minn.Stat. § 299C.105, subd. 1(b).

In addition to the provision that applies to C.T.L., Minn.Stat. § 299C.105, subd. 1(a), directs law-enforcement personnel to take biological specimens from (1) juveniles who have had a probable-cause determination on a charge of any one of several enumerated offenses or who have been adjudicated delinquent for committing, or attempting to commit, any of the offenses; Minn.Stat. § 299C.105, subd. 1 (a)(3); (2) persons who have had a judicial probable-cause determination on a charge of committing, or have been convicted of committing or attempting to commit, any of several enumerated offenses; Minn.Stat. § 299C.105, subd. 1(a)(1); and (3) persons sentenced as patterned sex offenders under Minn.Stat. § 609.108; Minn.Stat. § 299C.105, subd. 1(a)(2).

The certified question before us involves only the portions of Minn.Stat. § 299C.105, subd. 1(a)(1) and (3) that direct law-enforcement personnel to take biological specimens from juveniles and adults who have had a probable-cause determination on a charged offense but who have not been convicted. If one of these people is later found not guilty, the BCA is required to destroy the biological specimen taken from the person who is found not guilty and to return all records to the person. Minn. Stat. § 299C.105, subd. 3(a). If the charge against one of these people is later dismissed, the BCA is required to destroy the biological specimen and return all records to the person upon the request of the person who submitted a biological specimen. *Id.* If the BCA destroys a person's biological specimen under either of these circumstances, the BCA is also required to "remove the person's information from the [BCA's] combined DNA index system and return all related records and all copies or duplicates of them." Minn.Stat. § 299C.105, subd. 3(b).

The state does not dispute that taking and analyzing biological specimens as required under the statute is a search under the Fourth Amendment. *See Skinner v. Ry. Labor Executives' Ass'n,* 489 U.S. 602, 618, 109 S.Ct. 1402, 1413, 103 L.Ed.2d 639 (1989) ("the collection and subsequent analysis of the

6-4

requisite biological samples must be deemed Fourth Amendment searches"). The Fourth Amendment and Article I, section 10, of the Minnesota Constitution prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. "[T]he most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment —subject only to a few specifically established and well-delineated exceptions.'" *Coolidge v. New Hampshire,* 403 U.S. 443, 454-55, 91 S.Ct. 2022, 2032, 29 L.Ed.2d 564 (1971) (quoting *Katz v. United States,* 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967)).

In *Schmerber v. California,* 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), the United States Supreme Court explained the role of the Fourth Amendment when the state directs that a biological specimen be taken from a person and analyzed. *Schmerber* involved a defendant who was arrested at a hospital while receiving treatment for injuries that he had suffered when the automobile that he apparently had been driving was involved in an accident. *Id.* at 758, 86 S.Ct. at 1829. A police officer directed that a blood sample be drawn from the defendant by a

Page 489

physician at the hospital, and a chemical analysis of the sample indicated intoxication. *Id.* at 758-59, 86 S.Ct. at 1829. At the defendant's trial for driving an automobile while under the influence of intoxicating liquor, the report of the chemical analysis was admitted into evidence over the defendant's objection that the blood had been drawn without his consent. *Id.* at 759, 86 S.Ct. at 1829. The defendant contended that in that circumstance, the withdrawal of the blood and the admission of the report denied him his right not to be subjected to unreasonable searches and seizures in violation of the Fourth Amendment. *Id.*

In considering whether administering the blood test violated the Fourth Amendment, the Supreme Court explained that

> the Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner. In other words, the questions we must decide in this case are whether the police were justified in requiring [the defendant] to submit to the blood test, and whether the means and procedures employed in taking his blood respected relevant Fourth Amendment standards of reasonableness.(fn2)

Id. at 768, 86 S.Ct. at 1834.

The Supreme Court acknowledged that there was plainly probable cause for the officer to arrest the defendant and charge him with driving an automobile under the influence of alcohol. *Id.* But the court determined that the considerations that ordinarily permit a search of a defendant incident to an arrest

> have little applicability with respect to searches involving intrusions beyond the body's surface. The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.
>
> Although the facts which established probable cause to arrest in this case also suggested the

6-5

> required relevance and likely success of a test of [the defendant's] blood for alcohol, the question remains whether the arresting officer was permitted to draw these inferences himself, or was required instead to procure a warrant before proceeding with the test. Search warrants are ordinarily required for searches of dwellings, and absent an emergency, no less could be required where intrusions into the human body are concerned. The requirement that a warrant be obtained is a requirement that inferences to support the search "be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." The importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great.

Id. at 769-70, 86 S.Ct. at 1835 (quoting *Johnson v. United States,* 333 U.S. 10, 13-14, 68 S.Ct. 367, 369, 92 L.Ed. 436 (1948) (citation omitted)).

Page 490

The Supreme Court then recognized that the officer who directed the physician to draw the defendant's blood might reasonably have believed that the delay necessary to obtain a warrant threatened the destruction of the evidence because the amount of alcohol in the blood begins to diminish shortly after drinking stops. *Id.* at 770, 86 S.Ct. at 1835. Given the fact that the evidence could disappear during the time that it would take to seek out a magistrate and obtain a search warrant, the Supreme Court held that the officer's attempt to secure evidence of blood-alcohol content was an appropriate incident to the defendant's arrest. *Id.* at 771, 86 S.Ct. at 1836.

The significant principle to be drawn from *Schmerber* with respect to Minn.Stat. § 299C.105, subd. 1(a), is that establishing probable cause to arrest a person is not, by itself, sufficient to permit a biological specimen to be taken from the person without first obtaining a search warrant. In *Schmerber,* the facts that established probable cause to arrest the defendant were the smell of liquor on his breath, and the blood-shot, watery, and glassy appearance of his eyes. *Id.* at 769, 86 S.Ct. at 1835. These symptoms of drunkenness also suggested that there was alcohol in the defendant's blood. But, by itself, the strong inference that there was alcohol in the defendant's blood was not enough to permit the police officer to direct the physician to draw the defendant's blood. It was only because evidence of alcohol in the defendant's blood could disappear during the time it would take to obtain a search warrant that the Supreme Court permitted the search without a warrant. Otherwise, a search warrant was required, and the inferences to support the warrant needed to be drawn by a neutral and detached magistrate, instead of the police officer.

The state acknowledges that the Fourth Amendment requires a showing of probable cause in order for a search warrant to be issued. But it argues that Minn.Stat. § 299C.105, subd. 1(a), satisfies this requirement because, under the statute, a biological specimen will not be taken until a court makes a probable-cause determination. What this argument fails to recognize, however, is that probable cause to support a criminal charge is not the same thing as probable cause to issue a search warrant.

Probable cause to support a criminal charge exists when "'the evidence worthy of consideration * * * brings the charge against the prisoner within reasonable probability.'" *State v. Koenig,* 666 N.W.2d 366, 372 (Minn.2003) (quoting *State v. Florence,* 306 Minn. 442, 446, 239 N.W.2d 892, 896 (1976)). Probable cause to issue a search warrant exists when, given the totality of the circumstances, there is "a fair probability that contraband or evidence of a crime will be found in a particular place." *State v. Zanter,* 535 N.W.2d 624, 633 (Minn.1995) (quotation omitted).

6-6

Minn.Stat. § 299C.105, subd. 1(a)(1) and (3), use a judicial determination of probable cause to support a criminal charge as a substitute for a judicial determination of probable cause to issue a search warrant. But, just as in *Schmerber,* where the existence of probable cause to arrest the defendant was not sufficient to permit an intrusion into his body without a warrant, a determination of probable cause to support a criminal charge, even if it is made by a judge, is not sufficient to permit a biological specimen to be taken from the person charged without a warrant. The fact that a judge has determined that the evidence in a case brings a charge against the defendant within reasonable probability does not mean that the judge has also

Page 491

determined that there is a fair probability that contraband or evidence of a crime will be found in a biological specimen taken from the defendant.

By directing that biological specimens be taken from individuals who have been charged with certain offenses solely because there has been a judicial determination of probable cause to support a criminal charge, Minn.Stat. § 299C.105, subd. 1(a)(1) and (3), dispense with the requirement under the Fourth Amendment that before conducting a search, law-enforcement personnel must obtain a warrant based on a neutral and detached magistrate's determination that there is a fair probability that the search will produce contraband or evidence of a crime. Under the statute, it is not necessary for anyone to even consider whether the biological specimen to be taken is related in any way to the charged crime or to any other criminal activity.

Citing federal court opinions that conclude that requiring a defendant to submit to DNA sampling does not violate the defendant's Fourth Amendment right against unreasonable searches and seizures, the state argues that this court should examine the reasonableness of Minn.Stat. § 299C.105 under a general balancing test that weighs a defendant's right to privacy against the state's interest in collecting and storing DNA samples. But all of the opinions that the state cites involve statutes that require specimens for DNA testing to be taken only from individuals who have been convicted of a criminal offense, and when weighing the individual's right to privacy against the state's interest in DNA testing, the opinions recognize that an individual who has been convicted of an offense has a reduced expectation of privacy and conclude that this reduced expectation of privacy does not outweigh the state's interest in DNA testing. *Kruger v. Erickson,* 875 F.Supp. 583 (D.Minn.1995), *aff'd on other grounds,* 77 F.3d 1071 (8th Cir.1996); *Johnson v. Quander,* 370 F.Supp.2d 79 (D.D.C.2005), *aff'd,* 440 F.3d 489 (D.C.Cir.2006); *Padgett v. Ferrero,* 294 F.Supp.2d 1338 (N.D.Ga. 2003), *aff'd sub nom., Padgett v. Donald,* 401 F.3d 1273 (11th Cir.2005), *cert. denied,* ___ U.S. ___, 126 S.Ct. 352, 163 L.Ed.2d 61 (2005); *United States v. Sczubelek,* 255 F.Supp.2d 315 (D.Del.2003), *aff'd,* 402 F.3d 175 (3rd Cir.2005), *cert. denied,* ___ U.S. ___, 126 S.Ct. 2930, ___ L.Ed.2d ___ (2006).

The question certified by the district court involves only biological specimens to be taken from individuals who have been charged with a criminal offense but who have not been convicted. Therefore, the reduced expectation of privacy that was present in the cases the state cites is not present here.

Furthermore, Minn.Stat. § 299C.105, subd. 3, requires the BCA to destroy a biological specimen and remove information about the specimen from the combined DNA index system when the person from whom the specimen was taken is found not guilty or the charge against the person is dismissed. This requirement suggests that the legislature has determined that the state's interest in collecting and storing DNA samples is outweighed by the privacy interest of a person who has not been convicted. Consequently, unless the privacy expectation of a person who has been charged and is awaiting the disposition of the charge is different from the privacy expectation of a person who was charged but the

6-7

charge was dismissed or the person was found not guilty, we see no basis for concluding that the state's interest in taking a biological specimen from a person solely because the person has been charged outweighs the person's right to privacy. And because a person who has

Page 492

been charged is presumed innocent until proved guilty, we see no basis for concluding that before being convicted, a charged person's privacy expectation is different from the privacy expectation of a person who was charged but the charge was dismissed or the person was found not guilty. Therefore, we conclude that the privacy interest of a person who has been charged but has not been convicted is not outweighed by the state's interest in collecting and analyzing a DNA sample.

DECISION

Because Minn.Stat. § 299C.105, subd. 1(a)(1) and (3) (Supp. 2005), direct law-enforcement personnel to conduct searches without first obtaining a search warrant based on a neutral and detached magistrate's determination that there is a fair probability that the search will produce contraband or evidence of a crime, and because the privacy interest of a person who has been charged with a criminal offense, but who has not been convicted, is not outweighed by the state's interest in taking a biological specimen from the person for the purpose of DNA analysis, the portions of Minn.Stat. § 299C.105, subd. 1(a)(1) and (3), that direct law-enforcement personnel to take a biological specimen from a person who has been charged but not convicted violate the Fourth Amendment to the United States Constitution and Article I, Section 10 of the Minnesota Constitution.

Certified question answered in the affirmative.

Footnotes:

FN1. The Fourth Amendment to the United States Constitution states:

> The right of the people to be secure in their person, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Although there are minor differences in language and punctuation, Article I, Section 10 of the Minnesota Constitution is substantively the same as the Fourth Amendment.

FN2. C.T.L. does not claim that the means and procedures for taking a biological specimen from him do not respect relevant Fourth Amendment standards of reasonableness. The only question before us is whether the statute may require that biological specimens be taken from individuals who have been charged with an offense, but not convicted.

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6-8

Kansas Bureau of Investigation

Larry Welch
Director

Paul Morrison
Attorney General

Testimony in Opposition to SB 237
Before the Senate Judiciary Committee
Kyle Smith, Deputy Director
Kansas Bureau of Investigation
February 15, 2007

Chairman Vratil and Members of the Committee,

I appear today on behalf of the Kansas Bureau of Investigation in opposition to SB 237. The bill would appear to be a direct effort to make the Kansas law on collecting DNA upon arrest unconstitutional. Further, it would make actual compliance incredibly difficult for local agencies.

Last October, the Minnesota court of appeals in a case named *In re C.T.L., 722 N.W. 2d 484, 2006,* held that Minnesota's statute, that had almost the exact same language as is proposed in SB 237 requiring a probable cause determination, was unconstitutional. The inclusion of a probable cause determination only strengthens the argument, successful in Minnesota, that the collection of the DNA sample is a search, not an administrative action.

SB 237 does nothing but try to make our statute identical to a statute that has been found unconstitutional. While I can understand defense attorneys attacking the legislation directly, or someone legitimately thinking a probably cause finding would be a good addition to the law, this effort to insert this language would appear to actually make the law unconstitutional.

If we approach the collection of DNA samples as an investigative search then the analysis in CTL is probably correct – and a specific search warrant would be required for each sample collected. However, if the DNA samples collected under SB 237 are simply 'the new fingerprints', and an administrative function of the police powers, it may well pass constitutional muster. Passage of SB 237 inserting a probable cause requirement would certainly indicate that this is an investigative tool first and foremost, and not an administrative function like fingerprints.

Thank you for your time and consideration. I would be happy to stand for any questions.

Senate Judiciary
2-15-07
Attachment 7

1620 S.W. Tyler / Topeka, Kansas 66612-1837 / (785) 296-8200 FAX (785) 296-6781

SEDGWICK COUNTY, KANSAS

SHERIFF'S OFFICE
GARY STEED
Sheriff

141 WEST ELM * WICHITA, KANSAS 67203 * TELEPHONE: (316) 383-7264 * FAX: (316) 660-3248

TESTIMONY
Before the Senate Judiciary Committee
February 15, 2007

Honorable Chairman John Vratil and members of the committee, I appreciate the opportunity to testify concerning the collection and submission of samples of DNA. The proposed change in Senate Bill 237 fundamentally alters the responsibilities from the original law that went into effect in January.

The jails and detention facilities across the state are tasked with the collection of DNA sample at the time fingerprints are taken. We at the Sedgwick County Sheriff's Office understood the importance of the collection of DNA samples so we volunteered to assist the Kansas Bureau of Investigation with the development of the collection procedures, sample packaging and the training for the entire state.

The proposed language would require the sheriff to collect DNA samples only after a finding of probable cause by a magistrate. In Sedgwick County more than 35,000 persons were booked in 2006 and more than sixty DNA samples have been taken between January 1, 2007 and February 12, 2007. Starting in 2008 the number of charges for which samples are required will increase and it is realistic to expect the number of DNA sample will increase as well.

Beyond the volume of arrestees there is the issue workflow as required by the statute. The DNA sample must be taken at the same time as the person is fingerprinted and the added language calls for delaying the collection until a magistrate finds probable cause. In Sedgwick County the probable cause hearing maybe forty-eight hours after arrest and booking. During this period arrestee often make bond thus making the collection of a DNA sample impossible.

The Sedgwick County Sheriff's Office would like to suggest the amending K.S.A. 2006 Supp. § 21-2511 so that DNA sample would be collected upon conviction. The Kansas Department of Corrections and the various collection points for DNA samples prior to January 2007 are still in place. By reverting to collection after conviction court challenges should be minimal.

TESTIMONY TO THE SENATE JUDICIARY COMMITTEE IN OPPOSITION OF SB 237
Presented by Ed Klumpp
On behalf of the
Kansas Association of Chiefs of Police

February 15, 2007

This testimony is in opposition to the provisions of SB237 requiring a finding of probable cause prior to the collection of DNA samples. The only provision of this bill we can support is the cleanup of the statute reference on page 2, line 1. This cleanup language is also in HB2384 which contains the DNA collection provisions we support.

The provision of this bill requiring a probable cause finding will create inconsistencies and difficulties in the collection of the DNA samples. We offer the following points as the rationale for our opposition:

1. The collection of DNA is fundamentally no different than the collection of fingerprints or palm prints. They are all identification methods for the person arrested. While one consists of images of the ridges on the skin the other is merely the collection of a saliva sample. They all produce a record that can positively identify the person arrested. There is no real need to separate the administrative processes for the different types of identifying samples.
2. Arrests with a warrant occur after a probable cause finding to issue the warrant and the submission will be required at time of arrest, but an on view arrest or probable cause arrest by an officer would require waiting for the submission of the sample.
3. It is difficult in practice to collect the sample immediately following the probable cause hearing when a person is out on bond. The personnel and materials to collect this sample are not normally available at the court house at the time of the hearing. This can be further compounded if the preliminary hearing is waived. So collection at time of arrest is more efficient.
4. The current language of the statute allows for a clean consistent flow of collecting the sample and sending it to the KBI at the time of arrest, with the process of removal of the sample if no probable cause is found. To our knowledge there have not been any problems with this system.

We further submit that if the Committee determines to proceed with the proposed probable cause provisions then lines 11-15 and lines 23-28 on page 5 should be stricken since under the new provisions the KBI would not have any DNA samples taken from the arrested person under the conditions described in those sections.

In summary, we see no need to change the current language on lines 36-37 and 42-43 of page 2 of this bill. We strongly urge you to <u>not</u> recommend SB 237 to be passed.

Ed Klumpp

Ed Klumpp
Chief of Police-Retired
Topeka Police Department

Legislative Committee Chair
Kansas Association of Chiefs of Police
E-mail: eklumpp@cox.net
Phone: (785) 235-5619
Cell: (785) 640-1102

Senate Judiciary
2-15-07
Attachment 9

Senate Judiciary
2-15-07
Attachment 10

tion parenting time, support or education of the minor children shall be subject to the control of the court in accordance with all other provisions of this article. Matters settled by an agreement incorporated in the decree, other than matters pertaining to the legal custody, residency, visitation, parenting time, support or education of the minor children, shall not be subject to subsequent modification by the court except: (A) As prescribed by the agreement or (B) as subsequently consented to by the parties.

(4) *Costs and fees.* Costs and attorney fees may be awarded to either party as justice and equity require. The court may order that the amount be paid directly to the attorney, who may enforce the order in the attorney's name in the same case.

(c) *Miscellaneous matters.* (1) *Restoration of name.* Upon the request of a spouse, the court shall order the restoration of that spouse's maiden or former name. ~~At any time after the decree of divorce becomes final, the court, upon motion of a party, shall restore the maiden or former name of that party. The motion shall not be denied on the basis that the party has custody of a minor child who bears a different name or for any other reason other than fraud. The motion shall be deemed sufficient if in substantial compliance with the form set forth by the judicial council.~~

The court shall have jurisdiction to restore the spouse's maiden or former name at any time before or after the decree of divorce becomes final. The judicial council shall develop a form which is simple, concise and direct for use with this paragraph

(2) *Effective date as to remarriage.* Any marriage contracted by a party, within or outside this state, with any other person before a judgment of divorce becomes final shall be voidable until the decree of divorce becomes final. An agreement which waives the right of appeal from the granting of the divorce and which is incorporated into the decree or signed by the parties and filed in the case shall be effective to shorten the period of time during which the remarriage is voidable.

Sec. 2. K.S.A. 2006 Supp. 60-1621 is hereby amended to read as follows: 60-1621. (a) No post-decree motion petitioning for a modification or termination of separate maintenance, for a change in legal custody, residency, visitation rights or parenting time, *for the restoration of name* or for a modification of child support shall be filed or docketed in the district court without payment of a docket fee in the amount of $33 on and after July 1, 2006 through June 30, 2010, and $31 on and after July 1, 2010, to the clerk of the district court.

(b) A poverty affidavit may be filed in lieu of a docket fee as established in K.S.A. 60-2001, and amendments thereto.

(c) The docket fee shall be the only costs assessed in each case for services of the clerk of the district court and the sheriff. The docket fee shall be disbursed in accordance with subsection (f) of K.S.A. 20-362, and amendments thereto.

(d) The docket fee established in this section shall be the only fee collected or moneys in the nature of a fee collected for the docket fee. Such