

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Mike O'Neal at 3:30 P.M. on February 5, 2008 in Room 313-S of the Capitol.

All members were present except:

- Representative Marti Crow- excused
- Representative Raj Goyle - excused
- Representative Lance Kinzer - excused
- Representative Jim Ward - excused

Committee staff present:

- Jerry Ann Donaldson, Kansas Legislative Research
- Athena Andaya, Kansas Legislative Research
- Jill Wolters, Office of Revisor of Statutes
- Jason Thompson, Office of Revisor of Statutes
- Cindy O'Neal, Committee Assistant

Conferees appearing before the committee:

- Barbara Hinton, Kansas Legislative Post Audit
- Mark Stafford, Kansas Board of Healing Arts
- Representative Pat Colloton
- Sheriff Frank Denning, Johnson County

Representative Pauls requested two bills on behalf of Representative Candy Ruff:

- clean-up on right to carry bill by allowing expungements to be looked at
- licensed fire arm dealers can ship guns and silencers to law enforcement personal

Representative Pauls made the motion to have the requests introduced as committee bills. Representative Whitham seconded the motion. The motion carried.

The hearing on **HB 2620 - state board of healing arts, non-disciplinary resolutions**, was opened.

Jerry Donaldson provided an overview of the recommendations from the Special Committee on Judiciary. The committee was charged with reviewing the Legislative Post Audit report on the Board of Healing Arts (BOHA). The committee recommend a bill be introduced with regard to alternative sanctions to accomplish competency maintenance in a non-disciplinary setting.

Barbara Hinton, Kansas Legislative Post Audit, provided some background on the bill. The issue that was studied and brought to the forefront due to an audit showed that there is a lack of staff resources and the board is only permitted to take disciplinary actions when there are repeated instances or a pattern of a practice that is substandard. Since the audit, the board has adopted the policy to investigate alleged practice below the standard of care without waiting for a pattern to develop. (Attachment #1)

Mark Stafford, Kansas Board of Healing Arts (BOHA), stated that the only types of cases that were put off were cases where the standard of care was at issue. This is because there needed to be an investigation of the issue. They were overwhelmed with many complaints. The proposed bill would allow the board the opportunity to identify potential problems early and to address issues of negligence before patterns start to exist without resorting to adversarial disciplinary process. (Attachment #2)

Mr. Stafford explained that when the BOHA receives a complaint, no matter how small the complaint seems, there is an investigation. If the facts show that a further investigation is needed then that case is then given a priority number. This number determines how fast the assigned investigator will act. Once the investigator has received all the information he presents it to the disciplinary attorney who will review and either pursue it or not.

If a standard of care type of question is involved, the case is sent to a peer-review committee for a recommendation. The recommendation is then forwarded to the disciplinary panel. If the disciplinary panel decides it looks like there is a violation, the board will either file a disciplinary petition or offer a settlement.

CONTINUATION SHEET

MINUTES OF THE House Judiciary Committee at 3:30 P.M. on February 5, 2008 in Room 313-S of the Capitol.

Written testimony was provided by the Kansas Medical Society and the Kansas Association for Justice. (Attachments #3 & 4)

The hearing on **HB 2620** was closed.

The hearing on **HB 2701 - laboratory fees for criminal procedures; heart of America regional computer forensic laboratory**, was opened.

Representative Pat Colloton appeared as the sponsor of the proposed bill. She explained that the bill would allow a judge to assess a court cost in the amount of \$400 against a convicted defendant for forensic laboratory service. This allows for the laboratory to recover court costs for the analysis. (Attachment #5)

Sheriff Frank Denning, Johnson County, stated that the Heart of America Regional Computer Forensic Laboratory (HARCFL) has become a very important tool in fighting crime. The bill will allow them to receive similar compensation as other forensic labs. While they are located in Missouri, 50% of their cases derive from Kansas. Eleven of the eighteen law enforcement departments assigned to the HARCFL are from Kansas. (Attachment #6)

Kevin Steck, Director of HARCFL, explained that currently all forensic exams are done at no costs. Western District of MO are more offense specific than lab for reimbursement. The lab focuses only on digital forensic.

The hearing on **HB 2701** was closed.

The committee meeting adjourned at 4:30 p.m. The next meeting was scheduled for February 6, 2008.



LEGISLATURE OF KANSAS
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Information for the House Judiciary Committee on HB 2620

Barb Hinton, Legislative Post Auditor

February 5, 2008

Mr. Chairman and members of the Committee, thank you for allowing me to appear before you to provide background information on HB2620. This bill addresses an issue raised in our 2006 performance audit, *Board of Healing Arts: Reviewing Issues Related to Complaint Investigations, Background Investigations, and Composition of the Board*. The Board's mission is to protect the public from incompetent practice, unprofessional conduct, and other proscribed behavior by individuals from the 14 health care professions it regulates.

Within a regulatory environment, there's a general expectation that complaints alleging violations of laws, regulations, or requirements—including substandard care or practice—would be investigated to determine whether they can be substantiated, and what action, if any, needs to be taken. During this audit, however, we found that Board staff weren't investigating all allegations of substandard patient care.

Beginning in June 2005 the Board adopted a policy to **not** investigate allegations of substandard patient care until there was a historical pattern, which Board staff defined as three complaints in three years. At that point, all three complaints would be assigned for investigation.

Board staff told us the policy had been changed in June 2005 because they didn't have enough resources to investigate all complaints, and State law only allows the Board to take disciplinary action when there are "repeated instances" or a "pattern of practice" that is substandard.

House Judiciary
Date 2-5-08
Attachment # 1

Our concern was that not investigating a complaint until a third complaint has been filed in three years did not adequately protect the public from potential harm, and made it less likely the older complaints would be able to be substantiated, even if they were true. The more time that passes between the incident and investigation, the greater the likelihood that witnesses can't be located or will have forgotten important information, that documentation won't be available, and so on.

What we found led us to recommend that Board staff investigate **all** allegations of substandard patient care, and notify the licensee when an investigation revealed a problem exists, even if no formal action could be taken at that time.

In October 2007, the Board adopted a policy to investigate alleged practice below the standard of care without waiting for a pattern to develop.

This bill would then allow the Board, a committee of the Board, or a peer review committee to develop non-disciplinary resolutions to cases involving a licensee of the Board. If the Board finds that a licensee has either engaged in practice that, if continued, would reasonably be expected to result in future violations of the Healing Arts Act, or has failed to adhere to the applicable standard of care (but not to a degree constituting professional incompetence), they could enter into a written agreement for a professional development plan, make recommendations to a licensee, or issue a written letter of concern. Any such action would be confidential and would not imply that a violation of the Kansas Healing Arts Act has occurred.



KATHLEEN SEBELIUS
GOVERNOR

STATE BOARD OF HEALING ARTS

LAWRENCE T. BUENING, JR.
EXECUTIVE DIRECTOR

February 5, 2008

The Hon. Michael O'Neal
Chairman
House Committee on the Judiciary
Rm. 12-W
State House

Re: House Bill No. 2620

Dear Representative O'Neal:

Thank you for the opportunity to appear before this Committee on behalf of the State Board of Healing Arts in support of House Bill No. 2620. This bill originated at the Special Committee on Judiciary following discussions with the Board on how it had or intended to address recommendations identified in the October 2006 Legislative Post Audit Report. The Post Auditor recommended that the Board investigate all allegations of substandard care at the time the allegation is received rather than waiting for a pattern to develop.

Historically Board staff had investigated allegations of practice below the standard of care, even if the licensee had no prior complaints. To use our resources more efficiently, this practice was changed in 2005 so that investigations of such practice were commenced only when there were multiple allegations of substandard practice. This policy was consistent with the statutory definition of "professional incompetence", appearing at K.S.A. 65-2837(a). That definition requires a finding of multiple or repeated instances of ordinary negligence, or a single act of gross negligence. A single act of practice below the standard of care, by itself, is not a ground for disciplinary action, and as a result, even if an investigation revealed negligent practice, the Board had no authority to take action. This policy applied only to allegations of negligence, and single allegations of misconduct were investigated.

The Board agrees that investigating single acts of negligence may benefit the public, but not if the investigation file is then simply shelved until the statutory definition of professional incompetence is established. After careful consideration, the Board adopted Policy Statement No. 07-02, a copy of which is attached. That statement indicates the Board's intention to investigate as recommended, and to pursue legislation allowing alternatives to discipline. House Bill 2620 contains the language the Board requested, which would authorize the use of investigation results in a non-disciplinary manner and authorize the Board to work with the licensee to improve professional practice. This might include additional education or monitoring.

BOARD MEMBERS: BETTY McBRIDE, Public Member, PRESIDENT, Columbus - VINTON K. ARNETT, D.C., VICE PRESIDENT
MYRA J. CHRISTOPHER, Public Member, Fairway - RAY N. CONLEY, D.C., Overland Park - GARY L. COUNSELMAN, D.C.,
MERLE J. "BOO" HODGES, M.D., Salina - SUE ICE, Public Member, Newton - M. MYRON LEINWETTER, D.O., Rossville - MARK A. M
ROGER D. WARREN, M.D., Hanover - NANCY J. WELSH, M.D., Topeka - RONALD N. WILSON, M.D., Topeka

House Judiciary

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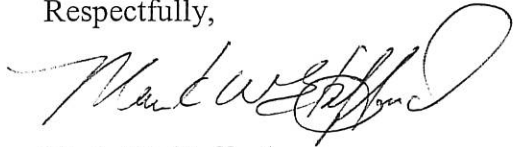
Date 2-5-08
Attachment # 2

House Bill No. 2620
February 5, 2008
Page 2

House Bill 2620 is also consistent with recent trends in establishing continued professional competence. Currently, continuing education is required for license renewal, and is commonly considered a measure of continued professional competence. Other means of establishing professional competence are being developed and some are becoming available, including long-term plans for directed education, re-examination and demonstration of practical skills. Licensees who voluntarily participate in these exercises or who do so to maintain specialty board certification might offer these as meaningful alternatives to traditional continuing education for demonstrating professional competence.

This bill offers a new dimension to Board regulation beyond licensure, renewal, discipline and rule-making. It allows the opportunity to identify potential problems early on and to address issues before a pattern of negligence develops, without resorting to the adversarial disciplinary process. The Board believes this will enhance its efforts to protect the public, and urges the Committee's favorable action.

Respectfully,

A handwritten signature in cursive script, appearing to read "Mark W. Stafford".

Mark W. Stafford
General Counsel

KANSAS STATE BOARD OF HEALING ARTS

POLICY STATEMENT NO. 07-02

Subject: Allegations of practice below the standard of care
Date: October 20, 2007

WHEREAS:

The healing arts act grants authority to the Board, its agents and employees to investigate matters of professional incompetency. The act defines professional incompetency at K.S.A. 2006 Supp. 65-2837(a) as follows:

"Professional incompetency" means:

(1) One or more instances involving failure to adhere to the applicable standard of care to a degree which constitutes gross negligence, as determined by the board.

(2) Repeated instances involving failure to adhere to the applicable standard of care to a degree which constitutes ordinary negligence, as determined by the board.

(3) A pattern of practice or other behavior which demonstrates a manifest incapacity or incompetence to practice medicine.

Similar definitions of professional incompetency apply to other professions the Board regulates.

Investigating allegations of practice below the standard of care includes, at a minimum, gathering pertinent patient records, communicating with the licensees involved and obtaining their statements, and presenting the records to a peer review committee.

The Board determines that alleged practice below the standard of care described in written complaints from the public, including other health care professionals, and reports of adverse findings from medical care facilities or peer review organizations warrant investigation without waiting for repeated instances or a pattern of practice to develop.

The Board projects that investigating all allegations of practice below the standard of care described in written complaints from the public, including other health care professionals, and reports of adverse findings from medical care facilities or peer review organizations would increase the number of cases opened each fiscal year by approximately 60. Investigation of these additional cases will require the addition of one FTE special investigator and the expenditure of approximately \$15,000 per year to obtain medical records.

IT IS, THEREFORE, DECLARED THE POLICY OF THE BOARD THAT:

1. All alleged practice below the standard of care described in written complaints from the public, including other health care professionals, and reports of

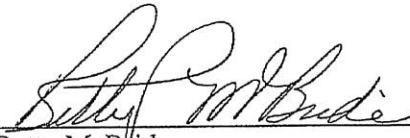
adverse findings from medical care facilities or peer review organizations, should be investigated without regard to prior complaints against the involved licensee.

2. Investigation should include gathering pertinent patient records, communicating with the licensees involved and obtaining their statements, interviewing other witnesses as staff determine is appropriate, and presenting the records to a peer review committee, except that Board staff may terminate an investigation when there is discovery of credible and persuasive evidence establishing that a complaint lacks merit or was made in bad faith.

3. The Board will continue to pursue legislative authority for alternative means of concluding investigations suggesting practice below the standard of care but not establishing grounds to initiate disciplinary action.

4. The Board will dedicate appropriate resources, and will seek sufficient legislative appropriations of staff and expenditure limitations to implement this policy.

ADOPTED THIS 20th Day of October, 2007.



Betty McBride
President



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To: House Committee on Judiciary

From: Dan Morin
Director of Government Affairs

Date: February 5, 2008

Subject: HB 2620; An act concerning the state board of healing arts; relating to non-disciplinary resolution.

The Kansas Medical Society appreciates the opportunity to submit the following comments in support of HB 2620 which would allow the Board of Healing Arts, a committee of the Board, or a peer review committee to develop non-disciplinary resolutions to cases involving a licensee of the Board of Healing Arts. The new law would allow the Board to issue a non-disciplinary resolution, enter into a written agreement with a licensee for a professional development plan, and make written recommendations to a licensee or issue a written letter of concern to a licensee if the board, committee of the board or peer review committee determines that the licensee has failed to adhere to the applicable standard of care but not to a degree constituting professional incompetence or has engaged in an act or practice that, if continued, would reasonably be expected to result in future violations of the Kansas Healing Arts Act. The Board would also have the ability to issue a resolution should a licensee, who has been away from clinical practice for significant amount of time, wish to resume practice and for a licensee wishing to prove competence aside from the more traditional continuing medical education requirements.

The bill basically is a mechanism by which the Board can take appropriate non-disciplinary action toward licensees who have made an isolated technical or judgment error regarding standard of care and have appropriate oversight over current and potential licensees to ensure they each have the standard level of skill, judgment, knowledge, and documentation to provide appropriate standards of care. The Kansas Medical Society supports the goal of HB 2620 to maintain safe environments, within which licensees can practice, rather than to identify and sanction problem licensees for isolated incidents.

Thank you for the opportunity to offer these comments.

House Judiciary
Date 2-5-08
Attachment # 3

Your rights. Our mission.

To: Representative Michael O'Neal, Chairman
Members of the House Judiciary Committee

From: Callie Denton Hartle

Date: February 5, 2008

Re: HB 2620 State Board of Healing Arts; Non-disciplinary
Resolutions--**NEUTRAL**

The Kansas Association for Justice is a statewide nonprofit organization of attorneys who serve Kansans seeking justice. Our association's position on HB 2620 is neutral.

Like many policymakers, KsAJ members are concerned with the findings of the 2006 Legislative Post Audit performance audit report on the Board of Healing Arts (BOHA) relating to timeliness and thoroughness of complaint investigations. As noted in the report, "the role of the Board of Healing Arts is to protect the public by ensuring that only those people who meet and maintain certain qualifications, competency levels, and standards of professional conduct are allowed to engage in the health care professions it regulates." We commend BOHA for taking steps to respond to Legislative Post Audit's findings and we support additional resources and authority for BOHA to be more nimble in its complaint-handling processes.

While HB 2620 is a step in the right direction, we wonder if it goes far enough in assuring that BOHA fulfills its role of protecting the public. In December 2007, Haysville physician Dr. Stephen Schneider was indicted on federal charges that he illegally distributed controlled substances, directly causing the deaths of his patients. More than a month later, BOHA suspended the Dr. Schneider's license and shut down his clinic, which had continued to operate with a physician assistant seeing patients. Dr. Schneider had been under investigation by BOHA since federal agents raided his clinic in 2005. The case is evolving.

House Judiciary
Date 2-5-08
Attachment # 4

The shocking revelations relating to Dr. Schneider, along with the findings of Legislative Post Audit, suggest a need for a more in-depth legislative discussion on the best way to assure that the public is adequately protected. For example, BOHA, in its response to the performance audit, disagreed with the recommendation that investigations should commence when allegations of substandard patient care are received, rather than waiting for a pattern of such complaints to develop. Timing and triggering of investigations is a fundamental question related to the effectiveness of BOHA in verifying and correcting instances of substandard patient care. Disagreement suggests that policymakers must play a role in setting an appropriate policy for investigations that will effectively protect the public.

Another important issue is transparency of information. As we move towards consumer-driven health care, all elements of the health care equation must reflect open access for consumers to information that affects their decision-making. Currently, pending investigations of health care providers are confidential. HB 2620 continues this policy by requiring that non-disciplinary resolutions are confidential and not subject to discovery.

Cloaking the disciplinary process in complete secrecy does not protect the public. There must be a balance struck between the public's need for information and affording licensees a fair review. The rules of the Kansas Supreme Court dealing with the discipline of attorneys serve as a good model. Under Supreme Court rules, all proceedings, reports and records of disciplinary investigations and hearings are private and not accessible to the public with two critical exceptions.

First, upon a probable cause determination, the matter becomes public and is no longer confidential. Second, as a fail safe measure, the Disciplinary Administrator must always divulge information upon order of the Supreme Court or subpoena or order of any other court of competent jurisdiction. Adding a "fail safe" exception would improve the non-disciplinary resolution process established in HB 2620, and an attached amendment shows how this might be accomplished. However, transparency of the overall complaint, investigation, and review/disciplinary process still merits broader discussion and action.

While HB 2620 is a step in the right direction, it may be only a temporary "Band-Aid" covering a condition that really needs a second opinion and more extensive treatment. Thank you for the opportunity to provide you with our comments on HB 2620.

**Kansas Association for Justice
Proposed Amendments
HB 2620
February 5, 2008**

"Fail safe" amendment

At p. 2, Section I, line 4, insert after "board":

. . . and shall be divulged upon order of the Supreme Court or subpoena or order of any other court of competent jurisdiction.

STATE OF KANSAS
HOUSE OF REPRESENTATIVES

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PAT COLLOTON
28TH DISTRICT

Testimony on HB 2701
House Judiciary Committee
Feb. 5, 2008

Mr. Chairman and Committee Members:

House Bill 2701 amends K.S.A.2007 Supp. 28-176 which allows a judge to assess a court cost in the amount of \$400 against a convicted defendant for forensic laboratory services rendered in connection with the case. At present the statute applies to the KBI laboratory, the Sedgwick County Regional Forensic Science Center and the Johnson County Sheriff's Laboratory. In cases involving technical computer or cell phone analysis, such as cases relating to internet pornography or electronic solicitation, Sedgwick County, Johnson County, the KBI and other counties use the digital forensic service of the Heart of America Regional Computer Forensics Laboratory (RCFL). This amendment adds RCFL as a laboratory eligible to recover court costs for the analysis conducted in a criminal investigation if the judge chooses to order it.

I believe this amendment updates the scope of the statute to include this growing field of forensic work and I urge its adoption.

Respectfully submitted,

Pat Colloton

Pat Colloton

House Judiciary
Date 2-5-08
Attachment # 5



FRANK P. DENNING
SHERIFF

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DAVID A. BURGER
UNDERSHERIFF

KEVIN D. CAVANAUGH
UNDERSHERIFF

February 4, 2008

To: House Judiciary Committee
From: Sheriff Frank Denning
Reference: HB2701

Chairperson O'Neal, Vice-Chairperson Kinzer and distinguished committee members,

My name is Sheriff Frank Denning with the Johnson County Sheriff's Office. I appear this afternoon asking you to support HB2701. The Heart of America Regional Computer Forensics Laboratory (HARCFL) has become an important crime fighting tool for state and local law enforcement in Kansas. The Heart of America Regional Computer Forensics Laboratory (HARCFL) is part of a national network of FBI-sponsored, full-service digital forensics laboratories. The HARCFL is designed as a one-stop forensics laboratory and training center devoted entirely to the examination of digital evidence in support of criminal investigations. Additionally, the HARCFL provides law enforcement throughout Kansas and the western two-thirds of Missouri with access to cutting-edge electronic equipment, as well as the combined experience and knowledge that only a team of highly trained and experienced examiners can provide.

Since opening in July 2003, the HARCFL has become a critical investigative tool for all law enforcement. The HARCFL provides its services at no cost to approximately 867 law enforcement agencies in its service area. This 15,000-square-foot, state-of-the-art digital forensics laboratory, located just north of downtown Kansas City, has supported hundreds of investigations, including many of national significance and notoriety. No doubt, the committee members will recall the cases of Bobbi Jo Stinnett and B.T.K. In each of these cases, the HARCFL provided extensive forensic support that resulted in the capture and conviction of Lisa Montgomery and Dennis Rader. While these two cases are among the most notorious, police departments throughout Kansas regularly submit hard drives, cell phones and other technology for digital examination. The HARCFL provides resources unavailable to most Kansas law enforcement agencies, yet none the less, crucial to local investigations, at no charge.

As costs for the HARCFL continue to rise, the ability for the laboratory to receive similar compensation as other forensic labs serving Kansas law enforcement would help defer the overhead costs associated with conducting forensic exams, e.g. hard drives, software, CDs, DVDs, shipping evidence, etc. 50% of the HARCFL cases derive from Kansas agencies, and 11 of 18 departments assigning examiners to the lab are Kansas based departments.

Adding the HARCFL to the list of authorized fee recipients is, in our opinion, the right thing to do and is consistent with the original purpose of the statute we seek to amend. Your favorable vote passing this amendment out of committee is encouraged, we thank the committee for its consideration, and we are happy to stand for questions.

Sincerely yours,

Sheriff Frank Denning by B

Sheriff Frank Denning
Johnson County Sheriff's Office

House Judiciary
Date 2-5-08
Attachment # 6