

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Mike O'Neal at 3:30 P.M. on February 21, 2008 in Room 313-S of the Capitol.

All members were present except:

Annie Kuether- excused
Ben Hodge - excused
Kevin Yoder - 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:

Representative Kasha Kelley
Debra Wilson, Kansas Judicial Council, Criminal Law Advisory Committee
Brian Sanderholm, Citizen
Chris Smith, Cowley County Attorney
Sean Wallace, Chief of Police, Arkansas City
Eileen Doran, Director of YWCA, Topeka
Judy Davis, Crisis Center of Manhattan
Jim Bartle, Kansas Department of Revenue
Eric Stafford, Associated General Contractors of Kansas

The hearing on **HB 2850 - stalking; protection orders**, was opened.

Representative Kasha Kelley appeared as the sponsor of the proposed bill. She commented that after the brutal death of Jodi Sanderholm she was speaking to the Arkansas City police about how hard it is to file stalking charges against individuals. She worked on and introduced HB 2473 during the 2007 legislative session, which was eventually referred to the Kansas Judicial Council. The Judicial Council met on the bill and came up with recommendations, which is the makeup of the bill being discussed today. She appreciated the work they did on this issue. The most notable change that the bill would make is to remove the insurmountable "credible threat" requirement which is hard to determine and prove. (Attachment #1)

Debra Wilson, Kansas Judicial Council, Criminal Law Advisory Committee, explained that the bill does the following:

1. Removes the "credible threat" requirement found in current statute. The key is how the behavior is perceived by the targeted person.
2. Contains a tighter or more helpful definition of "course of conduct."
3. Changes the law to include fear for the safety of a third party, but limits this expansion to member of the targeted person's immediate family.

The Advisory Committee looked at stalking legislation nationwide and based the bill loosely on the New Hampshire statute. (Attachment #2)

Brian Sanderholm, Citizen, relayed the story their daughter, Jody, and her brutal death. He stressed that law enforcement needs to be trained in the new law and citizens need to help prevent the next victim. U.S. statistics state that one in seven women will be stalked sometime in their lifetime. (Attachment #3)

Chris Smith, Cowley County Attorney, read his testimony in support of the bill. (Attachment #4) He proposed the following three amendments:

- Section (a)(3) refers to "at least one act listed in subsection (d)(1)" The bill does not have a section (d)(1).
- There is concern in Section (d) with the term "burden of proof" being used when describing exceptions, excuses or exemptions that could apply to a defense. The language suggests a possible affirmative defense. This section needs clarification.

CONTINUATION SHEET

MINUTES OF THE House Judiciary Committee at 3:30 P.M. on February 21, 2008 in Room 313-S of the Capitol.

- Section (d) refers to exceptions, excuses or exemptions however, none are listed within the bill.

Sean Wallace, Chief of Police, Arkansas City, commented that stalking only stops when a stalker kills the victim or when he finds a new person to abuse.

Eileen Doran, Director of YWCA, provided statistics on known stalking cases in Topeka. (Attachment #5)

Judy Davis, Crisis Center of Manhattan, read her testimony in support of the bill. (Attachment #6)

Written testimony, in support of the bill, was provided by the Office of Attorney General and Kansas Coalition Against Sexual and Domestic Violence. (Attachments 7 & 8)

The hearing on **HB 2850** was closed.

The hearing on **HB 2794 - civil procedure; public works bonds and certificates of deposit**, was opened.

Jim Bartle, Kansas Department of Revenue, appeared before the committee as a proponent of the bill. He explained that the bill would permit claims to be made against bonds or CDs for amounts owed to the state for liabilities, such as withholding taxes and unemployment insurance contributions.

There are employers incorrectly classifying their employees as independent contractors in order to avoid responsibility for payment of federal and state withholding taxes and unemployment insurance, workers compensation, social security and other payroll taxes. (Attachment #9) He hoped that when a state job is awarded, the contractor and subcontractor would get together and make sure that everyone is classified.

Eric Stafford, Associated General Contractors of Kansas, informed the committee that 2007 SB 292 would have repealed a section of the statute that held general contractors responsible for unpaid unemployment and payroll taxes of subcontractors; it passed out of committee but failed to get above the line. The general contractor has no control over how a subcontractor runs his business. He does not know the extent of the misclassification of employment. However, the state shouldn't hold one business accountable for another's misclassification. (Attachment #10)

Written testimony, in support of the bill, was provided by Kansas Building Industry. (Attachment #11)

The hearing on **HB 2794** was closed.

The committee meeting adjourned at 5:15 p.m. The next meeting was scheduled for February 25, 2008.

STATE OF KANSAS

COMMITTEE ASSIGNMENTS

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Testimony to the House Judiciary Committee
Representative Kasha Kelley

February 21, 2008
House Bill 2850

Chairman O'Neal and Members of the Committee:

I appreciate the time you've afforded me today for a hearing on House Bill 2850. It is not with pleasure that I sponsor or bring before you this bill. Rather the genesis of House Bill 2850 is borne of great sadness and loss.

In January 2007, 19-year-old Jodi Sanderholm, of Ark City, Kansas, lost her life in a most unfathomable way. Although Jodi was unaware of the lethal danger she was in, the young man charged with taking Jodi's life had routinely hung around the college dance team (on which Jodi performed) watching the members at a distance. Last month, at a hearing in the Sanderholm trial, 10 women testified that the man charged in Jodi's murder had both harassed and stalked women around Ark City for several years.

This past January, U.S. Senators Joseph R. Biden, Jr. (D-DE) and Susan Collins (R-ME) introduced a resolution designating January as National Stalking Awareness Month. As Senator Biden pointed out, so often, "Stalking is not a one-time occurrence; this is a crime that leaves its victim fearful 24 hours a day, seven days a week. No place – not even home – is safe if a stalker knows where the victim lives. Victims spend their days and nights looking over their shoulder, often changing jobs, relocating their homes, and even changing their appearance to escape the stalker."

And this is if the victim is "lucky." Many have met a brutal end at the hands of their stalker. The facts surrounding stalking are numerous and startling. And every day we turn on the TV, it seems there is a new case surrounding a missing woman who has often been watched and pursued by her alleged killer.

Nationally, statistics show that:

*More than 1.3 million women, and roughly 370 thousand men, are stalked annually in the US.

*One in 12 women will be stalked in their lifetime; one in 45 men.

*On campus, 80% of stalking victims know their stalker.

*Two-thirds of stalkers pursue their victims at least once per week and many daily—using
than one method.

House Judiciary

Date 2-21-08

Attachment # 1

Prior to Jodi's murder, I had little knowledge about the current law regarding stalking. However, in speaking with those in law enforcement, I quickly learned of a common frustration and theme: the current law creates hurdles often too high and penalties too low to convict. At the request of law enforcement, combined with the shock of such a serious – and obviously lethal – crime hitting home, I spent time visiting with those who work in the arena to learn more about our current statute and the difficulty in enforcing it.

I originally introduced this legislation last session in the form of HB 2473. HB 2473 was modeled after the model stalking code drafted by The National Center for Victims of Crime. At the core of law enforcement's concerns seemed to be the notion of "credible threat" and other vague language/difficult to prove situations in current statute. HB 2473 sought to remedy those and other concerns with a comprehensive change to current statute. The bill was then referred to the Kansas Judicial Council Criminal Law Advisory Committee for review.

The councils' time spent on the issue was quality, their input excellent. The members of the council sifted through every detail of the proposed legislation. After several meetings, they recommended a new and refined version reflected in the bill you have before you today.

Most notably, HB 2850:

- *Removes the often-insurmountable "credible threat" requirement found in current statute.
- *Contains a tighter and more helpful definition of "course of conduct."
- *Includes fear for the safety of third parties included in the targeted person's immediate family.
- *Includes penalties that better match the potentially lethal crime of stalking.

As a point of interest, all 50 states currently classify stalking as a crime. Of those 50, 15 classify stalking as a felony upon the first offense, and 34 a felony upon the second offense (and/or if there are aggravating factors). Although every state has found the issue important enough to "put it on the books," it is interesting to note the number of convictions per year of this crime in Kansas. Per statistics from the Kansas Sentencing Commission, since 2003, there have been an average of 15.25 convictions per year. That number sits in stark contrast with the thousands of PFS orders that have been sought during that time. Such an average would appear to support the difficulties stated by law enforcement regarding the hurdles and penalties for such crime.

Although Jodi Sanderholm is the inspiration for this renovated legislation, she is not the first – and sadly will not be the last – to endure such a fate. However, we as legislators have the ability to give both law enforcement and victims a stronger law with which to protect those in our society who would either knowingly or unknowingly become prey to stalkers. Let it be said of us that we quickly recognized the severity and lethality of stalking, and swiftly addressed it to increase the safety and protection of those whom we serve.

Thank you, Mr. Chair and members of the committee. At this time, I would stand for questions.



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MEMORANDUM

TO: House Judiciary Committee

FROM: Kansas Judicial Council

DATE: February 21, 2008

RE: 2008 HB 2850 - Concerning Stalking

BACKGROUND

In June 2007, Rep. Mike O'Neal, Chair of the House Judiciary Committee, requested that the Judicial Council study and make recommendations to the Legislature regarding 2007 HB 2473, which proposed to repeal and replace K.S.A. 21-3438, the Kansas stalking statute. The Kansas Judicial Council assigned the study to the Criminal Law Advisory Committee (hereinafter "the Committee").

The Committee reviewed the existing stalking statute, the amendments proposed in 2007 HB 2473, federal stalking laws, and stalking statutes from other states. The Committee also heard testimony from Rep. Kasha Kelley, who introduced 2007 HB 2473 in response to concerns raised in her district following the Jodi Sanderholm case in Arkansas City. The Committee recommended against adoption of 2007 HB 2473 because the proposed stalking statute as amended by HB 2473 was overly broad and too vague to give sufficient warning of the proscribed conduct. The Committee opposed transforming the crime of stalking in Kansas to one that no longer requires specific intent and opposed expanding the crime of stalking to proscribe causing someone "emotional distress."

The Committee proposed an alternative which is set forth in 2008 HB 2850. The Judicial Council approved the Committee's recommendations in December 2007. A copy of the Committee's report to the Judicial Council is attached.

House Judiciary
Date 2-21-08
Attachment # 2

2008 HB 2850

The Judicial Council recommends the adoption of 2008 HB 2850 which accomplishes the following:

1. Removes the “credible threat” requirement found in the current statute. Stalking behavior in and of itself is often not overtly threatening. The key is how the behavior is perceived by the targeted person, whose particular history may transform a seemingly innocuous act into something more sinister and frightening.
2. Contains a tighter and more helpful definition of “course of conduct.”
3. Changes the law to include fear for the safety of third parties, but limits this expansion to members of the targeted person’s immediate family (a term that is defined).
4. Does not expand the crime of stalking to include criminalization of causing “emotional distress.”
5. Does not transform stalking into a general intent crime. The bill instead adds a “reckless” element, which is consistent with the Kansas criminal code.

**REPORT OF THE JUDICIAL COUNCIL
CRIMINAL LAW ADVISORY COMMITTEE
ON 2007 HB 2473**

NOVEMBER 30, 2007

BACKGROUND

In June, 2007, Rep. Mike O'Neal, Chair of the House Judiciary Committee, requested that the Judicial Council study and make recommendations to the Legislature regarding 2007, HB 2473, which repeals and replaces K.S.A. 21-3438, the Kansas stalking statute. The Kansas Judicial Council assigned the study to the Criminal Law Advisory Committee (hereinafter "the Committee").

COMMITTEE MEMBERSHIP

The members of the Committee taking part in this study are as follows:

1. **Stephen E. Robison, Chair**; practicing attorney in Wichita and member of the Judicial Council.
2. **James W. Clark**, Lawrence; Kansas Bar Association Legislative Counsel.
3. **Edward G. Collister**; Practicing attorney in Lawrence.
4. **Jim D. Garner**, Coffeyville; Secretary, Kansas Department of Labor.
5. **Patrick M. Lewis**, Olathe; Johnson County Public Defender's Office.
6. **Hon. Michael Malone**, Lawrence; District Judge in the 7th Judicial District.
7. **Steven L. Opat**, Junction City; Geary County Attorney.
8. **John M. Settle**, Larned; Pawnee County Attorney.
9. **Ann Swegle**, Wichita; Sedgwick County Deputy District Attorney.
10. **Loren L. Taylor**, Kansas City; Police trainer.
11. **Debra J. Wilson**, Topeka; Appellate Defender's Office.
12. **Ron Wurtz**, Topeka; Assistant Federal Public Defender.

The Committee invited Joyce Grover to join the Committee for this study. Ms. Grover is the Legal Advocacy Coordinator for the Kansas Coalition Against Sexual and Domestic Violence.

The Committee also heard testimony from Rep. Kasha Kelley of Arkansas City, who authored and introduced 2007 HB 2473.

INTRODUCTION

Stalking is much more prevalent than one might think. The following statistics appeared in a U.S. Department of Justice Report:

- 8 percent of women and 2 percent of men in the United States have been stalked at some time in their life; an estimated 1,006,970 women and 370,990 men are stalked annually.
- Most (78 percent) stalking victims are female and most (87 percent) stalking perpetrators are male.
- Women are significantly more likely than men (59 percent and 30 percent, respectively) to be stalked by intimate partners, about half of whom stalk their partners while the relationship is intact.
- There is a strong link between stalking and other forms of violence in intimate relationships: 81 percent of women who were stalked by a current or former husband or cohabiting partner were also physically assaulted by that partner and 31 percent were also sexually assaulted by that partner.
- Less than half of all stalking victims are directly threatened by their stalkers, although the victims, by definition, experience a high level of fear.
- About half of all stalking victims report their stalking to the police. About a quarter of stalking cases reported to the police result in suspects being arrested.
- About 12 percent of all stalking cases result in criminal prosecution, and about a quarter of female stalking victims and about a tenth of male stalking victims obtain restraining orders against their stalkers. Of all victims with restraining orders, 69 percent of the women and 81 percent of the men said their stalkers violated the order.
- Thirty percent of female stalking victims and 20 percent of male stalking victims seek psychological counseling as a result of their victimization. Stalking victims are significantly more likely than nonstalking victims to live in fear for their personal safety and to carry something to defend themselves.
- The average stalking case lasts 1.8 years. Nearly a fifth of all stalking victims move to new locations to escape their stalkers.

Patricia Tjaden and Nancy Thoennes, "*Stalking in America: Findings from the National Violence Against Women Survey*," (Washington, DC: National Institute of Justice, U.S. Department of Justice, 1998), 2, <http://www.ncjrs.gov/pdffiles/169592.pdf>, (accessed November 18, 2007).

California was the first state to pass a stalking law in 1990. Today, there are anti-stalking laws on the books in all 50 states and the District of Columbia, and there are federal statutes as well. Kansas enacted K.S.A. 21-3438 in 1992, and substantially amended it in 1993 and 1994. The 1994 version of the statute was declared unconstitutional in *State v. Bryan*, 259 Kan. 143, 910 P.2d 212 (1996). K.S.A. 21-3438 was amended again in 1995, and that version passed constitutional muster in *State v. Rucker*, 267 Kan. 816, 987 P.2d 1080 (1999). The statute has been amended twice more. In 2000, language was added to include communications via “electronic means,” a definition of which was also added. In 2002, the statute was amended as part of the new Protection From Stalking Act to increase the severity level of a conviction under K.S.A. 21-3438(a) if the violation occurs when there is already an order in place under the Act.

The Kansas stalking law came under scrutiny again earlier this year in connection with the murder of Jodi Sanderholm, a 19-year-old college dance team member from Arkansas City. According to media reports, local police were aware that the man charged with Ms. Sanderholm’s kidnapping, rape and murder was stalking members of the dance team.

The Committee heard testimony from Rep. Kasha Kelley, whose district includes the Arkansas City area. Rep. Kelley was approached by the local police department about reviewing the stalking laws. She spoke to local law enforcement agencies and the county attorney and was told that K.S.A. 21-3438's requirement of a “credible threat” makes it more difficult for the police to intervene when stalking is reported and makes it more difficult for the county attorney to be able to prove a case and get a conviction under the statute. Rep. Kelley introduced 2007 HB 2473 in response to these concerns.

STATUTORY AMENDMENTS PROPOSED IN 2007 HB 2473

2007 HB 2473 proposes to repeal and completely replace the existing stalking statute, K.S.A. 21-3438. Copies of the bill and existing statute are attached to this report.

Rep. Kelley patterned HB 2473 after a model stalking statute drafted by the National Center For Victims of Crime ("NCVC"). NCVC released a policy report recommending a major update to the 1993 *Model Anti-Stalking Code for the States*, which was developed by the National Institute of Justice, U.S. Department of Justice. See *The Model Stalking Code Revisited: Responding to the New Realities of Stalking* (Washington, DC: National Center for Victims of Crime, 2007), <http://www.ncvc.org/ncvc/AGP.Net/Components/documentViewer/Download.aspxnz?DocumentID=41822>, (accessed November 18, 2007).

As noted above, HB 2473 proposes an entirely new stalking statute. Although there are many other differences between the existing K.S.A. 21-3438 and HB 2473, most of them flow from the way that "stalking" is defined in the first paragraph of each.

K.S.A. 21-3438 states that "Stalking is an intentional, malicious and repeated following or harassment of another person and making a credible threat with the intent to place such person in reasonable fear for such person's safety."

HB 2473 states that "Stalking is engaging in a course of conduct directed at a specific person when it is known or should be known that the course of conduct would cause a reasonable person to: (1) Fear for such person's safety or the safety of the third person; or (2) suffer other emotional distress.

COMMITTEE’S REVIEW OF 2007 HB 2473

The Committee met on August 24, October 5 and November 2, 2007. In addition to review of the new stalking statute proposed in 2007 HB 2473, the Committee explored the Model Stalking Code on which the bill was based, Kansas case law, stalking statutes from other states and federal stalking laws. The Committee also looked at statistics regarding stalking convictions under Kansas and federal laws and the number of orders issued pursuant to the Protection From Abuse and Protection From Stalking Acts.

The Committee first considered whether any changes to K.S.A. 21-3473 were necessary or desirable. Rep. Kelley had been told that it was difficult to prove stalking and that the element of “credible threat” was problematic. There was some agreement with this position. Although many Committee members noted that stalking is rarely charged in their jurisdictions, the reason for this was not necessarily just due to any perceived problem with proving the crime. Committee members agreed that charging decisions are also influenced by the fact that a conviction for stalking carries a presumption of probation for a defendant with no prior convictions, while convictions of other related misdemeanors could result in jail time.

That stalking is not often charged is borne out by statistics obtained from the Kansas Sentencing Commission. Recent statewide statistics for convictions under the stalking statute are as follows:

<u>Year</u>	<u>Convictions</u>
2003	7
2004	21
2005	14
2006	19

The Committee agreed that the Kansas stalking law could be improved, but had several serious concerns with the statute proposed in 2007 HB 2473:

1. The legislation casts too wide a net. "Course of conduct" is defined as "two or more acts, including, but not limited to, acts in which the stalker directly, indirectly or through third parties, by any action, method, device or means, follows, monitors, observes, surveils, threatens or communicates to or about a person, or interferes with a person's property." The Committee was able to describe many situations in which non-stalking activities could conceivably fall within the language of the bill, which could mean that the statute is unconstitutionally overbroad.
2. The Committee found it especially troubling that the defendant need not intend to cause fear or emotional distress, rendering this a "general" as opposed to "specific" intent offense. The U.S. Supreme Court has relied in part on the absence of an intent requirement to strike down laws as unconstitutionally vague. See *Colautti v. Franklin*, 439 U.S. 379, 395 (1979) and *Papachristou v. City of Jacksonville*, 405 U.S. 156, 163 (1972).
3. While the Committee acknowledged that it is legitimate to include language relating to "third parties" in stalking laws, the term is not defined in this proposed statute and is overly broad.
4. The Committee was opposed to inclusion of the term "emotional distress." Fear for one's safety is the basis for the emotional distress, and the additional term is not necessary.

The Committee unanimously agreed that it would not support the adoption of HB 2473. However, it was also agreed that Rep. Kelley's desire to rid the Kansas stalking statute of the "credible threat" element had merit. The Committee agreed to draft a new statute to propose in place of HB 2473. The Committee reviewed statutes from other states and chose the New Hampshire law as a starting point. The statute drafted by the Committee is fully set out below in the next section.

COMMITTEE'S RECOMMENDATIONS REGARDING 2007 HB 2473

The Judicial Council Criminal Law Advisory Committee recommends against the adoption of 2007 HB 2473. The proposed stalking statute is both overly broad and too vague to give sufficient warning of the proscribed conduct. The Committee is opposed to transforming the crime of stalking in Kansas to one that no longer requires specific intent. Finally, the Committee is opposed to expanding the crime of stalking to proscribe causing someone "emotional distress."

The Committee agreed that K.S.A. 21-3438 is in need of amendment. The Committee has drafted a proposed statute as an alternative to 2007 HB 2473. The Committee's proposal accomplishes the following:

1. Removes the "credible threat" requirement found in the current statute. Stalking behavior in and of itself is often not overtly threatening. The key is how the behavior is perceived by the targeted person, whose particular history may transform a seemingly innocuous act into something more sinister and frightening.
2. Contains a tighter and more helpful definition of "course of conduct."
3. Changes the law to include fear for the safety of third parties, but limits this expansion to members of the targeted person's immediate family (a term that is defined).

4. Does not expand the crime of stalking to include criminalization of causing “emotional distress.”
5. Does not transform stalking into a general intent crime. The Committee instead added a “reckless” element, which is consistent with the Kansas criminal code.

COMMITTEE’S PROPOSED LEGISLATION

The first part of this proposal is the stalking statute, intended to be a replacement for K.S.A. 21-3438. Also included are suggested revisions to K.S.A. 21-3843 and 60-31a06.

(a) A person commits the offense of stalking if such person:

(1) Intentionally or recklessly engages in a course of conduct targeted at a specific person which would cause a reasonable person in the circumstances of the targeted person to fear for his or her personal safety or the safety of a member of that person’s immediate family, and the person is actually placed in such fear;

(2) Intentionally engages in a course of conduct targeted at a specific person, which the actor knows will place that person in fear for his or her personal safety or the safety of a member of that person’s immediate family; or

(3) After being served with, or otherwise provided notice of, any protective order included in K.S.A. 21-3843 and amendments thereto that prohibits contact with a specific person, intentionally or recklessly engages in at least one act of conduct that: (i) violates the provisions of the order, (ii) is listed in subsection (b)(1), and (iii) would cause a reasonable person to fear for his or her personal safety or the safety of a member of that person’s immediate family, and the specific person is actually placed in such fear.

(b) As used in this section:

(1) “Course of conduct” means 2 or more acts over a period of time, however short, which evidence a continuity of purpose. A course of conduct shall not include constitutionally protected activity, nor shall it include conduct that was necessary to accomplish a legitimate purpose independent of making contact with the targeted person. A course of conduct may include, but not be limited to, any of the following acts or a combination thereof:

- (i) Threatening the safety of the targeted person or a member of that person's immediate family.
- (ii) Following, approaching, or confronting that person, or a member of that person's immediate family.
- (iii) Appearing in close proximity to, or entering the person's residence, place of employment, school, or other place where the person can be found, or the residence, place of employment or school of a member of that person's immediate family.
- (iv) Causing damage to the person's residence or property or that of a member of the person's immediate family.
- (v) Placing an object on the person's property or the property of a member of that person's immediate family, either directly or through a third person.
- (vi) Causing injury to that person's pet, or a pet belonging to a member of that person's immediate family.
- (vii) Any act of communication.

(2) "Communication" means to impart a message by any method of transmission, including but not limited to telephoning or personally delivering or sending or having delivered any information or material by written or printed note or letter, package, mail, courier service or electronic transmission, including electronic transmissions generated or communicated via a computer. For purposes of this section, "computer" means a programmable, electronic device capable of accepting and processing data.

(3) "Immediate family" means father, mother, stepparent, child, stepchild, sibling, spouse, or grandparent of the targeted person, any person residing in the household of the targeted person, or any person involved in an intimate relationship with the targeted person.

(c) For the purposes of this section, a person who engages in acts which would constitute stalking after having been advised by a uniformed law enforcement officer, as defined in K.S.A. 21-3110(10), that the person's acts were in violation of this chapter concerning any like future acts, or a person who has been served with a protective order included within K.S.A. 21-3843 and amendments thereto, shall be presumed to have acted intentionally as to any future act targeted at the person or persons named in the advisement or order.

(d) In any complaint, information, or indictment brought for the enforcement of any provision of this statute, it shall not be necessary to negate any exception, excuse, or exemption contained herein and the burden of proof for any exception, excuse, or exemption shall be upon the defendant.

(e)(1) Any person who is convicted of a violation of subsection (a)(1) shall be guilty of a class A misdemeanor. Any person convicted of a violation of subsection (a)(1) who has one or more prior stalking convictions in this state or another state when the second or subsequent offense occurs shall be guilty of a severity level 7, person felony.

(2) Any person who is convicted of a violation of subsection (a)(2) shall be guilty of a class A misdemeanor. Any person convicted of a violation of subsection (a)(2) who has one or more prior stalking convictions in this state or another state when the second or subsequent offense occurs shall be guilty of a severity level 5, person felony.

(3) Any person who is convicted of a violation of subsection (a)(3) shall be guilty of a level 9, person felony. Any person convicted of a violation of subsection (a)(3) who has one or more prior stalking convictions in this state or another state when the second or subsequent offense occurs shall be guilty of a severity level 5, person felony.

(f) If any provision or application of this section or the application thereof to a person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this section which can be given effect without the invalid provisions or applications, and to this end the provisions of this section are severable.

21-3843. Violation of a protective order. (a) Violation of a protective order is knowingly or intentionally violating:

(1) A protection from abuse order issued pursuant to K.S.A. 60-3105, 60-3106 and 60-3107, and amendments thereto;

(2) a protective order issued by a court or tribunal of any state or Indian tribe that is consistent with the provisions of 18 U.S.C. 2265, and amendments thereto;

(3) a restraining order issued pursuant to K.S.A. 2006 Supp. 38-2243, 38-2244 and 38-2255 and K.S.A. 60-1607, and amendments thereto;

(4) an order issued in this or any other state as a condition of pretrial release, diversion, probation, suspended sentence, postrelease supervision or at any other time during the criminal case that orders the person to refrain from having any direct or indirect contact with another person;

(5) an order issued in this or any other state as a condition of release after conviction or as a condition of a supersedeas bond pending disposition of an appeal, that orders the person to refrain from having any direct or indirect contact with another person; or

(6) a protection from stalking order issued pursuant to K.S.A. 60-31a05 or 60-31a06, and amendments thereto.

(b) As used in this section, "order" includes any order issued by a municipal or district court.

(c) No protective order included in this section shall be construed to prohibit an attorney, or any person acting on the attorney's behalf, who is representing the defendant in any civil or criminal proceeding from contacting the protected party for a legitimate purpose within the scope of the civil or criminal proceeding; provided, that the attorney or person acting on behalf of the attorney: identifies himself or herself.

(cd) Violation of a protective order is a class A person misdemeanor.

(de) This section shall be part of and supplemental to the Kansas criminal code.

60-31a06. Orders; time periods; amendments; costs. (a) The court may issue a protection from stalking order granting any of the following orders:

(1) Restraining the defendant from following, harassing, telephoning, contacting or otherwise communicating with the victim. Such order shall contain a statement that if such order is violated such violation may constitute stalking as provided in K.S.A. 21-3438, and amendments thereto, and violation of a protective order as provided in K.S.A. 2005 Supp. 21-3843, and amendments thereto.

(2) Restraining the defendant from abusing, molesting or interfering with the privacy rights of the victim. Such order shall contain a statement that if such order is violated, such violation may constitute stalking as provided in K.S.A. 21-3438, and amendments thereto, assault as provided in K.S.A. 21-3408, and amendments thereto, battery as provided in K.S.A. 21-3412, and amendments thereto, and violation of a protective order as provided in K.S.A. 2005 Supp. 21-3843, and amendments thereto.

(3) Restraining the defendant from entering upon or in the victim's residence or the immediate vicinity thereof. Such order shall contain a statement that if such order is violated, such violation shall constitute criminal trespass as provided in subsection (a)(1)(C) of K.S.A. 21-3721, and amendments thereto, and violation of a protective order as provided in K.S.A. 2005 Supp. 21-3843, and amendments thereto.

(4) Any other order deemed necessary by the court to carry out the provisions of this act.

(b) A protection from stalking order shall remain in effect until modified or dismissed by the court and shall be for a fixed period of time not to exceed one year, except that, on motion of the plaintiff, such period may be extended for one additional year. Before the expiration of an order for protection from stalking, a victim, or a parent on behalf of the victim, may request an extension of the protection from stalking order for up to one additional year on showing of continuing threat of stalking.

(c) The court may amend its order at any time upon motion filed by either party.

(d) The court shall assess costs against the defendant and may award attorney fees to the victim in any case in which the court issues a protection from stalking order pursuant to this act. The court may award attorney fees to the defendant in any case where the court finds that the petition to seek relief pursuant to this act is without merit.

(e) A no contact or restraining provision in a protective order issued pursuant to this section shall not be construed to:

(1) Prevent contact between counsel for represented parties; or

(2) Prevent a party from appearing at a scheduled court or administrative hearing; or

(3) Prevent a defendant or defendant's counsel from sending the plaintiff copies of any legal pleadings filed in court relating to civil or criminal matters presently relevant to the plaintiff.

Testimony to the House Judiciary Committee
Brian Sanderholm, Arkansas City, KS

February 21, 2008
House Bill 2850 - Proponent

Chairman O'Neal and Committee,

My name is Brian Sanderholm. My wife, Cindy and I have raised three children-Jason, Jennifer, and Jodi in Arkansas City.

US statistics say that 1 in 7 women will be stalked sometime in their lifetime. On January 5, 2007 my youngest daughter, Jodi Sanderholm, was kidnapped, raped, sodomized, and finally murdered. She was 19 years old and in all reality, as close to perfect as a child could be. As far as we know Jodi's end started as she left the local College Gym after dance practice at noon, in a small Kansas town. She was apparently followed home where she was abducted. All this on a one-way street, in what is supposed to be a safe rural community.

Jodi was unaware she was a stalking victim until it was too late; however, the alleged perpetrator was no stranger to stalking innocent women. As recent pre-trial testimony has shown he is accused of stalking multiple women. It is my belief that the changes to the current stalking laws proposed in House Bill 2850 could have helped to save my daughter's life.

Jodi touched many lives during her short 19 years. By now she would have been 20, she would have been at a Texas University, she would have been engaged, she would have been able to meet the niece she looked so forward to, she would have been with us at Thanksgiving and Christmas. Unfortunately, we will never know how much she would have continued to touch the world. Justin Thurber took that away from her family and friends. It is my hope that from this senseless tragedy others lives will be saved.

House Bill 2850 is a beginning to continuing Jodi's legacy of touching lives. However, I do feel law enforcement training is necessary to accompany any law in order to ensure the law is effectively enforced. I understand that training hours for law enforcement are in high demand. I ask each of you to put yourself in the place of Jodi's mother and I, her sister, her brother, her niece and her friends and make this training a priority. Without further training it is my fear that the law will sit without being enforced.

It seems that the police can only keep the honest people from committing crimes. So the situation just gets worse. Look around when you get home and consider who the next 1 in 7 could be. This could include your daughter, wife, granddaughter, or even a neighbor's daughter. I never thought it would happen to me, now it has, and I want something done to keep this horrific act from happening again.

House Judiciary
Date 2-21-08
Attachment # 3

It is up to you to prevent the next victim. We need better, clearer laws, with teeth, to keep our loved ones in a safe environment. These people that commit these crimes and the acts, leading up to this, (bad acts escalate which have identifiable patterns), should be the ones taking up our jail space.

If we can protect one person from a terrifying ordeal then maybe Jodi's death will not have been in vain. Help me to stop the 1 in 7. Currently, fifteen other states classify stalking a felony upon the first offense. Since statistically one third of stalkers have stalked before I am encouraged to see Kansas take action with these states in the event that a restraining order is in place.

Nothing can bring back my daughter. By passing House Bill 2850 my hope is that another family doesn't have to experience the pain that mine has over the last 13 months.

Christopher E. Smith, Cowley County Attorney

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February 21, 2008

House Judiciary Committee
Hon. Michael R. O'Neal, Chair
Room 313-S

Mr. Chairman and Members of the Committee:

I wish to thank the committee for the opportunity to speak in support of House Bill 2850, a complete revision of K.S.A. 21-3438, informally known as "Jodi's Law." Speaking as a prosecutor and for the Kansas County and District Attorney's Association (hereinafter referred to as "K.C.D.A.A."), I believe this legislation is beneficial because it clears up an otherwise convoluted statute. I thank Representative Kasha Kelley for her leadership in regards to this legislation.

The first Kansas stalking law was adopted in 1992. It was modified slightly in 1993 and then modified substantially in 1994. Subsequently, the 1994 stalking law was ruled unconstitutional by the Kansas Supreme Court. In 1995, the Kansas Legislature, closely following the holding in *State v. Bryan*, again amended the stalking law into its present form. There have been minor revisions since 1995.

Presently, the crime of stalking is extremely difficult to prosecute because of the seemingly insignificant phrase "...and making a credible threat..." That phrase alone precludes prosecution of most stalking reports made to law enforcement. In many of these reports, there is almost no:

verbal or written threat, including that which is communicated via electronic means, or a threat implied by a pattern of conduct or a combination of verbal or written statements and conduct made with the intent and the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for such person's safety.

as is required by the language of the current statute. True stalkers know the relative impossibility prosecutors face in getting a conviction under the present statute and are careful to confine their actions to remain within the latitude granted by the present law. Too many times, behavior occurs that common sense would say is stalking, but by statutory definition is not.

House Judiciary
Date 2-21-08
Attachment # 4

This concern was highlighted in a note in the Washburn Law Journal, Summer 1997 entitled "The Kansas Stalking Law: A 'Credible Threat' to Victims. A Critique of the Kansas Stalking Law and Proposed Legislation" written by Callie Anderson Marks.

In that note, Ms. Marks states that the current stalking statute imposes an unduly heavy burden on prosecutors and victims. In order to successfully prosecute an individual for stalking by harassment, eleven separate elements must be proved. They are:

1. intentional, malicious and repeated harassment,
2. knowing and intentional course of conduct,
3. subjective serious alarm, annoyance, torment or terror,
4. no legitimate purpose,
5. objective substantial emotional distress,
6. subjective substantial emotional distress,
7. credible threat,
8. intent to carry out the threat,
9. apparent ability to carry out the threat,
10. objective fear of safety caused by the threat, and
11. specific intent to create objective fear for safety.

In order to prove stalking by following, the following elements must be satisfied:

1. intentional, malicious and repeated following,
2. credible threat,
3. intent to carry out the threat,
4. apparent ability to carry out the threat,
5. objective fear for safety caused by the threat, and
6. specific intent to create objective fear of safety.

Because stalking manifests itself in many different behaviors and because the statute requires proof of a great number of them, the present law does not protect many victims. Perhaps the greatest hindrance to prosecution under this statute is the requirement that the stalker make a credible threat. Many prosecutors are unable or reluctant to utilize the current law due to that single requirement.

Furthermore, one purpose of the stalking law is to protect people before they become victims of actual violence; however, the credible threat element requires an intent and an apparent ability to carry out the threat before legal action may be taken. Thus, the credible threat requirement interferes with the purpose of the law because before a victim is protected, the stalker must be ready, willing and able to commit an act of violence. By the time this happens, the stalker may be moments away from harming his victim or may have already harmed his victim.

The proposed legislation does away with the credible threat requirement. Looking back to the *Bryan* opinion, I would argue that the Kansas Supreme Court, even though mentioning the credible threat element, did not imply that such an element is an essential part of a constitutional statute.

A review of “declined prosecution” reports from my office revealed thirteen reports of alleged stalking since 2005. Of those reports, none could be prosecuted under the current law. But, applying the revisions, nine of these cases could be prosecuted successfully.

I urge you to report favorably on this bill. There are, however, some technical concerns with the language of the bill. The K.C.D.A.A. asks that the following be noted:

1. Section (a) (3) of the bill refers to “... at least one act listed in subsection (d)(1)...” when, in fact, there is no (d)(1). It is most likely referring to (e)(1).
2. The Kansas County and District Attorneys Association is concerned by the language contained in Section (d) wherein the term, “burden of proof” is used when describing exceptions, excuses or exemptions that may apply to a defense. The burden of proof in a criminal prosecution is always upon the State and never shifts to the defendant. It is so fundamental to criminal procedure that all citizens of our state and nation are aware of this basic principle. Prosecutors are uneasy when this term is used in a criminal statute and it appears that the burden is shifted. The language seems to address possible affirmative defenses; however, this section is not clearly defined and needs clarification.
3. Section (d) of the proposed legislation also refers to exceptions, excuses or exemptions “contained herein”, however, no exceptions, excuses or exemptions can be found within the proposed stalking statute.

After addressing the technical revisions, I believe that this bill will give Kansas prosecutors an enhanced tool to protect victims of stalking and see that offenders are held responsible for their actions and punished for their choices. I again urge a favorable report for this legislation from this committee.

Respectfully Submitted,



Christopher E. Smith
Cowley County Attorney

My name is Eileen Doran and I am the Program Director for the YWCA Battered Women Task Force in Topeka, Kansas. Our Program provides services to victims of Stalking and Domestic and Sexual Violence. I am here to offer support for the HB 2850 because I believe the changes are necessary to protect the safety of victims of stalking in Kansas. Our program serves over 1500 survivors each year, including those who have been stalked by current and former partners as well as strangers. While we filed over 50 Protection From Stalking Orders last year on behalf of victims, criminal stalking cases were filed in less than 20% of these cases.

Nationally, more than 80% of victims who are stalked by current or former partners are also physically assaulted by their partner and 76% of women murdered by their current or former partners were previously stalked by them. These statistics are consistent with our own experience of working with victims of domestic and sexual violence. Of the 53 stalking orders we filed, police were also called for domestic violence incidents in 90% of the cases at some point in time. Alarmingly, weapons were involved in the thirty percent of our cases. These statistics also tell us that we have a tremendous opportunity to intervene and hold stalkers accountable for their behavior before their victims are physically assaulted or tragically killed. Victims often underestimate the danger they are in because of stalking behaviors and most want to believe that the stalker will not act on their threats or that the intimidation will diminish if ignored. Many victims are not aware that stalking is a crime and because it is often accompanied by acts of violence, only those acts are reported to law enforcement. When stalking behavior is reported along with acts of domestic violence, in the vast majority of cases, only the DV charges are filed. Because of the heavy burden of proof on the state under the current stalking statute, few cases are filed even when reported, and fewer still are successfully prosecuted, leaving victims feeling hopeless with respect to their situation.

With the proposed amendments, the law is strengthened in many ways to offer hope for victims. Significantly, by making it a felony for those who violate a Protection From Stalking Order, you send a clear message to offenders that once they have been put on notice to cease their intimidating behaviors ...no further intimidation will be tolerated. We must let victims know that there is hope that is offered to them and a recognition that they are in serious danger from stalking behaviors. If a victim feels that nothing will result from making a police report, he or she is not likely to take that action. A victim becomes more endangered when a report is filed and there is no consequence for the stalker.

Too often we leave victims to fend for themselves in dealing with their stalkers...they change their cell phone numbers, change their addresses, and quit their jobs. Our laws should be able to offer them the protection of the State of Kansas, not rely on themselves and family and friends for protection.. We have seen in our own state the tragic consequence of our failure to recognize stalking as part of a larger pattern of abusive behaviors. You have the opportunity to prevent more tragedies from occurring and we strongly encourage you to do so.

House Judiciary
Date 2-21-08
Attachment # 5

Testimony of Judy Davis
HB 2850
February 21, 2008

I am Judy Davis, Executive Director of The Crisis Center, Inc. a nonprofit organization providing round-the-clock services to victims of sexual assault, domestic violence, and stalking in Clay, Geary, Marshall, Pottawatomie, and Riley Counties. I am here to support HB 2850.

Dozens of times each year, Crisis Center Advocates are asked to assist victims of stalking. Too often all we can do is affirm their feelings and tell *them* how to behave. It is difficult to find words to communicate the impact of stalking on those victims' lives, to convey to you the *meaning* of stalking to them. We encourage them to be vigilant, to respect their fear, but to behave as though they were not afraid. We advise them to call the police and to document, document, document: send all your calls directly to voicemail or an answering machine, change your locks, inform your family and friends and co-workers, try to change your work or class schedule, don't answer the door, don't open packages, don't dump your caller ID, don't let it get you down, don't stop behaving as though you were a free person living in a free society.

They ask us how many "events" they must endure -- and document -- before the community can intervene to stop the stalker, how long they must live in fear. We don't have an answer, nor, frequently, do law enforcement officers.

We ask stalking victims to bear an awful burden: to try to ignore the menace that has invaded their daily lives. A victim who finds a sanitary napkin with the word "whore" scrawled on it in her office mail slot is reminded to keep her cool. If she gets an email containing a link to a site filled with violent pornography, she is encouraged to "just ignore it." When another discovers a phone message telling her how pretty her three year old is in the pink outfit she wore

House Judiciary
Date 2-21-08
Attachment # 6

to preschool this morning, she is expected to proceed apace. And when that call is followed by a note telling her where she bought yesterday's coffee and what she was wearing when she bought it, she's told not to worry.

Stalking victims are not weak, oversensitive, fainting flowers. And stalkers are not just awkward people who don't know how to communicate appropriately. On the contrary, many stalkers are cunning, destructive, dangerous masters of manipulation. We don't catch them uttering explicit threats, because they don't need to make explicit threats. Their tactics are exquisitely efficient: hiding behind a cloak of deniability, they terrorize by invading victims' daily lives and causing them to question their every activity. Stalking victims can take nothing for granted, not their ability to move peaceably about in the world unmolested, not even the privacy of their own homes and effects.

This bill takes the law to the reality of stalking in Kansas. I urge you to accept these important revisions.



STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

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House Judiciary Committee

HB 2850

Victims Services Director Dorthy Stucky Halley

Office of Attorney General Stephen N. Six

February 21, 2008

Mr. Chairman and members of the Committee, thank you for allowing me to submit this written testimony in support of House Bill 2850.

House Bill 2850 would remove the “credible threat” requirement existing in current law. This change would improve both the ability of law enforcement to intervene in cases where stalking occurs, and successful prosecution of those cases.

While there are more than 1.4 million victims of stalking annually nationwide (Tjaden & Thoennes, 1998), only 7 to 21 persons have been convicted of stalking in Kansas annually (Judicial Council, 2007). The difficulty of proving the “credible threat” element could be contributing to this small number of convictions.

Stalking is a crime of intimidation. Victims of stalking often experience incidents where their perpetrator plays on their past experiences together to terrify them. The stalker already knows what the victim is likely to fear most, and will do things simply to let the victim know they are being watched and stalked, making it difficult to prove “credible threat.”

The small number of convictions in Kansas is particularly concerning due to the link between stalking and homicide. Stalking is a significant risk factor for femicide in intimate relationships (Campbell, 2003). The Victim Services Division has repeatedly seen stalking occur as a precursor to heinous crimes. It is for this reason that the Attorney General’s office supports House Bill 2850, and we thank you for giving it consideration.

Campbell et al., 2003. Risk Factors for Femicide in Abusive Relationships: Results from a Multi-site Case control Study. *American Journal of Public Health*, 93 (7).

Judicial Council, 2007. *Report of the Judicial Council Criminal Law Advisory Committee on 2007 HB2473*.

Tjaden and Thoennes, 1998. *Stalking in America: Findings from the National Violence Against Women Survey*. Washington, DC: National Institute of Justice, U. S. Dept. of Justice.

House Judiciary
Date 2-21-08
Attachment # 7

634 SW Harrison Topeka, Kansas 66603
785-232-9784 • FAX 785-266-1874 • coalition@kcsdv.org • www.kcsdv.org

House Judiciary Committee
February 21, 2008
HB2850

Chairman O'Neal and Members of the House Judiciary Committee:

The Kansas Coalition Against Sexual and Domestic Violence (KCSDV) supports HB 2850 and urges the Committee to pass it favorably.

As many of you know, stalking is closely, but not always, related to domestic violence and sexual assault. Stalking is considered to be one of the red flags that point to increased seriousness and possible lethality when it is connected to domestic violence and sexual assault. National surveys have indicated that 76% of the women who were murdered by an intimate partner had been stalked prior to that murder. (McFarlane, et al. [1999]. "Stalking and Intimate Partner Femicide," Homicide Studies). 31% of women stalked by a current or former intimate partner are also sexually assaulted by that partner. (Tjaden & Thoennes. [1998]. "Stalking in America," National Institute of Justice.) Whether or not there has been previous domestic violence or sexual assault, stalking is a crime of intimidation and psychological terror that often escalates into physical and sexual violence against its victims. I have attached the Stalking Resource Center's Fact Sheet on Stalking that details the impact of stalking on women and men in the United States.

Advocates often see the impact of stalking while assisting victims who have made the decision to leave their abuser. Every advocate is familiar with the obsessive batterer who drives up and down every street and alley in town looking for his partner's car or trying to identify the shelter where she may have taken refuge. This obsessive behavior quickly becomes a form of psychological terrorism. Victims who are being stalked by their batterer often believe they will never be able to live without looking over their shoulder.

Additionally, terror by stalking does not always have a physical threat connected to it. The stalker may leave a single rose on her doorstep every morning with the message being, "I was here last night." The stalker may leave a note on her car as she is shopping downtown or at the mall with the message being, "I always know where you are." A stalker's message is often clear to the victim but seemingly innocuous to someone

looking on from the outside, someone who may not see the course of conduct or the intimidation inherent in this conduct.

KCSDV is fully supportive of efforts to tighten up and improve the crime of stalking in Kansas. KCSDV appreciates being able to work on this Bill with Representative Kasha Kelley and the Criminal Law Advisory Committee of the Kansas Judicial Council. We very much appreciated not only the attention to the details that will allow this statute to pass constitutional muster but also the attention to protecting victims of stalking by taking this crime seriously.

Stalking is a crime of terrorism. Recognizing its seriousness and improving prosecution can go a long way toward helping victims regain a sense of safety and security.

Respectfully submitted,

Sandra Barnett
Executive Director

WHAT IS STALKING?

While legal definitions of stalking vary from one jurisdiction to another, a good working definition of stalking is *a course of conduct directed at a specific person that would cause a reasonable person to feel fear.*

STALKING IN AMERICA

- 1,006,970 women and 370,990 men are stalked annually in the U.S.
- 1 in 12 women and 1 in 45 men will be stalked in their lifetime.
- 77% of female victims and 64% of male victims know their stalker.
- 87% of stalkers are men.
- 59% of female victims and 30% of male victims are stalked by an intimate partner.
- 81% of women stalked by a current or former intimate partner are also physically assaulted by that partner.
- 31% of women stalked by a current or former intimate partner are also sexually assaulted by that partner.
- 73% of intimate partner stalkers verbally threatened victims with physical violence, and almost 46% of victims experienced one or more violent incidents by the stalker.
- The average duration of stalking is 1.8 years.
- If stalking involves intimate partners, the average duration of stalking increases to 2.2 years.
- 28% of female victims and 10% of male victims obtained a protective order. 69% of female victims and 81% of male victims had the protection order violated.

[Tjaden & Thoennes. (1998). "Stalking in America," NIJ.]

IMPACT OF STALKING ON VICTIMS

- 56% of women stalked took some type of self-protective measure, often as drastic as relocating (11%). [Tjaden & Thoennes. (1998). "Stalking in America," NIJ]
- 26% of stalking victims lost time from work as a result of their victimization, and 7% never returned to work. [Tjaden & Thoennes.]
- 30% of female victims and 20% of male victims sought psychological counseling. [Tjaden & Thoennes.]
- The prevalence of anxiety, insomnia, social dysfunction, and severe depression is much higher among stalking victims than the general population, especially if the stalking involves being followed or having one's property destroyed. [Blauuw et. al. (2002). "The Toll of Stalking," *Journal of Interpersonal Violence*]

THE STALKING RESOURCE CENTER

The Stalking Resource Center is a program of the National Center for Victims of Crime. Our dual mission is to raise national awareness of stalking and to encourage the development and implementation of multidisciplinary responses to stalking in local communities across the country.

We can provide you with:

- Training and Technical Assistance
- Protocol Development
- Resources
- Help in collaborating with other agencies and systems in your community

Contact us at: 202-467-8700 or src@ncvc.org.

RECON STUDY OF STALKERS

- 2/3 of stalkers pursue their victims at least once per week, many daily, using more than one method.
- 78% of stalkers use more than one means of approach.
- Weapons are used to harm or threaten victims in 1 out of 5 cases.
- Almost 1/3 of stalkers have stalked before.
- Intimate partner stalkers frequently approach their targets, and their behaviors escalate quickly.

[Mohandie et al. "The RECON Typology of Stalking: Reliability and Validity Based upon a Large Sample of North American Stalkers." (In Press, *Journal of Forensic Sciences* 2006).]

STALKING AND INTIMATE PARTNER FEMICIDE*

- 76% of intimate partner femicide (murder) victims had been stalked by their intimate partner.
- 67% had been physically abused by their intimate partner.
- 89% of femicide victims who had been physically abused had also been stalked in the 12 months before the murder.
- 79% of abused femicide victims reported stalking during the same period that they reported abuse.
- 54% of femicide victims reported stalking to police before they were killed by their stalkers.

**The murder of a woman.*

[McFarlane et al. (1999). "Stalking and Intimate Partner Femicide," *Homicide Studies*.]

STALKING ON CAMPUS

- 13% of college women were stalked during one six- to nine-month period.
- 80% of campus stalking victims knew their stalkers.
- 3 in 10 college women reported being injured emotionally or psychologically from being stalked.

[Fisher, Cullen, and Turner. (2000). "The Sexual Victimization of College Women," NIJ/BJS.]

STATE LAWS¹

- Stalking is a crime under the laws of all 50 states, the District of Columbia, and the Federal Government.
- 15 states classify stalking as a felony upon the first offense.
- 34 states classify stalking as a felony upon the second offense and/or when the crime involves aggravating factors.²
- Aggravating factors may include: possession of a deadly weapon; violation of a court order or condition of probation/parole; victim under 16; same victim as prior occasions.

¹ Last updated October 2005.

² In Maryland, stalking is always a misdemeanor.

For a compilation of state, tribal and Federal laws visit: www.ncvc.org/src

Testimony to the House Judiciary Committee
James Bartle, General Counsel, Kansas Department of Revenue
February 21, 2008

Department of Revenue's Testimony in Support of House Bill 2794

Dear Chairman O'Neal and Members of the Committee:

K.S.A. 60-1111 and 60-1112 currently require contractors to post a bond or certificate of deposit when performing a contract in an amount exceeding \$100,000 for the purpose of making any public improvements or constructing or repairing any public building. Claims may be made against the bond or CD for certain liabilities or indebtedness owed by the contractor or the subcontractor of such contractor.

House Bill 2794 would amend K.S.A. 60-1111 and 60-1112 to permit claims to be made against the bond or CD for amounts owed to the State of Kansas and state agencies such as the Department of Revenue and the Department of Labor for liabilities such as withholding taxes and unemployment insurance contributions.

This bill is an attempt to address some of the problems that result from the practice of "employee misclassification" and the presence of illegal and undocumented workers in Kansas. A 2006 publication entitled, *The Economic Costs of Employee Misclassification in the State of Kansas*, by Dr. Michael P. Kelsay, Department of Economics, University of Missouri – Kansas City, estimates that in 2004, Kansas lost \$38.8 million in state income tax as a result of employee misclassification. A copy of that study is attached hereto as Exhibit A.

Essentially, misclassification occurs when employers incorrectly classify their employees as independent contractors in order to avoid responsibility for payment of federal and state withholding taxes, unemployment insurance contributions, workers compensation, Social Security, and other payroll taxes. Although such workers may be issued 1099s, they frequently fail to make estimated tax payments or file returns to report their income tax liabilities. A document from the website jointly administered by the Department of Revenue and the Department of Labor containing Questions and Answers on the subject of Misclassification of Workers is attached hereto as Exhibit B.

Similar problems arise when employers operate with complete disregard for the law: they make no effort to classify their workers as either employees or independent contractors, maintain no records, file no returns and pay no taxes.

The problem of worker misclassification and noncompliance with Kansas withholding tax requirements is greatest in the construction industry. As the result of its investigations and enforcement efforts, the Department of Revenue has learned that certain contractors and subcontractors who misclassify their employees also routinely work on public projects funded by taxpayer dollars. HB 2794 represents an effort to bring a halt to that practice.

By authorizing state agencies such as the Department to make claims against the security that is required to be posted on these contracts, HB 2794 would provide an efficient and effective way in which to collect taxes that are lawfully due. And perhaps more importantly, it would help insure that state funds are spent only on contracts awarded to those who accept responsibility for, and absorb the direct and indirect costs of, complying with their tax reporting and remittance requirements.

Under current law, contested claims are subject to adjudication in the district court of the county in which the construction project is located. HB 2794 would not alter this provision. Consequently, contractors would have a full and fair opportunity to contest claims brought by any state agency before such claims could be paid.

The Department of Revenue respectfully requests your support for House Bill 2794.

Attachments

The Economic Costs of Employee Misclassification in the State of Kansas

Michael P. Kelsay, PhD

Kelly D. Pinkham, MS

Department of Economics, University of Missouri - Kansas City

February 17, 2006

** Though we have not conducted an independent review of the data provided to us, we believe that the following estimates are reliable for a responsible discussion of the economic effects from employee misclassification in the State of Kansas.*

Brief Discussion of the Problem of Misclassification

Employee misclassification is defined as the case where employers treat workers as independent contractors that would otherwise be wage or salaried employees. If an employee is classified as an independent contractor, the employers are not required to pay a variety of payroll taxes (e.g. social security, unemployment insurance) and the independent contractor is not fully protected by unemployment laws.

The issue of misclassifying employees as an independent contractor is an emerging issue in Kansas and the nation, as employers remit their unemployment taxes based upon their payroll. Recent studies have shown that misclassification by employers is a growing problem.¹

Misclassification negatively impacts the citizens of Kansas in several ways. First, the conditions for a fair and competitive marketplace are sabotaged. Firms that misclassify pay no employment insurance on those workers. This places employers who correctly classify their employees at a distinct competitive disadvantage. Misclassification allows employers who violate state statutes to be rewarded. In addition, the Kansas worker who was misclassified by his or her employer also suffers. If this worker needs to apply for unemployment insurance benefits, they are denied those benefits since the state employment agencies have no record of them having worked. Again, the violating employer is rewarded because the laid-off employee is not charged to their

¹ In a report by the National Employment Law Project, it was reported that US DOL quarterly audit found 30,135 employees misclassified in 2002. This was a 42% increase from the prior year.

unemployment insurance account. Several studies have shown the problem of misclassification to be particularly acute in the construction sector.²

Table 1 provides estimates of the percentage of employees that are misclassified in a number of states. For the 13 states where studies have been conducted or in progress (University of Missouri – Kansas City on the State of Illinois and Michigan State University on the State of Michigan), the moderate rate of misclassification was between 13-23%. In two states (Massachusetts and Maine), the incidence of misclassification in the construction industry is higher than all industries in their states. For Massachusetts, the moderate statewide rate is 19%, while the rate of misclassification in the construction sector is 24%; for Maine, the

TABLE 1
Prevalence of Misclassification in All Industries
and the Construction Sector

	Low	Moderate	High
All Industries (9 States) ¹	5-10%	13-23%	29-42%
All Industries (United States) ²		15%	
All Industries (Massachusetts) ³	13%	19%	
All Industries (Maine) ⁴	11%		
All Industries (Illinois – Preliminary)		17.3%	
Construction Sector (Massachusetts) ⁵	14%	24%	
Construction Sector (Maine) ⁶	14%		
Construction Sector (United States) ⁷		20%	

¹ Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs, February, 2000.

² United States General Accounting Office, 1996.

³The Social and Economic Costs of Employee Misclassification in Construction. December 17, 2004.

⁴The Social and Economic Costs of Employee Misclassification in the Maine Construction Industry, April 25, 2005.

⁵The Social and Economic Costs of Employee Misclassification in Construction. December 17, 2004.

⁶The Social and Economic Costs of Employee Misclassification in the Maine Construction Industry, April 25, 2005.

⁷ United States General Accounting Office, 1996.

low statewide estimate is 11% while the incidence rate of misclassification in the construction sector is 14%. In a report by the General Accounting Office (GAO) in 1996, they reported that the percentage of misclassified workers in all industries was 15%, while the percentage of misclassified workers in the construction sector was 20%.

² The General Accounting Office (1996) reported that the estimated percentage of employees with misclassified workers was 13.4%, while the estimated percentage in the construction sector was the highest of all industry groups at 19.8%.

Based upon data about construction sector audits in Kansas, unemployment insurance audits were conducted upon 73 contractors with 517 employees in 2004.³ We do not know if these were random or targeted audits. The purpose of performing targeted audits is to search for incidents of misclassification where they are more likely to be discovered than with random audits alone (for example, targeted audits will be triggered when certain criteria are met such as the delinquent filing of reports, past infractions, late registration, etc.). For the purpose of making informed projections, random audits would provide a lower bound for estimates on the prevalence of misclassification while targeted audits would provide an upper bound.

Employee Misclassification in Kansas

- During 2004, 16.4% of construction employers misclassified workers as independent contractors.⁴ This translates into an estimate of 1,266 construction employers in Kansas. Based upon a misclassification rate of 16.4% statewide, this translates into 12,295 employers statewide.⁵
- When employers misclassify, they do so extensively. A key measure of misclassification is the severity of its impact within employers who misclassify. This measure indicates that misclassification is a common occurrence rather than a random occurrence in companies that do misclassify. According to the data, 24.2% of construction employees are misclassified in employers that are found to be misclassifying for 2004.⁶
- Based upon the data, across all establishments, 4.9% of employees were misclassified in 2004.⁷ The total number of employees statewide that are affected by improper misclassification is estimated at 54,384 and is estimated at 3,124 construction employees.⁸
- Misclassification of employees has a financial impact on the workers, the unemployment insurance system, and the private sector in Kansas. Workers are directly impacted by not being the beneficiary of unemployment insurance. The unemployment insurance system in Kansas is adversely affected as well. A proper research study could help to determine the level of uncollected unemployment insurance taxes in Kansas. In a separate study we are conducting on the State of

³ These figures for Kansas Department of Labor unemployment insurance audit activity were provided by Dr. Joshua L. Rosenbloom, Kansas University Department of Economics, in his one-page summary, *An Overview of Worker Misclassification in the Construction Industry*, June 7, 2005.

⁴ See Footnote No. 3

⁵ These estimates are based upon data from The Department of Commerce, County Business Patterns, 2003.

⁶ See Footnote No. 3

⁷ See Footnote No. 3

⁸ These estimates are based upon data from The Department of Commerce, County Business Patterns, 2003.

Illinois, we estimate that the unemployment insurance system lost approximately \$50 million in 2004 due to misclassification.

- According to published data, workers misclassified as independent contractors are known to underreport their personal income as well; as a result, Kansas suffers a loss of income tax revenue. According to the IRS, wage earners report 99% of their wages; self-employed individuals (such as independent contractors) formally report only 68% of their income. This represents a gap of 31%. Other studies estimate the gap to be as high as 50%.
- Based upon the lower IRS estimate that 30% of the income of misclassified workers in Kansas is not reported, we estimate that \$38.8 million in state income tax was lost in Kansas in 2004. For the construction sector, we estimate that \$2.1 million in state income tax was lost in Kansas from 2004.⁹
- Misclassification also impacts the workman compensation insurance system. Among other effects, costs are higher for employers that follow the rules placing them at a distinct competitive disadvantage. Workers compensation premiums are much higher in the construction trades. In Illinois, for example, the statewide rate for all industries is less than \$3.00 (per \$100 of payroll). However, within construction, rates can range from \$8.01 for electrical wiring to \$27.94 for concrete construction. A large, national study reported that the costs of workman compensation are the single most dominant reason why employers misclassify (Planmatics, 2000). Employers can avoid the high cost of paying workman compensation premiums by mandating that persons who work for them have an exemption. This allows employers who misclassify to underbid the legitimate employers who properly classify their employees. In the construction sector, the workers compensation effect from misclassification further destroys the fairness and legitimacy of the bidding process. Furthermore, it has been reported that many previously misclassified workers were later added to their company's workman compensation policy after they were injured, resulting in payment of benefits even though premiums were not fully collected.
- The problem of misclassification is receiving increased attention in many states. The effects of misclassification negatively impact workers, employers, small businesses, insurers, taxpayers and tax authorities. Furthermore, the operation of fair, competitive markets is compromised when the bidding process is undermined by the practice of misclassification. Like other states, Kansas will likely benefit from better documentation on misclassification along with measures that help to improve compliance with state statutes.

⁹ These estimates are based upon average statewide earnings in Kansas and for the construction sub-sector as reported by the Bureau of Labor Statistics, U.S. Department of Commerce. We use an average marginal tax rate of 6.25% (for incomes between \$15,000 and 30,000).

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MISCLASSIFICATION OF WORKERS

Frequently Asked Questions

- [What is the misclassification of workers?](#)
- [Why is it important to correctly classify workers?](#)
- [What is employment?](#)
- [Who is an employee?](#)
- [Who is an independent contractor?](#)
- [Who determines if a worker is an employee or an independent contractor?](#)
- [How does the Kansas Department of Labor determine if a worker is an employee or an independent contractor?](#)
- [What difference does it make if workers are misclassified?](#)
- [How can I report employment misclassification?](#)
- [What are the penalties that an employer maybe subject to if the employer misclassifies a worker?](#)

What is the misclassification of workers?

Misclassification of workers occurs when an employer incorrectly classifies workers as independent contractors rather than employees.

[Back to top.](#)

Why is it important to correctly classify workers?

An employer has different legal, tax and financial obligations depending on how a worker is classified. For example, if a worker is classified as an **employee**, the **employer** is required to:

- withhold income, F.I.C.A. (Social Security) and Medicare taxes from the employee's wages;
- pay F.I.C.A. (Social Security) and Medicare taxes in addition to the employee's share;
- pay unemployment taxes (which provides insurance coverage in case the worker is laid off;) and
- buy workers compensation insurance (which provides insurance coverage in case the worker is injured on the job.

If a worker is classified as an **independent contractor**, the employer generally does not have those obligations and the **worker** is required to:

9-7
02/ B

- make quarterly estimated payments for income taxes, and;
- pay self employment taxes.

An independent contractor is not entitled to unemployment compensation and, in many cases, will not receive workers compensation if injured on the job.

Most importantly, the intentional misclassification of workers is illegal and constitutes tax and insurance evasion. Employers engaging in this practice may be subject to significant penalties and fines.

[Back to top.](#)

What is employment?

Employment is defined in K.S.A. 44-703, Chapter 44, Article 7. According to this statute, employment means:

- Services performed by an individual for wages under any contract of hire is employment unless it is shown that:
 1. The individual has been and will continue to be free from control or direction over the performance of the services, both under the individual's contract of hire and in fact;

AND

2. The service is either outside the usual course of the business for which the service is performed or that the service is performed outside of all the places of business of the enterprise for which the service is performed.

[Back to top.](#)

Who is an employee?

An **employee** is anyone performing services for an employer who controls what will be done and how it will be done by the worker. This is true even if the employee has freedom of action. What matters is the right of the employer to control the details of how the services are performed.

[Back to top.](#)

Who is an independent contractor?

Independent contractors have an independent trade, business, or profession. They offer their services to the public and are generally not employees. However, whether they are employees or independent contractors depends on the facts in each case. The general rule is

9-8

that an individual is an independent contractor if the employer controls or directs only the result of the work and not the means and methods of accomplishing the result.

[Back to top.](#)

Who determines if a worker is an employee or an independent contractor?

The Kansas Department of Labor is responsible for investigating worker classification by employers.

[Back to top.](#)

How does the Kansas Department of Labor determine if a worker is an employee or an independent contractor?

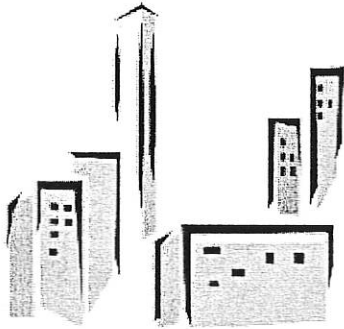
The right of control, whether or not exercised, is the most important factor in determining the relationship. An employer-employee relationship exists when an employer has the **right** to exercise control over the manner and means by which the individual performs services. The right to discharge a worker at will and without cause is strong evidence of the right of direction and control. The following factors should also be taken into consideration:

- Is the one performing the services engaged in a separately established occupation or business?
- Is the work usually performed without supervision in that locality?
- What skill is required in performing the services and accomplishing the desired result?
- Who supplies the tools, equipment, and place of work for the person doing the work?
- Is the performance of services an isolated or continuous event?
- What is the method of payment, whether by time, a piece rate, or by the job?
- Is the work part of the regular business of the employer?
- What is the extent of actual control exercised by the employer over the manner and means of performing the services?
- Are the services performed for the benefit or convenience of the employer as an individual or for the employer's business enterprise?
- Can the worker make business decisions that would result in a financial profit or loss for the worker? Investment of the worker's time is not sufficient to show a risk of loss.

A written contract that claims to create an independent contract relationship is worthless if the practice of the parties shows that the employer retains the right to control

9-9

- What is misclassification?
- Frequently asked questions
- Report misclassification
- Kansas Department of Revenue
- Kansas Department of Labor



the means and manner in which services are performed.

Generally an employer-employee relationship is found to exist when the work being done is an integral part of the regular business of the employer and the worker does not furnish an independent business or professional service to the employer.

Also see "What is employment" question for more detail.

Back to top.

What difference does it make if workers are misclassified?

A business that intentionally misclassifies employees creates a number of costs for a variety of people. The costs avoided do not go away, they are simply borne by other people.

- A worker misclassified as an independent contractor rather than as an employee suffers several adverse consequences. The worker is responsible for payment of income and self-employment taxes. Self-employment taxes are a higher cost for the worker because self-employment taxes include a portion of the F.I.C.A. (Social Security) and Medicare taxes that would have been paid by the employer.

If laid off from a job, the misclassified worker must bear the financial consequences and is usually not entitled to unemployment compensation.

If injured on the job, the misclassified worker is often not entitled to workers compensation benefits and must pay medical expenses and bear the financial burden of lost income.

- Businesses that intentionally misclassify workers put other businesses at a competitive disadvantage.
- In the end, honest Kansas taxpayers must pick up the remaining cost.

Back to top.

How can I report employment misclassification?

You can report suspected misclassification to the Department of Labor and Department of Revenue on this website. The Departments will investigate all reports submitted via this website. Click here to report misclassification.

Back to top.

9-10

What are the penalties that an employer maybe subject to if the employer misclassifies a worker?

Unemployment Taxes

K.S.A.44-117 states: (a)(1) Penalties on past-due reports, interest on past-due contributions, payments in lieu of contributions and benefit cost payments. Any employer or any officer or agent of an employer, who fails to file any wage report or contribution return by the last day of the month following the close of each calendar quarter to which they are related shall pay a penalty as provided by this subsection (1) for each month or fraction of a month until the report or return is received by the secretary of labor. The penalty for each month or fraction of a month shall be an amount equal to .05% of the total wages paid by the employer during the quarter, except that no penalty shall be less than \$25 nor more than \$200 for each such report or return not timely filed.

Contributions and benefit cost payments unpaid by the last day of the month following the last calendar quarter to which they are related and payments in lieu of contributions unpaid 30 days after the mailing of the statement of benefit charges, shall bear interest at the rate of 1% per month or fraction of a month until payment is received...

K.S.A. 44-719 states:

(e) Any employer or person who willfully fails or refuses to pay contributions, payments in lieu of contributions or benefit cost payments or attempt in any manner to evade or defeat any such contributions, payments in lieu of contributions or benefit cost payments or the payment thereof, shall be liable for the payment of such contributions, payments in lieu of contributions or benefit cost payments and, in addition to any other penalties provided by law, shall be liable to pay a penalty equal to the total amount of the contributions, payments in lieu of contributions or benefit cost payments evaded or not paid.

Worker Compensation

K.S.A. 44-5,120 states: (d) Fraudulent or abusive acts or practices for purposes of the workers compensation act include willfully, knowingly or intentionally: (2) misrepresenting to an insurance company or the insurance department, the classification of employees of an employer, or the location, number of employees, or true identity of the employer with the intent to lessen or reduce the premium otherwise chargeable for workers compensation insurance coverage.

Essentially, it is considered a fraudulent act to represent employees as a different classification for the purpose of obtaining a cheaper premium.

9-11

With regard to penalties, K.S.A. 44-5,120(g) provides for a couple different options:

(g)(1) Payment of a monetary penalty of not more than \$2,000 for each and every act constituting the fraudulent or abusive act or practice, but not exceeding an aggregate penalty of \$20,000 in a one-year period.

(g)(2) Redress of the injury by requiring the refund of any premiums paid by and requiring the payment of any moneys withheld from, any employee, employer, insurance company or other person or entity adversely affected by the act constituting a fraudulent or abusive act or practice.

Based on the two penalty provisions listed above, an employer potentially could be charged according to the number of times he misrepresents an employee and/or the amount of premium that should have been paid had the employees been classified correctly. Determining what penalties to charge depends on the facts of each case.

Withholding Tax

Generally, every employer required by federal law to withhold upon wages pursuant to the federal internal revenue code shall, whenever the wage recipient is a resident of Kansas or the wages are paid on account of personal services performed in Kansas, withhold and deduct from such wages an amount to be determined in accordance with K.S.A. (2005 Supp.) 79-32,100d, and amendments thereto.

Employers who fail to withhold upon their employees' wages or otherwise fail to comply with the provisions of the Kansas Withholding and Declaration of Estimated Tax Act shall be subject to the penalty provisions set forth in K.S.A. 79-3228 and 79-32,107, and amendments thereto. Such penalties range from 1% per month of the unpaid balance of tax due up to 100% of the unpaid balance of tax due, plus interest on the unpaid tax at the rate established by law.

[If you are seeking more specific information regarding Withholding tax penalties and interest click here.](#)

Related Links:

- [Misclassification Home Page](#)

9-12



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**TESTIMONY OF
ASSOCIATED GENERAL CONTRACTORS OF KANSAS
BEFORE HOUSE COMMITTEE ON JUDICIARY
HB 2794**

February 21, 2008

By Corey Peterson, Associated General Contractors of Kansas, Inc.

Mister Chairman and members of the committee, my name is Eric Stafford. I am the Associate Government Affairs Director for the Associated General Contractors of Kansas, Inc. The AGC of Kansas is a trade association representing the commercial building construction industry, including general contractors, subcontractors and suppliers throughout Kansas (with the exception of Johnson and Wyandotte counties).

AGC of Kansas opposes House Bill 2794 and respectfully asks that this committee reject HB 2794.

Last year, the AGC of Kansas, along with other industry groups actively supported SB 292 that repealed a section of statute that held the general contractor responsible for unpaid unemployment and payroll taxes of subcontractors.

HB 2794, through the process of obtaining a public works bond, would reverse last year's legislation, again placing unfair and unnecessary responsibility and risk on the general contractor and its surety company. By including "withholding taxes, unemployment insurance contributions, any other amount owed to the State of Kansas or any state agency," the bill would greatly expand the scope of what is recoverable against a surety bond.

AGC feels it is bad public policy to hold one company responsible for the business practices of another. According to representatives from the insurance industry, a general contractor will not be able to obtain bonding or insurance for any debts assumed from another company. Additionally, representatives from the bonding industry have informed AGC that leaving such expansive and undefined exposures could result in Kansas being viewed as a less desirable place to do business, making it a less competitive market as fewer companies would choose to operate in the state.

It appears the state is trying to leverage payment and performance bonds related to a project to help collect unpaid taxes from deadbeat businesses. If this truly is a problem, the state should go directly to the offending business and not broaden the scope of a bond of a company with no control of another's employment and business practices. Doing so would cause the general contractor to become an alternative resource for State taxes or premiums.

The AGC of Kansas **respectfully requests that you reject HB 2794.** Thank you for your consideration.

House Judiciary
Date 2-21-08
Attachment # 10



Thomas McGee, L.C.

INSURANCE AGENCY • SINCE 1910

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816-842-4800 • FAX 816-472-5018
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February 21, 2008

House Committee on Judiciary
Chairman Mike O'Neal

RE: HB 2794

Chairman O'Neal & Committee Members:

My name is Michael Swift of Thomas McGee L.C. Our company provides surety bonding and risk management services to over 250 construction companies in the states of Kansas and Missouri. In addition, our company is an affiliate member of the AGC of Kansas, Kansas Contractors Association, along with the National Association of General Contractors.

As a surety and risk management consultant to our construction clients, both general contractors and subcontractors/suppliers, I oppose House Bill 2794 and respectfully request that this committee reject HB 2794.

The language contained in the bill places unnecessary responsibility and financial burdens upon the prime contractor and their surety company. With the inclusion of the assurance by the prime contractor and their surety to police the subcontractor's payment of "withholding taxes, unemployment insurance contributions, any other amounts owed to the state of Kansas or any state agency" is unfair and will most likely not be supported by any of the surety representatives of the construction industry.

To utilize a surety bond as a mechanism in securing the payment of such items would be very difficult to assess and price from a risk mitigation standpoint. Surety companies, if reluctantly supported, would impose a substantially large premium based on the overall contract price. This in turn would inflate the cost of doing business in the state of Kansas and would possibly increase the tax burdens on individual residents of the state as a result from high construction costs and limited competition.

As a representative of the construction industry, I respectfully request that you reject HB 2794.

Thank you for your time and consideration,

Thomas McGee L.C.

Michael L. Swift
Surety Account Executive



**STATEMENT OF THE KANSAS BUILDING INDUSTRY
ASSOCIATION TO THE HOUSE JUDICIARY
COMMITTEE**

REPRESENTATIVE MIKE O'NEAL, CHAIR

**REGARDING H.B. 2794
FEBRUARY 21, 2008**

Chairman O'Neal and Members of the Committee, I am Chris Wilson, Executive Director of Kansas Building Industry Association (KBIA). Our more than 2300 member companies are involved in the residential housing and commercial construction industry. We oppose H.B. 2794.

During the 2007 Session, KBIA supported SB 292 that repealed a section of statute that held the general contractor responsible for unpaid unemployment and payroll taxes of subcontractors. We appreciate the Legislature's passing of SB 292.

We believe it is poor public policy to hold one company responsible for the business practices of another. We also supported legislation recommended by this Committee and passed four years ago to reinforce our view that one party cannot hold another liable for the first party's own negligence. And we support S.B. 379, now before you again to further reinforce this policy.

HB 2794, through the process of obtaining a public works bond, would reverse last year's legislation, again placing unfair and unnecessary responsibility and risk on the general contractor and its surety company. By including "withholding taxes, unemployment insurance contributions, any other amount owed to the State of Kansas or any state agency," the bill would greatly expand the scope of what is recoverable against a surety bond.

It appears this is an effort to leverage payment and performance bonds related to a project to help collect unpaid taxes from businesses which have not paid their taxes. The state should go directly to the businesses which have not paid and not broaden the scope of a bond of a company with no control of another's employment and business practices. Doing so would cause the general contractor to become a tax collection agency.

Thank you for the opportunity to comment in opposition to H.B. 2794.

House Judiciary
Date 2-21-08
Attachment # 11