Approved: 3/31/09
Date

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Lance Kinzer at 3:30 p.m. on March 9, 2009, in Room 143-N of the Capitol.

All members were present except:
Representative Marvin Kleeb- excused
Representative Kevin Yoder- excused

Committee staff present:
Melissa Doeblin, Office of the Revisor of Statutes
Matt Sterling, Office of the Revisor of Statutes
Jill Wolters, Office of the Revisor of Statutes
Athena Andaya, Kansas Legislative Research Department
Jerry Donaldson, Kansas Legislative Research Department
Sue VonFeldt, Committee Assistant

Conferees appearing before the Committee:
Jerry Sloan, Judicial Branch Budget and Fiscal Officer, Kansas Judicial Branch
Chief Judge Stephen Tatum, 10th Judicial District, Johnson County
Chief Judge James Fleetwood, 18th Judicial District, Sedgwick County
Kari Schmidt, Wichita Bar Association
Chief Judge Richard Smith, 6th Judicial District, Bourbon, Linn, and Miami Counties
Doug Smith, Kansas Credit Attorney's Association
Judge Steve Leben, Judicial Council-Administrative Procedure Advisory Committee
Joann Corpstein, Legal Counsel-Department of Aging
Sherry Diel, Kansas Real Estate Commission
Ted Smith, Attorney with the Office of the Director of Vehicles, Department of Revenue
Pat Barnes, Kansas Automobile Dealers Association

Others attending:
See attached list.

The hearing on **SB 134 - Court fees and costs; authorizing supreme court to establish additional charges for court procedures** was opened.

Chairman Kinzer provided the Committee with a copy of a published writing by G. Gregg Webb and Keith E. Whittington entitled "Judicial Independence, the power of the Purse, and inherent Judicial Powers", Judicature, Volume 88, Number 1 July-August 2004. This article is about the use of judicial powers to make up budget shortfalls, fundamental questions about judicial independence and the nature of the separation of powers which also talks specifically about the Kansas Supreme Court ordering an across-the-board increase in court fees in the state on March 14, 2002.

Jill Wolters, Staff Revisor, presented an overview of the bill. This bill authorizes the Kansas Supreme Court to establish additional charges for court procedures. Fees currently being collected include docket fees; reinstatement fees, bond, lien or judgement fees and marriage license fees. On March 19th, 2002, the Kansas Supreme Court, beginning April 1, 2002, implemented the Judicial Branch Surcharge. The surcharge continued until July 1, 2006, when a bill enacted by the Legislature took effect, prohibiting the Court from collecting any additional fees. [See KSA 2008 Supp.28-177. Page 9, lines 24 through 30]. (Attachment 1)

Proponents:
Jerry Sloan, Judicial Branch Budget and Fiscal Officer, Kansas Judicial Branch spoke as a proponent.
He explained the bill would remove the prohibition of the Supreme Court establishing a surcharge if funding were reduced to the extent that the Judicial Branch could no longer perform its constitutional and statutory responsibilities. He provided the committee with explanations how salaries and operating expenses are structured in the Judicial Branch. Given the current fiscal crisis the state is experiencing, he stated re-institution of a surcharge would allow the Legislature to use funds that otherwise would be appropriated to the Judicial Branch for other necessary expenditures while keeping the courts open and functioning. The Supreme Count initiated the Emergency Surcharge in order to help fund the budget from April 1, 2002 to June

30, 2006. This bill would allow a similar response if the need arises. (Attachment 2)

Chief Judge Stephen Tatum, 10th Judicial District, Johnson County appeared before the committee as a proponent. He explained how the current budget cuts have effected the Judicial Branch employees in Johnson County and the unique position they are in by having its personnel funded through the State of Kansas, but its operations funded by county government. He also testified to the fact that in prior years by implementing the surcharge, it proved to be a very effective approach to the fiscal crisis. He also stated, in a time when the economy is down and persons are experiencing tough times, the courts see increases in cases due to failed businesses, foreclosures, and other legal issues and the courts are essential in resolving these legal issues fairly for its citizens. (Attachment 3)

Chief Judge James Fleetwood, 18th Judicial District, Sedgwick County spoke on behalf of his district in favor of this bill and attested to the need of the surcharge to protect the court form further degradation of its ability to serve the community. He stated this surcharge would not deter individuals from accessing the courts and confirmed the judges would retain the ability to take into consideration the financial circumstances of the individual and waive the charges if appropriate. (Attachment 4)

Kari Schmidt, Vice President of the Wichita Bar Association testified strongly in favor of the bill. She stated that justice demands that we adequately fund our courts in order to prevent court closings and reduced hours; protect the services provided by our judicial branch; preserve constitutionally mandated access to our courts; and, this issue is not about the courts, it is about our citizens who have the right to rely on them. (Attachment 5)

Chief Judge Richard Smith, 6th Judicial District, Bourbon, Linn, and Miami Counties presented written testimony in support of restoring the Supreme Court's ability to consider a docket fee surcharge in times of financial emergency. (Attachment 6)

Opponent:
Doug Smith appeared as an opponent on behalf of the Kansas Credit Attorney's Association and the Kansas Collectors Association. He explained while they are not against the bill itself, they are concerned about the wide-ranging authority and lack of limitations on its scope. He stated the following concerns:
1) If the Court language is adopted there will be no requirement for review by the public or the Legislature.
2) There is no limit on how the money can be used by the Court once collected.
3) There is no limit on the amount of money that can be raised.
4) There is no time limit on how long this surcharge will be in place.
He suggested consideration of a compromise that would remove the 2006 language prohibiting an emergency surcharge, and replace it with expressed authority being granted to the Court, by the legislature, to enact surcharges in these extraordinary fiscal circumstances to allow the Court to meet their statutory and constitutional obligations; funding should be limited to the amounts authorized and approved in the Court's budget for the fiscal year, which will not be attained due to unanticipated revenue shortfalls, and, the authority should lapse when budget funding returns to adequate levels. (Attachment 7)

After some discussion, the hearing on **SB 134** was closed.

The hearing on **SB 87 - Agencies; disclosure of certain records; administrative procedure; judicial review** was opened.

Melissa Doeblin, Staff Revisor, gave the Committee an overview of the bill.

Proponent:
Judge Steve Leben, a member of the Administrative Procedure Advisory Committee spoke on behalf of the Kansas Judicial Council in support of this bill. The task assigned to this Committee was to study the Kansas Administrative Procedure Act (KAPA), K.S.A. 77-501 *et seq.* and the Kansas Act for judicial Review and Civil Enforcement of Agency Actions (KJRA), K.S.A. 77-601 *et seq.* This bill was recommended by this Committee after a lengthy study. (Attachment 8)

The Senate added an amendment that would significantly limit the use of summary orders under K.S.A. 77-537 and the Advisory Committee is concerned this may have unintended consequences. The Judiciary Council presented a Balloon Amendment. (Attachment 9)

Opponent:
Joann Corpstein, Chief Legal Counsel for the Kansas Department of Aging , appeared as an opponent to the bill because of concerns regarding the amendments to K.S.A. 77-537, section 20 and specifically the amendment at lines 18 thru 29 and offered substitute language. (Attachment 10)

Sherry Diel, Executive Director of the Kansas Real Estate Commission also appeared as an opponent. She stated they support SB 87 and did not testify in opposition to the legislation on the Senate side. Unfortunately, an amendment was added by the Senate Committee without the benefit of having any testimony on the subject. They now have the same concerns as the other opponents regarding the summary orders. (Attachment 11)

Ted Smith, Attorney with the Office of the Director of Vehicles, Department of Revenue appeared as an opponent. He urged the committee to remove Sections 26 and 27 from this bill prior to any vote. He provided detailed testimony to support this request. (Attachment 12)

Kansas Coalition Against Sexual and Domestic Violence provided written testimony in opposition. (Attachment 13)

Pat Barnes, General Counsel of the Kansas Automobile Dealers Association appeared as neutral in his testimony. He testified to some of their issues that have become problematic in the way the current system was redesigned. He pointed out specific concerns regarding Section 14, 16, 23 and 28, and offered to participate in any way to improve the context of this bill. (Attachment 14)

The hearing on **SB 87** was closed.

The hearing on **SB 68** - Docket fees; prosecuting attorneys' training fund was postponed until March 12, 2009 due to time constraints.

The next meeting is scheduled for March 10, 2009.

The meeting was adjourned at 5:40 p.m.

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

JUDICIARY COMMITTEE GUEST LIST

DATE: 3-9-09

NAME	REPRESENTING
Scott Heidner	KADC
Rick Fleming	Securities Comm.
Gail Bright	" "
Nancy Zogleman	Polsinelli
Sherry C Diel	KS Real Estate Comm
Larry Magill	KAIA
Ted Smith	KDOR
Jackie Carlson	Secretary of State
Diane Minear	Secretary of State
~~KS Bar Assn~~ Joseph Molina	KS BAR ASSN.
Kristi Parkertz	KSBHA
Julia Mowers	KSBHA
Barb Conant	KDOA
Sandy Barnett	KCSDV
Holly Smith	Kansas Liberty
Sean Miller	Capitol Strategies
Leigh Keck	Hein Law Firm
Richard Samaniego	Kearney & Assoc.
Tom Stanton	KCDAA

JUDICIARY COMMITTEE GUEST LIST

DATE: 3-9-09

NAME	REPRESENTING
Dave Starkey	KDA
Joann E Corpstein	KDOA
Kathy Porter	Judicial Branch
Jerry Sloan	Judicial Branch
Steve Tatum	10th Judicial Dist.
Jim Fleetwood	18th Judicial Dist
Kari Schmidt	Wichita Bar Assn.
Tyler Emerson	observer
Patrick Vogelsberg	Kearney and Assoc.
Camille Nohe	Attorney General Office
Christy Molzen	Judicial Council
Steve Leben	Ks. Judicial Council
Randy Hearrell	"
Whitney Damron	Ks Automobile Dealers Assn.
Pat Barnes	KS. Automobile Dealers Assn.

Office of Revisor of Statutes
300 S.W. 10th Avenue
Suite 010-E, Statehouse
Topeka, Kansas 66612-1592
Telephone (785) 296-2321 FAX (785) 296-6668

MEMORANDUM

To: Representative Kinzer, Chairman, and Members of the House Judiciary Committee

From: Jill Wolters, Senior Assistant Revisor

Date: March 9, 2009

Subject: Senate Bill No. 134, as am. by Senate Committee, court fees and costs

Senate Bill No. 134 authorizes the Supreme Court to establish additional charges for court procedures. Fees currently being collected include docket fees; reinstatement fees; bond, lien or judgment fees; and marriage license fees.

On March 19th, 2002, the Kansas Supreme Court, beginning April 1, 2002, implemented the Judicial Branch Surcharge. The surcharge continued until July 1, 2006, when a bill enacted by the Legislature took effect, prohibiting the Court from collecting any additional fees. [See KSA 2008 Supp. 28-177, page 9, lines 24 through 30]

The bill would become effective upon publication in the Kansas register, which was the Senate Committee amendment.

State of Kansas

Office of Judicial Administration

Kansas Judicial Center
301 SW 10th
Topeka, Kansas 66612-1507 (785) 296-2256

House Judiciary
Monday, March 9, 2009

Comments on SB 134
Jerry Sloan, Judicial Branch Budget and Fiscal Officer

Thank you for the opportunity to testify in favor of SB 134. This bill would remove the prohibition of the Supreme Court establishing a surcharge if funding were reduced to the extent that the Judicial Branch could no longer perform its constitutional and statutory responsibilities.

There was some confusion after the presentation of the House Budget Committee recommendation for the Judicial Branch to the Appropriations Committee last Thursday. I would like to take a moment to clarify the situation. As I stated, SB 134 removes the prohibition of the Supreme Court establishing a surcharge if funding is drastically reduced. I will discuss in more detail later, but the Judicial Branch budget has been cut in the past and either the cut was met through savings or the portion that was not met was made up with a supplemental. It was not until a cut was made so deep that courts would be unable to function that the Emergency Surcharge was implemented. The Court does not view the removal of the prohibition as permission to increase fees to fund enhancements or even operations when they choose. It is viewed as a temporary stopgap measure to react to severe underfunding. The Legislature is the appropriating body, and should remain so.

A bill was introduced on Thursday in the House Appropriations Committee that would raise docket fees by $9 to fund the second year of a three-year plan to bring nonjudicial salaried up to market rate. The Executive Branch three-year plan was fully funded by the 2008 Legislature, while the same body funded only the first year of the Judicial Branch plan. I believe that only the first year of our plan was funded due to lack of State General Fund (SGF) money in the hope that SGF Funding would be available in future years. Since the state's financial status has not improved, the decision was made by our House Budget Committee members to again turn to docket fees as a funding source. While using docket fees to bring our nonjudicial employees up to market rate may not be the most desirable method of funding, treating employees of the Judicial Branch the same as their counterparts in the Executive Branch is much desired.

Returning to SB 134, I'd like to give a little background. The Kansas Judicial Branch is unique in state government. While all employees and judges of the district courts are state employees and their salaries are funded primarily from the State General Fund, nearly all other operating expenses of the district courts are funded by the counties. This results in a Judicial Branch State General Fund budget that overwhelmingly (97.67% in FY 2 personnel costs. Thus, nearly any budget reduction of any significance m

House Judiciary
Date 3-9-09
Attachment # 2

Of course, we will continue to be as frugal as possible with operating expenses. However, it is interesting to note that, based on FY 2008 expenditures, about one-half of the amount budgeted for other operating expenses was spent either for the travel of district judges to hear cases, which is necessary in multi-county districts, or was paid to state agencies for such things as phones, computer services, printing, and fees. That leaves very little flexibility.

There are also limitations on the amount of savings that can be generated from personnel costs. Thirty-four and sixty-five one hundredths of one percent (34.65%) of the State General Fund budget dedicated to personnel costs pays for judicial salaries. Judges are statutory, elected officials and there are statutory provisions for filling vacancies and constitutional prohibitions against reducing salaries. Therefore, salary expenditures for these positions cannot be reduced through management.

These limitations leave 63.83% of the State General Fund appropriated for nonjudicial salaries to bear any required budget savings.

To achieve budget savings, we implemented a hiring freeze at the beginning of the fiscal year and we have reduced expenditures for temporary positions. However, from our past experience in taking these measures, we know that we cannot expect savings of more than about 1.5% of our total budget. A hiring freeze takes some time to realize its full savings potential. In FY 2001 and FY 2002, we faced underfunding of $1.2 million and $2.0 million respectively. Supplemental appropriations of $300,000 in FY 2001 and $600,000 in FY 2002 were required at the end of the year to avoid furloughs. The approved budget for the following year, FY 2003, was $3.5 million below our maintenance budget requirements. You may recall that the Supreme Court initiated the Emergency Surcharge in order to fund the budget that year. This bill would allow a similar response if the need arises.

The Emergency Surcharge was a fee that was charged in addition to the statutory docket fee when cases were filed. The revenue generated from the Emergency Surcharge kept Kansas courts open and operating at a level in which citizens deserved. The Emergency Surcharge was in effect April 1, 2002, through fiscal year 2006. At that time, the state's fiscal situation had improved and the Legislature was able to fully fund the courts. Therefore, during the 2006 legislative session SB 180 was enacted, which stated that docket fees would be set by the Legislature and no other fee would be charged. Given the current fiscal crisis the state is experiencing, it is time to revisit the idea of an Emergency Surcharge. Reinstitution of a surcharge would allow the Legislature to use funds that otherwise would be appropriated to the Judicial Branch for other necessary expenditures while keeping the courts open and functioning.

I appreciate your consideration of recommending SB 134 favorably for passage.

2-2-09

Testimony in Support of SB 134

House Judiciary Committee
Monday, March 9, 2009

Chief Judge Stephen R. Tatum, 10th Judicial District (Johnson County)
Court Administrator Mike McLain, 10th Judicial District (Johnson County

As you are aware, more than 97% of the state's annual budget for the Judicial Branch goes for personnel salaries.

This year to date in Johnson County, we have lost 30% of what remained of our temporary hour allocation. These positions have been critical for our district court's effort to become a paperless operation. They have also assisted in filling in for long term absences. Locally they have taken on the name "fire fighters," because they were deployed where we have the most critical need.

Additionally, a hiring freeze has already claimed two positions - a Computer Programmer II and Court Services Officer I. These are both professional positions that work in areas that are vitally important to our technology efforts, public safety, and services to families and youths.

Further reductions in the judicial budget can only be addressed by adjustments in workforce. The available options become reduced to layoffs or furloughs. In a judicial district that continues to experience workload growth, personnel reductions are particularly harmful. This year, our judicial district requested and received approval from the Supreme Court for two additional judgeships to address the growing number of case filings. While funding of these positions is unlikely during the current budget crises, the documented need certainly speaks to the workload of this district. In the past three years we have had a 32% increase in civil case filings, 35% increase in traffic offenses, and continue to have the highest number of criminal and juvenile cases of any judicial district in Kansas.

Clearly, sacrifices are required of all branches and levels of government. We are currently examining what are our essential duties, responsibilities, and expenditures. We are making plans to cut out non-essential, non-critical activities to address the shortfall from our county funded operations. The work activities of our state funded personnel rarely stray from essential duties. Johnson County anticipates substantial reductions in its 2010 budget. The district court is in a

unique position of having its personnel funded through the State of Kansas, but its operations funded by county government. In a difficult year, we are making adjustments in both areas.

The emergency action of the Kansas Supreme Court in prior years by implementing the surcharge proved to be a very effective approach to the fiscal crises. At the district court level, the surcharge had virtually no adverse impact on litigation. Case filings continued to increase, which suggest no effect on the use of the district court to resolve conflicts. It would appear to me that maintenance of our workforce is critical, and reductions in our operational expenses would be extremely beneficial to our community's interest in the short term. As always, persons who are indigent will be allowed to file their cases without any fee.

In a time when the economy is down and persons are experiencing tough times, the courts see increases in cases. As businesses fail and foreclosures increase, etc., the courts are essential in resolving legal issues fairly for its citizens. Please consider allowing use of a surcharge to help the courts maintain a high level of service to the community.

Thank you for your consideration.

HOUSE JUDICIARY COMMITTEE

Hon. Lance Kinzer, Chair
Hon. Jeff Whitham, Vice Chair
Hon. Jan Pauls, Ranking Minority Member

March 9, 2009
3:30 pm
Room 143-N

Chief Judge James R. Fleetwood
Eighteenth Judicial District
525 N. Main, Wichita, KS. 67203
jfleetwo@dc18.org

TESTIMONY IN SUPPORT OF SB 134 JUDICIAL SURCHARGES

My name is James R. Fleetwood. I am the Chief Judge of the 18th Judicial District. I would like to thank this honorable committee for allowing me the opportunity to speak in favor of Senate Bill 134 (permission for the court to assess surcharges on filings). I appear on behalf of my district which consists of 28 district judges, one hearing officer and several judges pro tem who serve as specific demand requires in areas such as Protection From Abuse and Protection From Stalking cases as well as child support hearings, and other family law matters. The 18th judicial district presently has 99 clerks, 62 court officers, 24 court reporters, 4 IT personnel, 27 administrative assistants and 5 administrative staff. This is a total of 221 non-judicial support staff. While these numbers may seem substantial, it should be remembered that we serve the largest judicial district in the State and are presently operating under a significant handicap. Taking into consideration the existing permanent hiring freeze, these numbers constitute more than a 4% reduction in our allocated staff which has created a significant challenge in meeting the needs of Sedgwick County citizens. For instance our clerk is presently two months behind in filing pleadings and other documentation into the court files despite the best efforts of the staff. Our employees are dedicated to providing quality service to the citizens of Sedgwick County. I have observed many individuals working through lunch hours and weekends to meet the demands of the workload. While I appreciate their commitment, under our present personnel rules I must

discourage them from making such efforts when we have no way to compensate them. A sampling of our regular docket shows that there are 508 domestic cases, 266 civil cases, 1,851 limited action cases, 725 criminal cases and 795 traffic cases that come up for hearing or consideration in one fashion or another on a weekly basis. All of these must be addressed in some way by court employees. In these cases litigants, attorneys and others expect immediate and professional services in the courthouse to insure justice is available and provided in a timely manner.

As you know the judicial budget allocation from the State in any district is 100% personnel. There are no maintenance projects or capital improvement projects that can be deferred from the State judicial budget allocation for each district. For all intents and purposes the district court's sole method of meeting necessary budget cuts is by further reduction in court services to attorneys and the public. Where services are statutorily or constitutionally mandated timeliness must be sacrificed.

Rather than wait until we are over-run by circumstances as in New Hampshire, where state courts were forced to suspend all jury trials for a month due to a lack of funds and resources (LA Times Dec 8, 2008), or require financial sacrifices from the employees of the court and their families, we would propose that the court be allowed to take temporary measures to at least spread the cost of operations to those that presently make the most use of its resources.

A recent survey of 18th Judicial District employees showed that 1/3 of them presently work a second job to make ends meet. Suggesting that a couple of furloughed days would have no significant effect on these families would ignore the efforts they are now making to meet their financial demands. Obviously, furloughs would be less painful for the individual than complete layoffs. However, further loss of staff or available work hours would have a significant effect on the quality and timeliness of services provided to the public. These services include Protection From Abuse orders, civil restraining orders, collection actions and writs of execution that cannot be obtained elsewhere but must be provided in a timely manner to assure justice. Even without layoffs or furloughs we can anticipate further loss of staff through normal attrition due to the present hiring freeze. It is my hope that we can

be in a position to protect the court from further degradation of its ability to serve the community.

The benefits arising from temporary surcharges are proven by past experiences. Previous efforts to meet the court's budget demands through minimal surcharges in Sedgwick County alone raised $650,000 per year. While this is not the balm to cure the judicial budget issues, it will still provide a significant tool to address the court's budgetary shortfalls that are expected to reach seven to nine million dollars next year.

The greatest concern for such surcharges would be whether or not they create a barrier to justice. Would the extra cost of filing motions, petitions and other pleadings deter individuals from accessing the court system? Past experience would say no. During the period from 2002 to 2006 when surcharges were last assessed there was no decrease in filings in the 18th Judicial District. Furthermore, the judges would retain the ability to take into consideration the financial circumstances of the individual and waive such charges if appropriate. Also, a recent review of standard filing fees across the nation shows that even with the addition of surcharges filing fees in Kansas would remain less than, or comparable to, a significant majority of other states.

In closing, with the greatest respect for this committee and the challenges you face I would ask you to allow the imposition of surcharges to benefit the ongoing work of the state court system, its employees and officers.

Sincerely,

James R. Fleetwood
Chief Judge
18th Judicial District
State of Kansas

IN THE JUDICIARY COMMITTEE OF THE KANSAS HOUSE OF REPRESENTATIVES -REGARDING SENATE BILL 134

Kari Schmidt, Wichita Bar Association

My name is Kari Schmidt. I am Vice President of the Wichita Bar Association, Wichita, Kansas. I am here to testify in favor of SB 134 which authorizes the Kansas Supreme Court to raise docket fees to offset budget cuts for the judiciary. The alternative is unacceptable.

I am, perhaps, uniquely qualified to speak to this issue. I was general counsel at two financial institutions for 15 years. Today, my private practice focuses on probate matters (primarily guardianships/conservatorships), employment matters (plaintiff and defense), small business representation, and federal criminal defense work. I practice in the state and federal courts.

The judicial branch of government is the only branch where individual citizens and parties may seek redress for civil wrongdoings. Justice demands that we adequately fund our courts in order to prevent court closings and reduced hours. Justice demands that we protect the services provided by our judicial branch. Justice demands that we preserve constitutionally mandated access to our courts. This issue is not about the courts; it is about our citizens who have the right to rely on them.

Everyone here knows there is a budget crisis. The alternative to reduction in court services is for the legislature to authorize a temporary and minimal $5.00 increase in docket fees. The Supreme Court authorized a docket fee increase for four (4) years from 2002-2006. If an individual could not pay it, our judges often waived it. To my knowledge, no data suggests the $5.00 surcharge during that time drove any prospective litigant to refrain from filing a meritorious lawsuit. To my knowledge, no data suggests that civil litigation even declined during that time. History taught us that the $5.00/case increase in cost of maintaining access to justice had no material adverse effects. In times of economic crisis, I submit that maintaining services is more important and optimizing access to justice is imperative.

History instructs that, when spread across the universe of civil litigants, a *de minimus* increase in docket fees has a material impact on access to justice. By way of comparison, filing fees for federal civil cases is $ 350.00, and filing fees for Chapter 7 bankruptcy cases is $299.00. The proposal before you is in no way comparable to the fees necessary to keep the federal judiciary functioning. Even with the surcharge, the highest Kansas civil docket fee will be $163.00. I urge you to vote in favor of citizen access to justice. I urge you to vote in support of SB 134.

03-09-09

House Judiciary
Date 3-9-09
Attachment # 5

HOUSE COMMITTEE ON JUDICIARY

Hon. Lance Kinzer, Chairman
Hon. Jeff Whitham, Vice Chairman
Hon. Jan Pauls, R.M. Member

March 9, 2009
3:30 p.m.
Room 143-N

Chief Judge Richard M. Smith
Sixth Judicial District
P.O. Box 350
Mound City, Kansas 66056-0350
judgelndc@earthlink.net

TESTIMONY ON BEHALF OF KANSAS DISTRICT JUDGE'S ASSOCIATION IN SUPPORT OF SENATE BILL 134

I wish to thank this honorable committee for extending the opportunity to appear and present testimony in support of SB 134. My name is Richard M. Smith, I am the Chief Judge of the Sixth Judicial District (Miami, Linn and Bourbon Counties) and am the legislative chairman and treasurer of the Kansas District Judge's Association. I appear on behalf of the District Judge's Association to request this committee recommend passage of SB 134 [thereby restoring the Supreme Court's ability to consider a docket fee surcharge in times of financial emergency]. I am confident the dire financial circumstances of the state are so well known by you I need not spend any time reciting the financial problems faced by our state or the necessitous circumstances which confront the Judicial Branch.

The importance of this legislation as it relates to urban districts has been well stated by Chief Judges Fleetwood and Tatum. The KDJA Executive Committee is in unanimous support of this legislation and I would like to briefly mention the need for this legi more rural counties and districts.

If the lack of needed resources forces the Judicial Branch to furlough or layoff employees the impact in rural districts may be the complete cessation of certain services while the employees are furloughed.

- Many rural courts have just a handful of employees who by necessity are specialized. Provisions of these services may be halted or at least delayed while certain employees are laid off.
- Examples of some services being unavailable during the furlough period might include: Delays in restitution payments to crime victims, delays in reports to the KDOR will affect drivers license renewals and suspensions, the processing of time sensitive court matters ranging from abused and neglected children to cases involving the removal of problem tenants, the issuance of marriage licenses and other vital matters affecting the public.
- Some courts have only one or two probation officers such that furloughs will affect the supervision of probationers creating potential risks to the public.
- Overall, in rural areas furloughs will delay various essential services to the detriment of the public.

In summary, I respectfully ask this committee to remember that adequate funding of the court system is not just necessary to keep valuable trained employees at work. It is also an absolute necessity to ensure the provision of vital services to the citizens of our state. Last year the Kansas Legislature recognized the need for the Judicial Branch to maintain long-term top notch workers. Furloughs of our employees will undermine our recent efforts to keep dedicated and effective employees. More importantly, in the long run it will be even more devastating to our attempts to provide Kansas citizens with consistent access to the court system and to justice.

It is my concern as Chief Judge that, without the passage of SB 134, ultimately the residents of this state will suffer the most.

Respectfully submitted:
Richard M. Smith
Chief Judge of the 6th Jud. District
913.795.2622 – Linn Co Chambers
judgelndc@earthlink.net

KANSAS CREDIT ATTORNEYS ASSOCIATION AND KANSAS COLLECTORS ASSOCIATION, INC.

REMARKS CONCERNING SENATE BILL NO. 134

HOUSE JUDICIARY COMMITTEE

MARCH 9, 20009

Chairman Kinzer and Members of the House Judiciary Committee:

Thank you for the opportunity to present remarks regarding Senate Bill No. 134 on behalf of the Kansas Credit Attorneys Association and Kansas Collectors Association, Inc. The Kansas Credit Attorneys Association is a statewide organization of attorneys, representing law firms, whose practice includes considerable collection work, and Kansas Collectors Association, Inc., which is an association of collection agencies in Kansas.

The KCAA and KCA appear today as opponents to the broad language used in Senate Bill No. 134, which seeks to grant the Supreme Court authority to establish surcharges for court services. Specifically, "Notwithstanding any provision of law to the contrary, the supreme court is hereby authorized to establish additional charges for court procedures."

We clearly understand the Court's desire to have this authority and do not believe it to be an unreasonable request in these tough budgetary times. However, we are concerned about the wide-ranging authority sought in Senate Bill No. 134.

We believe that the Court could have this authority with some limitations on its scope.

In SB 134, as drafted, we find:

1. The Court would have the ability to implement new surcharges without public comment or oversight. At least during the legislative appropriations process it is an open process weighing the pros and cons on each appropriation. If the Court language is adopted there will be no requirement for review by the public or the Legislature.

2. There is no limit on how money can be used by the Court once collected. At least the previous emergency surcharges stated that the money had to be used to make up deficits in the Court's maintenance budget. Any authority granted to the court should be limited to existing personnel and the cost associated with keeping the court "open and operating". The money should not be used to implement new programs, hire new staff or for salary increases. All state agencies have similar issues and are making tough budget decisions and attempting operating on reduced or limited resources. The financial impact to the Court can be mitigated but should not be granted funding increases when other parts of state and local government are struggling to meet their statutory obligations.

House Judiciary
Date 3-9-09
Attachment # 7

3. There is no limit on the amount of money that can be raised. The Court should clearly identify the target money needed to cover any funding gaps due to State General Fund shortfalls. Increases should be in a reasonable amount and not provide a windfall for the Court.

4. There is no time limit on how long this surcharge will be in place. The Court has stated in previous testimony to the legislature that they believe surcharges should only be in place during a budget crisis and should not be made permanent source of funding. Once proper funding levels from the State General Fund are restored the surcharge should be suspended.

We might offer that you consider a compromise that would remove the 2006 language prohibiting an emergency surcharge, and replace it with expressed authority being granted to the Court, by the legislature, to enact surcharges in these extraordinary fiscal circumstances to allow the Court to meet their statutory and constitutional obligations. The funding should be limited to the amounts authorized and approved in the Court's budget for the given fiscal year, which will not be attained due to unanticipated revenue shortfalls. The authority should lapse when budget funding returns to adequate levels.

Thank you for your time and consideration.

Douglas E. Smith
For the Kansas Credit Attorneys Association
and the Kansas Collectors Association, Inc.

~~The docket fee established in this section shall be the only fee collected or moneys in the nature of a fee collected for the docket fee. Such fee shall only be established by an act of the legislature and no other authority is established by law or otherwise to collect a fee.~~ *Notwithstanding any provision of law to the contrary, the supreme court is hereby authorized to establish additional charges for court procedures.* **Such additional charges established by the supreme court shall be limited to the expenditures considered reasonable and necessary to maintain normal court operations and functions. Additional charges made under this authority, shall not for expenditures made for capital outlay purposes, salary increases, personnel or program enhancements. Such authority may be used to offset budget reductions approved by the 2009 legislature for fiscal year 2009 and 2010 appropriations.**

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MEMORANDUM

TO: **House Judiciary Committee**

FROM: **Kansas Judicial Council - Judge Steve Leben**

DATE: **March 9, 2009**

RE: **2009 SB 87**

The Judicial Council recommends 2009 SB 87, a bill amending the Kansas Administrative Procedure Act and the Kansas Judicial Review Act. The bill was recommended by the Council's Administrative Procedure Advisory Committee after a lengthy study. The bill is intended to strengthen the protections for fair and impartial adjudication without unduly sacrificing agency expertise or interfering with agency policy-making responsibilities.

The rationale for each recommended amendment is set out in the attached report. The six major recommendations for change are summarized on page 3 of the report.

House Judiciary
Date 3-9-09
Attachment # 8

REPORT OF THE JUDICIAL COUNCIL
ADMINISTRATIVE PROCEDURE ADVISORY COMMITTEE

APPROVED BY THE JUDICIAL COUNCIL ON
DECEMBER 9, 2008

BACKGROUND

In June 2006, the Judicial Council's Administrative Procedure Advisory Committee requested that the Council assign it the task of studying the Kansas Administrative Procedure Act (KAPA), K.S.A. 77-501 *et seq.*, and the Kansas Act for Judicial Review and Civil Enforcement of Agency Actions (KJRA), K.S.A. 77-601 *et seq.* Both Acts were originally passed in 1984 and had not been significantly amended since that time. Advisory Committee members were aware of several areas in which the Acts could be improved and believed that a comprehensive review of both Acts was needed. The Judicial Council agreed and made the requested assignment.

COMMITTEE MEMBERSHIP

The members of the Administrative Procedure Advisory Committee taking part in this study were:

Carol L. Foreman, Chair, Topeka; Deputy Secretary of the Department of Administration
Tracy T. Diel, Topeka; Director of the Office of Administrative Hearings
James G. Flaherty, Ottawa; practicing attorney
Jack Glaves, Wichita; practicing attorney
Hon. Steve Leben, Topeka; Kansas Court of Appeals Judge
Prof. Richard E. Levy, Lawrence; Professor at the University of Kansas School of Law
Brian J. Moline, Topeka; practicing attorney and former member of the Kansas Corporation Commission
Camille A. Nohe, Topeka; Assistant Attorney General
Hon. Eric Rosen, Topeka; Kansas Supreme Court Justice
Steve A. Schwarm, Topeka; practicing attorney
John S. Seeber, Wichita; practicing attorney
Mark W. Stafford, Topeka; practicing attorney

METHOD OF STUDY

In conducting its study of KAPA and KJRA, the Administrative Procedure Advisory Committee held 24 meetings over two and a half years. The Committee solicited and considered input from a variety of sources, including state agencies, agency legal counsel, and other attorneys practicing in the area of administrative law. The Committee also met with two students in the University of Kansas Law School's Public Policy Clinic who prepared a research paper

addressing specific administrative law issues suggested by the Committee.

As it reviewed each Act, the Committee considered the case law interpreting each section. Because the original versions of KAPA and KJRA were based, at least in part, on the 1981 Model State Administrative Procedure Act, the Committee also considered a revised version of the Model Act currently under consideration by the Uniform Law Commissioners.[1] When proposing amendments to KAPA and KJRA, the Committee adapted language from the revised Model Act if the Act's language was consistent with the Committee's resolution of an issue, because the Model Act's language has been carefully vetted and because using that language would promote consistency with other states.

During the period in which the Committee was studying the KAPA and KJRA, various bills were introduced in the Kansas Legislature proposing amendments to those statutes. Responding to legislative requests, the Committee provided testimony or commented on several of these bills, and in several instances suggested specific language that was the product of the Committee's ongoing discussions. This report represents the culmination of the Committee's comprehensive review of both statutes, although it incorporates a number of recommendations or comments already submitted to the legislature.

COMMITTEE RECOMMENDATIONS

The Committee proposes the adoption of a number of amendments to KAPA and KJRA, which are contained in 2009 SB 87. The "Comments" section beginning at page 7 of this report discusses the reasons for each of the amendments, many of which are technical or intended for purposes of clarification. This report will not discuss technical or clarifying amendments, but rather will focus on the Committee's most important recommendations concerning agency adjudication and judicial review. Most of these recommendations address the same concerns that prompted legislative attention to KAPA and KJRA over the last few years: Whether the agency's role in investigating and prosecuting violations of the laws it administers is compatible with its acting as a fair and impartial adjudicator. States respond to this issue in a variety of ways, ranging from giving agencies complete control over adjudication to making hearing officers independent and precluding agency review.[2] Currently, Kansas law provides agencies with very strong tools to control adjudication and offers relatively few protections to ensure fair and impartial agency adjudications. Many of the Committee's recommendations are intended to significantly strengthen the protections for fair and impartial adjudication without unduly sacrificing agency expertise or interfering with agency policymaking responsibilities.

The Committee recommendations, which concern both the conduct of hearings under KAPA and the effectiveness of judicial review under KJRA, can be summarized as follows:

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[1] National Conference of Commissioners on Uniform State Laws, Revised Model State Administrative Procedure Act (Draft), available on line at http://www.law.upenn.edu/bll/archives/ulc/msapa/2008_amdraft.htm.

[2] Two fairly recent articles by the same author provide a useful compendium and summary of state approaches to these issues. *See* James F. Flanagan, *An Update on Developments in Central Panels and ALJ Final Order Authority*, 38 Ind. L. Rev. 401 (2005); James F. Flanagan, *Redefining the Role of the State Administrative Law Judge: Central Panels and Their Impact on State ALJ Authority and Standards of Agency Review*, 54 Admin. L. Rev. 1355, 1382-85 (2002).

1. The burden of proof for adverse actions involving an individual's occupational and professional licenses should be "clear and convincing evidence." (Section 6 amending K.S.A. 77-512)

2. The separation of agency adjudicators from personnel involved in investigations and prosecutions should be strengthened. (Section 8 amending K.S.A. 77-514 and Section 13 amending K.S.A. 77-525)

3. When agency heads review decisions by hearing officers in the Office of Administrative Hearings, they should be required to give "due regard" to the hearing officer's opportunity to observe witnesses. (Section 14 amending K.S.A. 77-527)

4. Unnecessary technical barriers to judicial review of agency action should be removed. (Sections 26, 27, and 28 amending K.S.A. 77-612, 77-614, and 77-617, respectively)

5. KJRA should emphasize the obligation of courts reviewing an agency's factual findings to consider the whole record (including adverse evidence and a contrary hearing officer decision). (Section 29 amending K.S.A. 77-621) **Note:** This change would not adopt the de novo review standard or permit courts to reweigh the evidence, but rather would restore the original intent of KJRA that reviewing courts should consider the substantiality of the evidence supporting the agency decision in light of the entire record.

6. Additional amendments should be adopted to clarify the computation of time (Section 4 amending K.S.A. 77-503 and Section 11 amending K.S.A. 77-521) and to provide greater protection for confidential information (New Section 1, Section 2 amending K.S.A. 45-221 and Section 12 amending K.S.A. 77-523).

A. Recommended Amendments to KAPA: The first three recommendations involve amendments to KAPA to provide greater protections to parties in the conduct of KAPA hearings.

1. The burden of proof for adverse actions involving an individual's occupational and professional licenses should be "clear and convincing evidence." (Section 6 amending K.S.A. 77-512)

The advisory committee recommends raising the burden of proof to "clear and convincing evidence" for disciplinary actions concerning occupational and professional licenses in order to provide greater protection for these especially important interests. Occupational and professional licenses represent a substantial investment of time, energy, and resources and are a prerequisite to the individual's pursuit of a chosen calling. These concerns have caused some courts to hold that due process requires the application of the clear and convincing standard of

proof to the revocation of professional licenses, although these decisions appear to represent the minority view and the Kansas Supreme Court does not appear to have resolved the issue.[3] This higher standard of proof already applies by virtue of Supreme Court Rule in attorney disciplinary proceedings and may apply to other licenses as well.[4] The Committee believes that the law in Kansas regarding the appropriate standard of proof should be clarified and that strong evidence of incompetence or misconduct should be presented before disciplinary action is taken against such licenses. At the same time, the advisory committee believes that similar concerns do not apply to initial applications for licenses or to other kinds of licenses that fall under the broad definition in the Kansas Administrative Procedure Act.

2. The separation of agency adjudicators from personnel involved in investigations or prosecutions should be strengthened. (Section 8 amending K.S.A. 77-514 and Section 13 amending K.S.A. 77-525)

The most troubling situation from a fundamental fairness perspective is when agency personnel who act in an investigatory, prosecutorial or adversarial capacity on a case are also involved in the adjudication of that case. Currently, K.S.A. 77-514, which governs the presiding officer in hearings, does not contain any separation of functions requirement and K.S.A. 77-525, which prohibits ex parte communications, would not appear to apply to communications between the agency head serving as presiding officer and agency personnel who had investigatory or prosecutorial roles. Although judicial decisions in Kansas require separation of functions,[5] the advisory committee recommends the addition of a separation of functions requirement to K.S.A. 77-514 to provide more specific guidance. To reinforce this separation, the Committee recommends that the prohibition on ex parte communications under KAPA should be expanded to bar communications between presiding officers and investigatory or prosecutorial personnel regarding pending cases.

3. When agency heads review decisions by hearing officers in the Office of Administrative Hearings, they should be required to give "due regard" to the hearing officer's opportunity to observe witnesses. (Section 14 amending K.S.A. 77-527)

Under current law, agencies review decisions of hearing officers in the Office of Administrative hearings "de novo"; *i.e.*, without any deference to the hearing officer decision. While such de novo review power is critical to the agency's policy making function and to the application of its expertise (which hearing officers lack), concerns may arise because the hearing officer rather than the agency has the opportunity to observe the witnesses and because this

[3] *See, e.g.*, Johnson v. Board of Governors of Registered Dentists, 913 P.2d 1339, 1345-47 (Okla.1996); Nguyen v. State, 144 Wash.2d 516, 29 P.3d 689, 690-97 (2001); Painter v. Abels, 998 P.2d 931, 941-42 (Wyo.2000). *But see* Eaves v. Board of Med. Exam'rs, 467 N.W.2d 234, 237 (Iowa 1991); Rucker v. Michigan Bd. of Med., 138 Mich.App. 209, 360 N.W.2d 154, 155 (1984); Petition of Grimm, 138 N.H. 42, 635 A.2d 456, 461 (1993); In re Polk, 90 N.J. 550, 449 A.2d 7, 12-17 (1982); Anonymous v. State Bd. of Med. Exam'rs, 329 S.C. 371, 496 S.E.2d 17, 19-20 (1998); Gandhi v. Medical Examining Bd., 168 Wis.2d 299, 483 N.W.2d 295, 298-300 (Ct.App.1992).

[4] *See* Lacy v. Kansas Dental Bd., 274 Kan. 1031, 1036 58 P.3d 668, 673 (2002) (application of clear and convincing evidence standard in case involving dentist's license).

[5] *E.g.*, Pork Motel, Corp v. Kansas Department of Health and Environment, 234 Kan. 374, 383 (1983).

standard appears to give the agency authority to disregard the findings of fact made by the independent hearing officer. The advisory committee believes that the draft Revised Model State Administrative Procedure Act,[6] which requires the agency to have "due regard" for the hearing officer's obligation to view witnesses takes a reasonable approach and its proposed amendment to K.S.A. 77-527 reflects this approach. Under this standard, the agency would, in effect, be required to explain why it is rejecting the credibility determinations of the hearing officer. This requirement in turn interacts with the Committee's proposals to strengthen judicial review, discussed below.

B. Recommended Amendments to KJRA: Recommendations 4 and 5 involve amendments to KJRA designed to make judicial review more available and meaningful as a check on the fairness of agency decisions without interfering with the agencies' expertise and legitimate policy making functions.

4. Unnecessary technical barriers to judicial review of agency action should be removed. (Sections 26, 27, and 28 amending K.S.A. 77-612, 77-614, and 77-617, respectively)

During its review of KJRA, the Committee received comments expressing concern that pleading and exhaustion requirements in KJRA were being applied to dismiss or reject challenges to agency action for technical reasons unrelated to the merits of the challenge. The Committee believed that some of these technical barriers were unreasonable and unnecessary. First, with regard to the initiation of actions for judicial review, K.S.A. 77-614 contains a number of very specific pleading requirements that are not required in ordinary civil actions. While more detailed information is necessary and helpful in conducting the action for judicial review, many courts have interpreted these requirements as jurisdictional, applied them very strictly, and refused to allow amendments to correct minor errors. This strict application is not necessary to the effective conduct of judicial review and deprives many parties of their day in court. Thus, the Committee recommends amendments to clarify that the pleading requirements are not jurisdictional in the sense that pleadings can be amended to correct mistakes if doing so will not cause prejudice. Second, the Committee also recommends language to clarify an exception to exhaustion requirements in K.S.A. 77-612 when administrative remedies are inadequate or when exhausting administrative remedies would cause irreparable harm. These exceptions have been recognized in some court cases in Kansas, and the committee believes that they should be defined by statute. Similarly, the Committee also recommends expanding an exception in K.S.A. 77-617 to allow parties to raise issues on review that were not presented to the agency if those issues were not reasonably knowable during the administrative process.

5. KJRA should be amended to emphasize the obligation of courts reviewing an agency's factual findings to consider the whole record (including adverse evidence and a contrary hearing officer decision). (Section 29 amending K.S.A. 77-621)

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[6] Revised Model State Administrative Procedure Act § 418(e).

Under the Kansas Supreme Court's approach to the "substantial evidence" standard of review, courts should consider only the evidence in the record that favors the agency decision, and disregard contrary evidence.[7] The Committee believes that this approach accords excessive deference to the agency and erects a nearly insurmountable barrier for parties challenging agency action. It is particularly problematic when the agency reverses the decision of a hearing officer, because it treats the hearing officer's decision as essentially irrelevant. The Kansas approach is a significant departure from the usual understanding (at the federal level and in other states) of the requirement that an agency decision be supported by substantial evidence ***in light of the record as a whole***, which includes consideration of the contrary evidence in the record and specifically treats a hearing officer's decision as part of that record. The Committee believes that amending K.S.A. 77-621 to ensure that on judicial review the court will consider contrary evidence in the record, including the hearing officer's contrary decision, would reinforce the importance of the neutral hearing officer's factual findings–particularly credibility determinations based on the opportunity to view the witnesses–without impairing the agency's legitimate policy making functions. This change would work together with the Committee's recommendation that the agencies should be required to give due regard to the hearing officer's ability to observe witnesses. More broadly, it would require agencies to explain more fully their reasons for rejecting contrary evidence in the record. This change would not adopt the de novo review standard or permit courts to reweigh the evidence, but rather restore the original intent of KJRA that reviewing courts should consider the substantiality of the evidence supporting the agency decision in light of the entire record.)

The language of the Committee's proposed amendment is adapted from one of two alternative versions of the scope of review standards in the Revised Model State Administrative Procedure Act.[8] The other alternative version is consistent with the current version of the KJRA in Kansas and the Committee considered additional language clarifying the reviewing court's obligation to consider all the evidence in the record to be necessary. After hearing concerns from some agencies that the Committee's proposed language would adopt the de novo standard of review, which was never the Committee's intention, the Committee added additional language to specify that de novo review does not apply. That language is not adapted from the Revised Model Act.

C. Additional Recommendation: Recommendation 6 addresses additional issues.

6. Additional amendments should be adopted to clarify the computation of time (Section 4 amending K.S.A. 77-503 and Section 11 amending K.S.A. 77-521) and to provide greater protection for confidential information (New Section 1, Section 2 amending K.S.A. 45-221 and Section 12 amending K.S.A. 77-523).

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[7] *See, e,g.*, Blue Cross and Blue Shield of Kansas v. Praeger, 276 Kan. 232, 263, 75 P.3d 226, 246 (2003) ("[T]he courts are not concerned with evidence contrary to the agency findings but must focus solely on evidence in support of the findings."); Kaufman v. State Department of Social and Rehabilitation Services, 248 Kan. 951, 962, 811 P.2d 876, 884 (1991); *In re* Andover Antique Mall, L.L.C., 33 Kan. App. 3d 199, 207-08, 99 P.3d 1117, 1124 (Kan. Ct. App. 2004). *See generally*, Steve Leben, *Challenging and Defending Agency Actions in Kansas*, 64 Kansas Bar Association Journal 22, 27-29 (June/July 1995).

[8] Revised Model State Administrative Procedure Act § 509 (Alternative 2).

Two additional aspects of the Committee's proposals warrant mention, even though they are not related to the central issue of strengthening the protections for fair and impartial adjudication without unduly sacrificing agency expertise or interfering with agency policymaking responsibilities. First, the Committee proposes new language in K.S.A. 77-503 to clarify the computation of time and make that computation workable for the time limits incorporated in KAPA. The Committee has also proposed conforming amendments to some other provisions in KAPA that set time limits. These changes are not intended to significantly alter the existing time limits, but rather to address particular issues that arise because of the very short time limits associated with some actions under KAPA. Second, the Committee proposes a new section of KAPA (77-503a) that would permit presiding officers to keep the personal information regarding victims of crimes out of the public record to protect their health, safety, and liberty. The Committee has included a similar amendment for the Kansas Open Records Act, which would add such information to the exceptions to Act in K.S.A. 45-221. In addition, the Committee proposes an amendment to K.S.A. 77-523 that would authorize a hearing officer to close a KAPA hearing when information required by law to be kept confidential would otherwise be disclosed.

COMMENTS TO 2009 SB 87

New Section 1.

The Advisory Committee recommends the addition of a new section to KAPA to protect the names, addresses and other contact information of alleged victims of crime, abuse, domestic violence or sexual assault. The Committee also recommends a related amendment to K.S.A. 45-221(a) of the Open Records Act to provide that agencies are not required to disclose such information pursuant to an Open Records request.

Section 2 (amending K.S.A. 45-221).

The Advisory Committee recommends that the Open Records Act be amended to provide that agencies are not required to disclose the name, address, location or other contact information of alleged victims of crime, abuse, domestic violence or sexual assault if release of that information might jeopardize their health, safety, or liberty . The Advisory Committee also recommends a new section be added to KAPA (77-503a) to allow a presiding officer to protect this kind of sensitive information.

Section 3 (amending K.S.A. 77-501).

This technical amendment reflects the addition of various new sections to KAPA since the Act was originally enacted in 1984.

Section 4 (amending K.S.A. 77-503).

New subsection (c) is intended to clarify that, when a time requirement under KAPA is expressed in days, all days must be counted including intervening Saturdays, Sundays and legal holidays, unless the statute specifically provides otherwise. Those portions of new subsection (c) relating to the first and last days of any counting period are based on K.S.A. 60-206(a). However, K.S.A. 60-206(a) was not adopted in its entirety.

Section 5 (amending K.S.A. 77-511.

The technical amendment in subsection (c) is intended to clarify that subsection (c) applies to the commencement of a hearing, whether upon an application for order pursuant to subsection (a) or upon a request for hearing pursuant to subsection (b), but not to other KAPA hearings.

Section 6 (amending K.S.A. 77-512).

The Advisory Committee recommends raising the burden of proof to "clear and convincing evidence" for disputed issues of fact in occupational or professional licensing disciplinary proceedings against an individual in order to provide greater protection for these especially important interests. The amendment is narrowly drafted so that it applies only to proceedings against an individual licensee and not business licensing proceedings. Also, if another statute states a different burden of proof, that statute will control.

The clear and convincing evidence standard is met when the evidence shows that the truth of the facts asserted is "highly probable." *In re B.D.-Y.*, 286 Kan. __, 187 P.3d 594 (2008). The Advisory Committee believes this heightened standard is appropriate because occupational and professional licenses represent a substantial investment of time, energy, and resources and are a prerequisite to the individual's pursuit of a chosen calling. These concerns have caused some courts to hold that due process requires the application of the clear and convincing standard of proof to the revocation of professional licenses, although these decisions appear to represent the minority view and the Kansas Supreme Court does not appear to have resolved the issue.

This higher standard of proof already applies in attorney disciplinary proceedings by virtue of Supreme Court Rule 211(f). (2007 Kan. Ct. R. Annot. 304.) It may also apply to other licenses as well. See *Lacy v. Kansas Dental Bd.*, 274 Kan. 1031, 1036, 58 P.3d 668, 673)2002( )application of clear and convincing evidence standard in case involving dentist's license(and Attorney General Opinion No. 95-54)in professional license or registration disciplinary proceedings, an agency should establish its claim by clear and convincing evidence(. The Committee believes that the law in Kansas regarding the appropriate standard of proof should be clarified and that strong evidence of incompetence or misconduct should be presented before disciplinary action is taken against such licenses. At the same time, the Committee believes that similar concerns do not apply to initial applications for licenses or to other kinds of licenses that fall under the broad definition in the Kansas Administrative Procedure Act.

The Advisory Committee acknowledges that the issue of what burden of proof should apply to occupational and professional licensing disciplinary proceedings is a difficult one and not without some disagreement among different agencies. The Committee considered the

alternative option of amending individual licensing statutes to change the burden of proof on a case-by-case basis, instead of recommending an amendment that will apply to licensing proceedings across the board. However, the Committee believes its recommended amendment is a more workable solution.

The Committee's other recommended amendments to this section are mostly technical, but one point is important to note. Under the provisions of subsection (c), the heightened burden of proof does not apply to emergency proceedings.

Section 7 (amending K.S.A. 77-513).

The technical amendment in subsection (b) reflects the addition of a new section to KAPA in 1990.

Section 8 (amending K.S.A. 77-514).

New subsection (h) is a separation of functions provision that is intended to address the troubling situation that arises when agency personnel who act in an investigatory or prosecutorial capacity in a proceeding are also involved in the adjudication by the agency. The amendment would prohibit a person who has participated in an investigatory or prosecutorial capacity in connection with a proceeding, or who is supervised by such a person, from acting as presiding officer or providing confidential legal or technical advice to a presiding officer in that proceeding.

The amendments contained in subsection (a) were inadvertently picked up by the Revisor's office from a Committee Note contained in the Advisory Committee's draft amendments to KAPA. The amendments were part of 2004 SB 141 and, pursuant to that bill, will take effect July 1, 2009. See L. 2004, Ch. 145, § 39. Thus, the amendment to subsection (a) in this bill is redundant, but does no harm.

Section 9 (amending K.S.A. 77-519).

The amendment to subsection (c) allows a presiding officer to determine the manner of service.

Section 10 (amending K.S.A. 77-520).

New subsection (e) is intended as a clarification of whether a default order is an initial order or a final order depending upon who issues it.

Section 11 (amending K.S.A. 77-521).

In general, time limits under KAPA which are expressed in days refer to calendar days rather than business days. The amendments to this section create an exception to the general rule; the time limits in this section should be counted as business days rather than calendar days. "Business day" is defined at K.S.A. 77-503(c).

Section 12 (amending K.S.A. 77-523).

The amendments to subsection (f) are intended to clarify that a presiding officer may close parts of a hearing pursuant to any statute which expressly authorizes closure or requires information to be kept confidential. In addition, any hearing under KAPA is deemed not to be a meeting pursuant to the Open Meetings Act.

Section 13 (amending K.S.A. 77-525).

The amendment in subsection (a) expands the prohibition on ex parte communications by prohibiting intra-agency communication between presiding officers and investigatory or prosecutorial personnel.

Section 14 (amending K.S.A. 77-527).

The amendment to subsection (d) deals with agency review of a presiding officer's initial order. The amendment requires an agency head, in reviewing findings of fact by a presiding officer, to give due regard to the presiding officer's credibility determinations. The language of this amendment was taken from the draft Revised Model State Administrative Procedure Act, which the Advisory Committee believes strikes an appropriate balance between protecting the independent fact findings of a hearing officer and preserving the agency's policy-making role.

Section 15 (amending K.S.A. 77-528).

The technical amendment is intended to make this section read more clearly.

Section 16 (amending K.S.A. 77-529).

The amendment to subsection (b) is intended to clarify that findings of fact and conclusions of law are required in an order on reconsideration that alters a prior order, but not in an order that merely states the prior order will be reconsidered.

New subsection (c) clarifies, when there are multiple parties to a proceeding and one party has filed a petition for judicial review, the agency retains jurisdiction to consider a petition for reconsideration filed by another party to the proceeding, so long as it is timely filed.

Section 17 (amending K.S.A. 77-531).

The technical amendment is intended to make this section read more clearly.

Section 18 (amending K.S.A. 77-532).

The amendments to this section clarify that confidential internal communications permitted under K.S.A. 77-525 are not part of the state agency record, while oral or written statements allowed by a presiding officer pursuant to K.S.A. 77-523(c) are part of the state agency record.

Section 19 (amending K.S.A. 77-534).

Although a prehearing conference may be rarely needed before a conference hearing, the Advisory Committee believes there is no justification for a blanket prohibition on prehearing conferences in this context.

Section 20 (amending K.S.A. 77-537).

This amendment is intended to clarify that, when an agency enters a summary order and one of the parties requests a hearing, the burden of proof does not shift to the party requesting the hearing to prove that the summary order was entered in error. If a hearing is requested, the burden of proof remains with the party who sought the summary order in the first instance.

Section 21 (amending K.S.A. 77-549).

The amendments are intended as a clarification.

Section 22 (amending K.S.A. 77-550).

The amendment is intended as a clarification.

Section 23 (amending K.S.A. 77-551).

The technical amendment in subsection (c) corrects what appears to have been a drafting oversight.

The amendment contained in subsection (a) was inadvertently picked up by the Revisor's office from a Committee Note contained in the Advisory Committee's draft amendments to KAPA. The amendment was part of 2004 SB 141 and, pursuant to that bill, will take effect July 1, 2009. See L. 2004, Ch. 145, § 43. Thus, the amendment to subsection (a) in this bill is redundant, but does no harm.

Section 24 (amending K.S.A. 77-601).

The first amendment reflects the addition of various new sections to the KJRA since it was originally enacted in 1984. The second amendment changes the name of the act to the Kansas judicial review act. Because both bench and bar commonly refer to the act by that short title and commonly abbreviate the title as the "KJRA," the Advisory Committee recommends that the name of the act be changed to reflect common usage.

Section 25 (amending K.S.A. 77-603).

This amendment provides that the KJRA does not apply to agency actions concerning the civil commitment of sexually violent predators pursuant to K.S.A. 59-29a01 *et seq*. The amendment is intended as a direct response to *Williams v. DesLauriers*, 38 Kan. App. 2d 629,

172 P.3d 42 (2007), which held that the KJRA, rather than petition for writ of habeas corpus, was the appropriate method for a sexually violent predator who was civilly committed to a state hospital to assert his due process claim.

Section 26 (amending K.S.A. 77-612).

The purpose of the recommended amendment is to clarify and codify existing case law exceptions to the requirement that a petitioner for judicial review must first exhaust administrative remedies. See, *e.g.*, *State ex Rel. Slusher v. City of Leavenworth*, 285 Kan. 438, 172 P.3d 1154 (2007) (if no agency remedy is available or if remedy is inadequate, exhaustion of administrative remedies is not required); *In re Lietz Const. Co.*, 273 Kan. 890, 47 P.3d 1275 (2002) (constitutional issues do not lend themselves to administrative determination and are subject to de novo review; thus, they are properly before the court even though they were not first argued before the agency). The language of the amendment was taken from Section 507(e) of the draft Revised Model State Administrative Procedure Act.

Section 27 (amending K.S.A. 77-614).

The amendments to this section are intended to accomplish three objectives: 1) prevent dismissal of an appeal for lack of jurisdiction when there is some defect in the petition for judicial review; 2) allow the petition to be amended under the same standard as K.S.A. 60-215; and 3) provide that substantial compliance with service requirements is sufficient under the same standard as K.S.A. 60-204. Because the amendments are based on provisions from the code of civil procedure, any existing case law interpretations of the corresponding provisions will be helpful to courts interpreting the amendments.

The amendments are intended as a direct response to *Bruch v. Dept. of Revenue*, 282 Kan. 764, 148 P.3d 538 (2006), and similar cases which have required strict compliance with the pleading requirements of this section. The Advisory Committee believes that pleading and service requirements for judicial review of an administrative action should be no more difficult or technical than similar requirements under the code of civil procedure.

Section 28 (amending K.S.A. 77-617).

The amendment in subsection (d)(2) is intended to allow a party to raise an issue which the party was not aware of, and could not reasonably have been aware of, before the filing of the petition for judicial review. For example, a party might find out about an *ex parte* communication with the agency only after a petition for judicial review was filed. K.S.A. 77-619 already allows a district court to receive evidence about the unlawfulness of the decision-making process. The amendment to this section explicitly allows such an issue to be raised.

Section 29 (amending K.S.A. 77-621).

Under current Kansas law, courts reviewing administrative decisions are instructed to disregard contrary evidence in the record and focus solely on the evidence that supports the agency findings. See *Blue Cross and Blue Shield of Kansas v. Praeger*, 276 Kan. 232, 263, 75

P.3d 226, 246 (2003). The Advisory Committee believes this approach accords excessive deference to the agency and erects a nearly insurmountable barrier for parties challenging agency action. The current Kansas approach is a significant departure from the usual understanding (at the federal level and in other states) of the requirement that an agency decision be supported by substantial evidence "in light of the record as a whole," which includes consideration of the contrary evidence in the record. See, *e.g.*, *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 71 S.Ct. 456 (1951).

The amendment contained in new subsection (d) directs the reviewing court, when applying the substantial evidence standard of review, to consider the whole record, including the evidence that detracts from the agency finding, and specifically requires consideration of any contrary hearing officer findings. The amendment is adapted from one of two alternative versions of the scope of review standards contained in Section 509 of the draft Revised Model State Administrative Procedure Act. The Committee chose the alternative which best clarifies the substantial evidence standard and explicitly addresses the role of the hearing officer's decision. The Committee believes that the amendment strikes an appropriate balance between protecting the independent factual findings of a hearing officer and preserving the agency's role as the entity to which the Legislature delegated policy-making authority.

The Committee heard concerns from some agencies that the Committee's recommended amendment would encourage courts to adopt a de novo standard of review. To clarify that this is not the intended effect of the amendment, the Committee added the final sentence in subsection (d) indicating that courts are not to reweigh evidence or engage in de novo review. The Committee believes this would restore the original intent of the KJRA that reviewing courts should consider the substantiality of the evidence supporting the agency decision in light of the entire record. The last sentence added to subsection (d) was not adapted from the Revised Model Act.

The amendment to subsection (c)(7) is intended to clarify that the appropriate standard of judicial review of an agency's factual determination is dependent on the underlying standard of proof.

Section 30 (repealer).

The Advisory Committee recommends repeal of K.S.A. 77-507, 77-507a, and 77-605 because they are no longer needed.

ADDENDUM REGARDING SENATE AMENDMENT

The Senate added an amendment that would significantly limit the use of summary orders under K.S.A. 77-537. The Advisory Committee is concerned that this may have unintended consequences: many agencies use summary orders for a variety of purposes. More significantly, summary orders should not operate to the detriment of anyone because they have no effect if the party receiving one simply asks for a hearing within a specified time limit.

In taking a further look at K.S.A. 77-537 after reviewing the Senate amendment, the Advisory Committee concluded that some additional clarification could be added to the statute to eliminate any ambiguity about the effectiveness of summary orders. We recommend a balloon amendment, in place of the Senate amendment, to make clear that summary orders may only be used for orders that do not take effect until after the time for requesting a hearing has expired. If an agency wants or needs to have an order take effect sooner than that, an emergency order, provided for by K.S.A. 77-536, must be used.

SB 87 already contained another amendment we had proposed for K.S.A. 77-537, clarifying that when a hearing is requested after a summary order has been issued, the burden of proof is not affected at a later contested hearing. Thus, even when a summary order has been issued, the agency retains the burden of proof on all issues for which the agency otherwise would have it.

We can provide a variety of examples of the use of summary orders. In a great many cases, these orders are accepted by the recipients and no hearing is requested. There should be no downside to the use of summary orders as long as (a) order recipients are advised of their right to have a hearing [already required by the statute] and (b) the orders have no effect when a hearing is requested. Our proposed balloon amendment, along with the revision we had already suggested in SB87, should make sure that this is the case.

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communication may be disqualified and the portions of the record pertaining to the communication may be sealed by protective order.

(g) The state agency shall, and any party may, report any willful violation of this section to appropriate authorities for any disciplinary proceedings provided by law. In addition, each state agency, by rule and regulation, may provide for appropriate sanctions, including default, for any violations of this section.

(h) This section shall not apply to adjudicative proceedings before:

(1) The state corporation commission. Such proceedings shall be subject to the provisions of K.S.A. 77-545, *and amendments thereto*;

(2) the commissioner of insurance concerning any rate, or any rule, regulation or practice pertaining to the rates over which the commissioner has jurisdiction or adjudicative proceedings held pursuant to the Kansas insurance holding companies act. Such proceedings shall be subject to the provisions of K.S.A. 77-546, *and amendments thereto*; and

(3) the director of taxation. Such proceedings shall be subject to the provisions of K.S.A. 77-548, *and amendments thereto*.

Sec. 14. K.S.A. 2008 Supp. 77-527 is hereby amended to read as follows: 77-527. (a) The agency head, upon its own motion may, and upon petition by any party or when required by law shall, review an initial order, except to the extent that:

(1) A provision of law precludes or limits state agency review of the initial order; or

(2) the agency head (A) determines to review some but not all issues, or not to exercise any review, (B) delegates its authority to review the initial order to one or more persons, unless such delegation is expressly prohibited by law, or (C) authorizes one or more persons to review the initial order, subject to further review by the agency head.

(b) A petition for review of an initial order must be filed with the agency head, or with any person designated for this purpose by rule and regulation of the state agency, within 15 days after service of the initial order. If the agency head on its own motion decides to review an initial order, the agency head shall give written notice of its intention to review the initial order within 15 days after its service. If the agency head determines not to review an initial order in response to a petition for review, the agency head shall, within 20 days after filing of the petition for review, serve on each party an order stating that review will not be exercised.

(c) The petition for review shall state its basis. If the agency head on its own motion gives notice of its intent to review an initial order, the agency head shall identify the issues that it intends to review.

(d) *Subject to K.S.A. 77-621, and amendments thereto,* in reviewing an initial order, the agency head or designee shall exercise all the decision-making power that the agency head or designee would have had to render

a final order had the agency head or designee presided over the hearing, except to the extent that the issues subject to review are limited by a provision of law or by the agency head or designee upon notice to all parties. *In reviewing findings of fact in initial orders by presiding officers, the agency head shall give due regard to the presiding officer's opportunity to observe the witnesses.* [and to determine the credibility of witnesses] *The agency head shall consider the agency record or such portions of it as have been designated by the parties.*

(e) The agency head or designee shall afford each party an opportunity to present briefs and may afford each party an opportunity to present oral argument.

(f) The agency head or designee shall render a final order disposing of the proceeding or remand the matter for further proceedings with instructions to the person who rendered the initial order. Upon remanding a matter, the agency head or designee may order such temporary relief as is authorized and appropriate.

(g) A final order or an order remanding the matter for further proceedings shall be rendered in writing and served within 30 days after receipt of briefs and oral argument unless that period is waived or extended with the written consent of all parties or for good cause shown.

(h) A final order or an order remanding the matter for further proceedings under this section shall identify any difference between this order and the initial order and shall state the facts of record which support any difference in findings of fact, state the source of law which supports any difference in legal conclusions, and state the policy reasons which support any difference in the exercise of discretion. A final order under this section shall include, or incorporate by express reference to the initial order, all the matters required by subsection (c) of K.S.A. 77-526, and amendments thereto.

(i) The agency head shall cause copies of the final order or order remanding the matter for further proceedings to be served on each party in the manner prescribed by K.S.A. 77-531, and amendments thereto.

(j) Unless a petition for reconsideration is a prerequisite for seeking judicial review, a final order under this section shall state the agency officer to receive service of a petition for judicial review on behalf of the agency.

Sec. 15. K.S.A. 77-528 is hereby amended to read as follows: 77-528. *Until the time at which a petition for judicial review would no longer be timely,* a party may submit to the presiding officer or agency head a petition for stay of effectiveness of an initial or final order ~~until the time at which a petition for judicial review would no longer be timely~~, unless otherwise provided by statute or stated in the initial or final order. The presiding officer or agency head may take action on the petition for stay, either before or after the effective date of the initial or final order.

Comment

The amendment to subsection (d) deals with agency review of a presiding officer's initial order. As originally drafted, the amendment requires an agency head, in reviewing findings of fact by a presiding officer, to give due regard to the presiding officer's opportunity to observe the witnesses. The balloon amendment clarifies that the presiding officer's opportunity to observe the witnesses is important because it may play a role in how the presiding officer weighs the credibility of the witnesses.

The language for the original amendment was taken from Section 418(e) of the draft Revised Model State Administrative Procedure Act, which is a work in progress. The balloon amendment picks up an additional change made by the Uniform Law Commissioners after the Administrative Procedure Advisory Committee finalized its recommendations. The Advisory Committee believes it is useful to track the language of the Model Act.

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apply to conference hearings insofar as those provisions authorize the issuance and enforcement of subpoenas and discovery orders, but do apply to conference hearings insofar as those provisions authorize the presiding officer to issue protective orders at the request of any party or upon the presiding officer's motion.

~~(c)~~ *(b)* Paragraphs (a), (b) and (c) of K.S.A. 77-523, and amendments thereto, do not apply; but (1) the presiding officer shall regulate the course of the proceedings; (2) only the parties may testify and present written exhibits; and (3) the parties may offer comments on the issues.

Sec. 20. K.S.A. 77-537 is hereby amended to read as follows: 77-537. (a) A state agency may use summary proceedings, subject to a party's request for a hearing on the order, if:

(1) The use of those proceedings in the circumstances does not violate any provision of law; ~~and~~

(2) the protection of the public interest does not require the state agency to give notice and an opportunity to participate to persons other than the parties~~.~~*; and*

(3) ~~*the matter is entirely within one or more of the following categories:*~~

the order does not take effect until after the time for requesting a hearing has expired.

~~*(A) A monetary amount of not more than $100;*~~

~~*(B) the denial of an application after the applicant has abandoned the application;*~~

~~*(C) the denial, in whole or in part, of an application if the applicant has an opportunity for administrative review in accordance with K.S.A. 77-511, and amendments thereto;*~~

~~*(D) a matter that is resolved on the sole basis of inspections, examinations or tests; or*~~

~~*(E) any matter having only trivial potential impact upon the affected parties.*~~

(b) The state agency shall serve each party with a copy of the order in a summary proceeding in the manner prescribed by K.S.A. 77-531, and amendments thereto. The order shall include at least:

(1) A statement of the state agency's action and, if unfavorable action is taken, a brief statement of the reasons for the action;

(2) notice of the time and manner for requesting a hearing on the order, as provided in K.S.A. 77-542; and

(3) notice that, if a hearing is not requested, the order shall become effective upon the expiration of the time for requesting a hearing.

(c) If a hearing is requested, the prior issuance of a summary order shall not affect the burden of proof.

Sec. 21. K.S.A. 2008 Supp. 77-549 is hereby amended to read as follows: 77-549. (a) The filing of a return with the director of taxation under article 15, 32, 33, 34, 36, 37, 41, 42 or 47 of chapter 79 of the

Comment

The Advisory Committee is concerned that the Senate amendment limiting summary proceedings might have unintended consequences. Many agencies use summary proceedings to deal with routine matters, sometimes to the benefit of an applicant, and the Senate amendment would unduly restrict the use of summary proceedings even in situations such as the granting of an application or permit. Furthermore, because summary orders do not take effect if a person requests a hearing, there is little danger that agencies will misuse summary proceedings.

The Advisory Committee recognizes that there may be some confusion about when summary orders take effect and what happens when a person requests a hearing. The Committee recommends this alternative balloon amendment to eliminate any possibly ambiguity. The balloon amendment to Section 20 clarifies that summary orders do not take effect until after the time for requesting a hearing has expired.

The Committee's recommended amendment in subsection (c) also helps to clear up confusion about the effect of summary orders. The amendment clarifies that, if a hearing is requested, the burden of proof does not shift to the party requesting the hearing to prove that the summary order was entered in error. Rather, the burden of proof remains with the agency that issued the summary order in the first instance.

KANSAS
DEPARTMENT ON AGING

Kathleen Sebelius, Governor
Kathy Greenlee, Secretary
www.agingkansas.org

House Committee on Judiciary
March 9, 2009

SB 87/Public agencies relating to disclosure of certain records, administrative procedure; judicial review
As Amended by the Senate Committee

Joann E. Corpstein, Chief Counsel
Kansas Department on Aging

Chairman Kinzer and Members of the Committee,

I am Joann Corpstein, chief counsel for the Kansas Department on Aging. The KDOA thanks you for this opportunity to comment on Senate Bill 87 as amended by the Senate Committee. As you are aware, the KDOA, among other responsibilities, licenses, inspects and certifies adult care homes.

The KDOA's concern with this bill lies with the amendments to K.S.A. 77-537, Section 20, specifically the amendment at lines 18 through 29. It is unclear to the Department how this amendment could impact the types of enforcement action, Notices and Orders our agency issues. First, the term "summary proceeding" is not defined. It could therefore be argued that any Notice or Order issued by a State agency could fall within the umbrella of a summary proceeding. If this is the case, then the amendments greatly limit the enforcement and other types of actions an agency can take.

We recommend striking lines 10 through 29 in Section 20. Section 7 (amending 77-513) which states that "When a statute provides for a hearing in accordance with this act, the hearing shall be governed by K.S.A. 77-513 through 77-532, and amendments thereto, except as otherwise provided by: (a) a statute other than this act; or (b) K.S.A. 77-533 through 77-542, and amendments thereto." It is important for KDOA to have certainty that hearings which may be requested in response to Notices of Findings and Orders issued by KDOA will be governed by K.S.A. 77-513 through 77-532. If K.S.A. 77-537 were deemed applicable, the amendments would preclude the vast majority, if not all, of KDOA's case types including hearings requested on Notices of Findings issued in cases involving abuse, neglect and exploitation of adult care home resident and Notices relating to the revocation of a license due to failure to meet regulatory requirements.

The KDOA appreciates the opportunity to express our concern regarding this language and asks the committee to remove the amended language. I'll be happy to answer any questions the Committee may have.

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KANSAS REAL ESTATE COMMISSION
SHERRY C. DIEL, EXECUTIVE DIRECTOR

KATHLEEN SEBELIUS, GOVERNOR

Memo To: Chairperson Kinzer and Members of the House Judiciary Committee
From: Sherry C. Diel, Executive Director, Kansas Real Estate Commission
RE: SB 87 Kansas Administrative Procedure Act and Kansas Act for Judicial Review
Date: March 9, 2009

Chairperson Kinzer and members of the Committee, thank you for the opportunity to testify before you today. The Real Estate Commission was in support of SB 87 and did not testify in opposition to the legislation on the Senate side. Unfortunately, an amendment was added by the Senate committee after the hearing concerning summary proceeding orders without the benefit of having any testimony on the subject. The amendment appears on **page 19, lines 20-29.** The subject amendment would substantially restrict the use of summary proceedings orders and would cause many agencies to either unnecessarily start every case as a petition or similar format or attempt to pursue cases informally first through consent agreements. Either way, at a time when the agencies are facing budget constraints, their flexibility for handling administrative proceedings should not be hampered as long as due process is provided.

The Supplemental Note on page 3 states that the subject amendment is intended to "expand" the use of summary proceeding orders. The amendment does just the opposite. The Real Estate Commission uses summary proceedings orders for licensure denials, granting a license with restrictions or conditions, audit orders after an audit of a broker's transaction files and trust account is completed, and for disciplinary cases arising from complaints. The Commission advises the applicant or licensee of the date that they must request a hearing or the order will become effective. If the order is complex, exhibits are attached. The applicant or licensee is always provided findings of fact, conclusions of law to support the Commission's order. If the licensee or applicant requests a hearing, the summary proceeding order does not take effect. If a hearing is requested in a licensure case, it is the applicant's burden to show that the applicant meets the requirements for licensure. If it's an audit or disciplinary case arising from a complaint and a hearing is requested, it's the Commission's burden to show that the licensee committed a violation of the law.

Many applicants or licensees do not intend to challenge the findings. If they disagree with the findings in the summary proceeding order, the applicant or licensee will request a hearing. In a disciplinary case, many licensees just want to pay a fine and go on. They do not a want hearing. However, a licensee may not be so accepting of a suspension or revocation and oftentimes challenges those findings. An applicant may not be happy

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that his or her application for licensure was denied and may request a hearing. In that case, the summary proceeding order does not take effect.

The system appears to be working. The Commission probably issues 30+ orders per month. To hold hearings in all cases when the finding is not intended to be challenged or to file petitions just because the licensee failed to send in a signed consent agreement only to find out immediately prior to the hearing that the licensee wants to pay the fine anyway wastes budgetary resources. Testimony was not held on why the amendment was made. If there is a valid reason why the amendment was proposed, any language that is drafted that expands or restricts the use of summary proceeding orders should only be crafted after careful thought is given on how the amendment would affect each and every agency that uses some form of a summary proceeding order. Each and every State agency uses the Kansas Administrative Procedure Act differently. Consequently, consideration will most likely need to be given to what impact this amendment has on every agency that issues some type of ruling or determination by letter.

Thank you for the opportunity to address your Committee this afternoon. I will be happy to address any questions from the members.

To: Chairman Lance Kinzer
Members of the House Judiciary Committee

From: Ted E. Smith
Attorney with the Office of the Director of Vehicles, Department of Revenue

Date: March 9, 2009

Subject: Senate Bill 87c

Good Afternoon, Chairman Kinzer and members of the Committee. Thank you for permitting me to appear today and offer oral and written testimony in opposition to Senate Bill 87c. My name is Ted Smith and I am a staff attorney for the Division of Vehicles, Kansas Department of Revenue

Senate Bill No. 87 grew out of recommendations made by an Administrative Procedure Advisory Committee under the Kansas Judicial Council. Most of the proposed changes involve the Kansas Administrative Procedures Act (KAPA). Some, however, address the Act for Judicial Review and Civil Enforcement of Agency Actions (KJRA), K.S.A. 77-601 *et seq*. The Department of Revenue supports the suggested changes to KAPA. The Department of Revenue opposes the suggested changes to KJRA, specifically Sections 26 and 27 of Senate Bill 87c. My testimony will focus on the proposed changes to the KJRA, particularly K.S.A. 77-612 (sec. 26) and 77-614 (sec. 27).

> Sec. 26 would permit a District Court to relieve a petitioner of the requirement to exhaust any or all administrative remedies to the extent that the administrative remedies are inadequate or would result in irreparable harm.
>
> Sec. 27 would loosen the Petition information requirements by giving the District Court authority to freely give a petitioner leave to amend and supplement a Petition with omitted information when justice so requires.

From review of the recommendations of the Advisory Committee, it appears that the changes in Sec. 26 and Sec. 27 of SB 87c were drafted in direct response to *Bruch v. Kansas Dept. of Revenue,* 282 Kan. 764 (2006), a Kansas Supreme Court decision affirming a district court decision in favor of the Department of Revenue. The *Bruch* decision enunciated principles previously set out in several other Kansas appellate decisions, including *Pittsburg State University v. Kansas Bd. of Regents,* 30 Kan.App.2d 37 (2001) *rev. denied* 273 Kan. 1036 (2002), and *Little v. State,* 34 Kan.App.2d 557 (2005), *rev. denied* Feb. 14, 2006).

The *Bruch* decision specifically rejected "notice pleading", stating that review by the District Court was appellate in nature. The Court held that a person petitioning for review from an agency action must strictly comply with the pleading requirements set out

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in K.S.A. 77-614(b), including the requirement in K.S.A. 77-614(b)(5) that the petition for review set forth "facts to demonstrate that the petitioner is entitled to obtain judicial review," and that in K.S.A. 77-614(b)(6) requiring that the petition include "the petitioner's reasons for believing that relief should be granted."

Prior to the *Bruch* and *Pittsburg State* decisions, licensees would often file "bare bones" petitions. The filing of the petition for review would delay the onset of the suspension of driving privileges, without clearly setting out the claimed "agency error" as to which the licensee was seeking review. The Department would often submit discovery. However, licensees would sometimes not respond at all or would object to discovery, arguing that the KJRA did not provide for discovery and therefore none should be allowed. As a result, the Department's attorneys would often not find out the real issue, if one existed, until the trial *de novo* held in district court.

In *Bruch,* for example, the licensee did not testify at his own administrative hearing. The only witness was the certifying officer. On appeal, the petition raised issues about probable cause to arrest, reasonable suspicion to begin a DUI investigation and due process. The allegations in the petition did not specifically state the basis of any of those issues, however. At trial, the "probable cause" issue evolved into an issue regarding the preliminary breath test, although no such issue was mentioned in the petition for review.

Since the *Bruch* decision, most litigants have made adjustments to their petitions for review to comply with the requirements of K.S.A. 77-614(b). It has not been necessary to issue discovery to find out what the case is really about. Specificity in pleading has served to streamline the process. The detail and quality of the Petitions have improved and that has directly improved the Court's efficiency in conducting these reviews. There are less and less Petition dismissed due to K.S.A. 77-614(b) factual deficiencies, because the DUI defense bar has adjusted to the rules and changed their practices accordingly. The question for this Committee becomes why should we now go backwards and remove this incentive to prepare well drafted petitions?

The Kansas Implied Consent Law is a remedial law intended to quickly remove drunk drivers from the road to protect the public, as the Kansas Supreme Court stated in *Foster v. Kansas Dept. of Revenue,* 281 Kan. 368 (2006). When a licensee petitions for review from an administrative suspension order, K.S.A. 2008 Supp. 8-1020(o) requires the extension of temporary driving privileges, effectively staying the administrative suspension. Attached hereto is a table that generates the number of administrative hearings scheduled on a yearly basis by the Department.

The Kansas Legislature has devoted needed attention to the societal problems caused by drunk driving. Administration of the Kansas Implied Consent Law is an important tool in addressing that issue. Difficulties have arisen, however, in that increases in driver's license sanctions have produced increases in the number and complexity of administrative hearings and trials *de novo* before the district courts. Requiring licensees who have been through an administrative process to specifically articulate the "agency error" they are claiming, as explained in *Bruch,* has served to clarify and focus the issues

in district court appeals, which has helped to achieve the goal of quickly removing drunk drivers from the road, while still allowing a way for licensees to raise real issues concerning the agency action.

By enacting Senate Bill No. 87c in its current form, the Legislature will, in effect, will return agency appeal process to a place wherein petitions can be filed simply without having to articulate any specific issue. Time will be taken up by wrangling over whether discovery can be conducted in a KJRA case and courts will be called on to determine whether "justice requires" an amendment to a petition prior to trial or even during a trial, which may create a dilemma for the Department whether to proceed without necessary evidence to address the newly added issue or ask for a continuance, which compromises the intention of the law to quickly remove drunk drivers from the road.

The proposed amendments to the KJRA appear to treat the review procedures as an appendage to civil procedure rather than judicial review of an administrative proceeding at which, presumably, specific issues which were raised and resolved administratively--allowing the party petitioning for review to specifically set out the "agency error" to be addressed upon review. If the licensee is not required to fully litigate the matter at the administrative hearing, this Bill will encourage more appeals to the District Court because the licensee need not get serious about the matter until the De Novo review? The changes proposed in K.S.A. 77-612 and 614 serve to diminish the importance of the administrative proceeding by reducing the exhaustion requirement and allowing a person to petition for review without having to specifically meet the pleading requirements or stating the specific issue to be reviewed. Prior to any Committee vote on the Bill, the Department of Revenue would respectfully request the Committee remove Sections 26 and 27 from SB 87c.

ADMINISTRATIVE HEARINGS SCHEDULED

		2004	2005	2006	2007	2008	2009
JANUARY		681	867	810	727	1013	927
FEBRUARY		806	615	764	776	885	
MARCH		947	706	743	736	1001	
APRIL		805	767	561	820	853	
MAY		472	751	864	525	843	
JUNE		614	669	830	597	905	
JULY		694	775	902	683	882	
AUGUST		700	922	804	671	662	
SEPTEMBER		727	887	854	552	926	
OCTOBER		771	838	756	675	806	
NOVEMBER		518	687	457	683	755	
DECEMBER		812	578	662	853	892	
	TOTAL	**8,547**	**9,062**	**9,007**	**8,298**	**10,423**	**927**

FY 2009	In Person	Telephone	Total
JULY	508	374	882
AUGUST	494	168	662
SEPTEMBER	699	227	926
OCTOBER	588	218	806
NOVEMBER	565	190	755
DECEMBER	636	256	892
JANUARY	655	272	927
FEBRUARY			0
MARCH			0
APRIL			0
MAY			0
JUNE			0
TOTAL	**4145**	**1705**	**5850**

Kansas Coalition Against Sexual and Domestic Violence

UNITED AGAINST VIOLENCE

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House Judiciary Committee
Senate Bill 87
March 9, 2009
Proponent

Chairman Kinzer and Members of the Committee:

The Kansas Coalition Against Sexual and Domestic Violence (KCSDV) is a statewide non-profit organization with member programs across the state providing direct services to victims of sexual and domestic violence and stalking.

KCSDV appreciates the attention to victim safety and confidentiality included in Senate Bill 87 and recognizes the complicated nature of this bill as it addresses the Kansas Administrative Procedures Act, the Kansas Open Records Act, and the Kansas Judicial Review Act. KCSDV submits this written testimony in support of SB87.

Confidentiality and safety are at the core of the many concerns victims of sexual and domestic violence and stalking have as they reach out for help, whether that help is through the criminal justice system, an administrative agency, or in a civil proceeding. Kansas recognizes this need for safety and confidentiality in a variety of other statutes. What follows is a list of where those provisions can be found:

- Employment Security Insurance Act for Domestic Violence Survivors (K.S.A. 44-760), enacted in 2003, requires confidentiality that can be found in K.S.A. 44-706(a)(12)(B).
- Taking time off from work to address sexual and domestic violence (K.S.A. 44-1131 to 1133), enacted in 2006, requires that employers keep information confidential and that provision can be found in K.S.A. 44-1132.
- Address Confidentiality Program (Safe at Home Program) was enacted in 2006 and allows victims of domestic violence, sexual assault, stalking and trafficking to obtain a confidential address. Administered by the Kansas Secretary of State's office, this program can be found at K.S.A. 75-451 through 458.
- Protection from Abuse Act (K.S.A. 60-3101 *et seq.*) allows a victim of domestic violence to request that her address remain confidential; that provision can be found at K.S.A. 60-3104(e).

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- Protection for Stalking Act (K.S.A 60-31a01 *et seq.*) requires that the court keep the address and telephone number of the petitioning stalking victim confidential and that provision can be found at K.S.A. 60-31a04(3).
- Kansas Supreme Court rules require that appellate documents refer to victims of sexual assault by initials only. See Supreme Court Rule 7.043(c).
- The Uniform Child Custody Jurisdiction and Enforcement Act (K.S.A. 38-1336 *et seq.*) provides for safety and confidentiality if the health, safety, or liberty of a party or child would be jeopardized and can be found at K.S.A. 38-1356(e), with additional provisions for addressing safety at K.S.A. 38-1357(c).

SB87 is a great supplement to the other protections found throughout Kansas statutes and rules. On behalf of victims of sexual assault, domestic violence, and stalking, KCSDV supports this bill and applauds the drafters for considering these core and critical needs for survivors.

TESTIMONY OF THE KANSAS AUTOMOBILE DEALERS ASSOCIATION BEFORE THE HOUSE OF REPRESENTATIVES' COMMITTEE ON JUDICIARY REGARDING SENATE BILL 87 ON ADMINISTRATIVE PROCEDURES

Mr. Chairman, Members of the Committee, I am Pat Barnes, general counsel of the Kansas Automobile Dealers Association, representing the new vehicle dealers of Kansas. It is our intention to appear neutral in our testimony before you today. Because SB 87 effects changes implemented over the last couple of years in administrative hearings in Kansas, we believe you should have some understanding of our point of view in this process and issues we feel we have encountered with it.

When one looks at the administrative process, they generally tend to think of regulatory matters which are typically an agency dealing with enforcement of their authority over another in licensing or other regulatory contexts. We certainly fall within that description, but unbeknownst to many people we also have a number of special sections of law within our Dealers and Manufacturers Licensing Act that are actually designed to referee franchise disputes and the balance of the relationship between franchisor and franchisee, and between some licensees.

What this means is that administrative proceedings as they relate to us are more in the nature of litigation such as that which you might encounter in court where the agency itself is actually to sit as a neutral party in most instances, though with the public interest in mind. The typical arrangements that this would fall under would be termination of a franchise by an automobile manufacturer, transfer issues with respect to a franchise (such as estate planning, probate, employee ownership, buyers and sellers of businesses, and intra-family transfers, to name a few), and sales point locations. Many times these are very complex cases and can and often do involve extraordinarily complex econometric data, detailed facts and circumstances with complex legal issues. In some instances, the prior pronouncements of the agency are very important in the construction of the statute in like cases as well as public policy considerations.

It is these matters that have become problematic for us in the way the current system was redesigned. What has occurred with us since the passage of the administrative hearing reorganizations of the past few years in these extra-regulatory cases is that we have encountered what appear to be less than receptive or capable determinations of the issues. In particular, since passage of

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the original reorganization, of three cases which we note have gone through the hearing process, and perhaps another, none of those cases have successfully survived a jurisdictional analysis by the Department of Administration at the outset. In one instance, a statute on point relocations was interpreted contrary to the plain meaning and at last two prior independent determinations on the same point of law by the agency. In other words, the Department of Administration's process for hearing these matters we feel has resulted in essentially repealing a system that was put in place to serve them. It is also taking far too long for the process to designate the hearing officer to commence the scheduling process. As things now stand, one of the types of issues I described would be referred to the Department of Administration. In our experience, not only do they not understand the issues before them, but are all too quick to find that the Act has no jurisdiction to deal with it. It also takes far too long for that referral to even be made and to schedule.

Because of these recent experiences, we have some trepidation about some of the amendments that are offered that would seemingly short-circuit the ability for review to take place. I would also say that we are concerned that there may not be a way to inject complete fairness into this process absent the ability for *de novo* review in a court of law. Thus, most of our concerns would center upon the more procedural aspects of the bill that start at page 15 with section 14. There probably is not a better example of how this could work both for or against a party in terms of fairness.

The first line of subsection (d) to us seems to say that in reference to the statute shown there one must look at the scope of review in the Act for Judicial Review. This section of the bill is referring to KAPA in the remainder of subsection (d). Section 14 requires "due regard" to the presiding officer's observation of witnesses. We point at this because we are unsure of how that would impact review and are concerned an undue bias toward a party's point of view could not be addressed.

Looking at Section 16 of the bill, page 17, subsection (b), and also considering yet again Section 14 which I just noted, reference is made to certain specifics requiring written findings of fact. While one might argue that has always been required, the only point I would make is that we would like to make sure that there is actual access to a record that the parties can utilize with this type of formality and time to make use of it for legal arguments.

Subsection (c) of the same section allows one party to proceed with judicial review while the agency retains jurisdiction to act on reconsideration petitions filed by other parties. Our question here is essentially how the two reconcile if they are inter-related? What happens in such matters and how would it impact the renewal of a license?

As we read it, Section 23 deals with the assignment of hearings. The question here becomes how is this process reconciled between the agencies? In other words, who decides how that process is to function? We realize, of course, that this is already in place to a certain extent, but the question is nevertheless there.

Finally, turning to the judicial review portion of this matter, Section 28 further clarifies standards of review once a matter reaches a court. In our instance, we feel that we are seeing a lack of correct application of the facts and law in instances that do not turn upon the credibility of witnesses. Thus, we would ask that you be very careful in how you fashion subsection (c)(7) and (d) in Section 29 dealing with the scope of review of a court. I recognize that what may very well be described there is essentially current law on interpreting agency action on court review, but our concern is that subsection (d), lines 15-17 actually go a little farther by absolutely prohibiting all form of *de novo* review, including questions of law.

As I said at the outset, our purpose is primarily to highlight our experience following the reorganization of administrative proceedings and we would be happy to participate in any way we can so that our experience is better related and dealt with in the context of this bill.

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