

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 10, 2009, in Room 143-N of the Capitol.

All members were present except:

Representative Jeff King- 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:

Randy Hearrell, Kansas Judicial Council
Patrick Hurley, Kansas Judicial Council-False Claims Act Advisory Committee
Loren Snell, Attorney General's Office
Jerry Schlaughter, Kansas Medical Society
Jim Bush, Judicial Council-Probate Law Advisory Committee
Joe Ewert, Kansas Association of Homes and Services for Aging
Gilbert Cruz, Kansas State-Long Term Care Ombudsman

Others attending:

See attached list.

The hearing on **SB 44 - Kansas false claims act** was opened.

Randy Hearrell, Executive Director, Kansas Judicial Council, spoke as a proponent. Patrick Hurley, Chief Counsel, Kansas Department of Administration, was a member of that Committee and was scheduled to appear as an opponent and explain the bill but was delayed, therefore Randy Hearrell presented for him. He explained in March 2008, former Chair of the House Judiciary Committee, Representative Mike O'Neal, requested the Judicial Council study and make recommendations to the Legislature regarding 2008 HB 2943, which established a Kansas False Claims Act. The Kansas Judicial Council formed the False Claims Act Advisory Committee to undertake the study. Originally, the desire was to obtain for Kansas a higher percentage of monies recovered in Medicaid fraud cases. The federal Deficit Reduction Act (DRA) of 2005 included a cash incentive to encourage states to pass false claims acts modeled on the federal False Claims Act. The pertinent provision of the DRA states that the federal government will decrease by 10% its share of the recovery in cases brought under a qualifying state false claims law. There were also strict requirements in order to be deemed in compliance with the DRA. Although Medicaid fraud was an important consideration for both 2008 HB 2943 and the Judicial Council False Claims Act, this bill has a broader application and covers any type of claim or demand for payment, property or services made to the state or a political subdivision of the state. Attached to his testimony is the Committee's report, which was approved by the Judicial Council on December 9, 2008. (Attachment 1)

Loren Snell, Deputy Attorney General and Director of the Medicaid Fraud Division of the office of Attorney General spoke as a proponent. He further stated the Attorney General, Steve Six, is a strong proponent of this legislation and believes it will enable their office to better prosecute fraud and waste, while at the same time recouping taxpayer money. In regards to a *qui tam* provision, it is the position of the Attorney General's office that this bill should be passed as written, without such a provision, at this time. (Attachment 2)

Jerry Schlaughter, spoke as a proponent on behalf of the Kansas Medical Society. He expressed appreciation for being allowed to participate in the study and stated they can support the bill as written. They objected to including the *qui tam* section because they believed it would encourage the filing of unmeritorious allegations of fraud by private individuals since they, and their attorneys, would stand to gain financially from any settlements or judgments arising from the action. He stressed their support for this legislation is predicated

CONTINUATION SHEET

Minutes of the House Judiciary Committee at 3:30 p.m. on March 10, 2009, in Room 143-N of the Capitol.

on maintaining the language which is found in Section 4 (b) on page 3, lines 28-29, which makes it clear that, except for the whistleblower protection found in Section 6, nothing in the act shall be construed to create a private cause of action. They believe this approach is appropriate because it relies on the Attorney General to bring an action for violations of the Act, presumable after an investigation and a showing that there is a reasonable basis to suspect actual fraud. They believe that strikes an appropriate balance between protecting the public and not subjecting providers to meritless and costly litigation. (Attachment 3)

Chad Austin, Vice President, Government Relations, on behalf of Kansas Hospital Association provided written testimony in support of this bill. (Attachment 4)

Questions were asked by various members of the Committee with answers being provided by Randy Hearrell, Loren Snell and Jerry Slaughter.

The hearing on SB 44 was closed.

The hearing on SB 45 - Kansas power of attorney act amendments was opened.

Randy Hearrell, Kansas Judicial Council, spoke briefly as a proponent of the bill and to introduce Jim Bush of the Judicial Council. Jim Bush, Judicial Council-Probate Law Advisory Committee, provided the background information for this bill. In 2003 the Kansas Power of Attorney Act was passed by Legislature. The act was drafted by the Kansas Judicial Council's Probate Advisory Committee (PLAC) and recommended by the Judicial Council. In July of 2006, the National Conference of Commissioners on Uniform State Laws approved the Uniform Power of Attorney Act. The PLAC reviewed the Uniform Power of Attorney Act and noted that in several respects the Kansas Act was more comprehensive and therefore did not recommend the adoption fo the Uniform Act at this time, however, the PLAC did propose three amendments to the Kansas Power of Attorney Act which are based on the Uniform Act. (Attachment 5)

Joe Ewert, Government Affairs Coordinator for the Kansas Association of Homes and Services for Aging spoke in favor of the bill. He stated their members witness financial elder abuse every day and far too often is perpetrated by those who operate as a Power of Attorney and do not distinguish their funds from those of another for which they have taken responsibility. He added that this bill does not address the penalties for failing to meet these expectations, however, they believe this bill will strengthen the ability of those investigating these crimes to effectively prosecute. (Attachment 6)

Gilbert Cruz, Kansas State-Long Term Care Ombudsman (LTC) spoke in support of the bill. He said LTC represents the rights of nearly 28,000 individuals located in adult care homes throughout Kansas comprised of nursing home facilities, assisted living facilities, board and care homes, residential health care facilities, home plus facilities, adult day cares and LTC units in hospitals. He stated stronger laws are needed to offer a pathway in dealing with the growing number of fiduciary abuse cases which is a serious matter to the residents residing in adult care homes throughout Kansas and they strongly encourage the committee to pursue this cause to protect the health and property of residents. (Attachment 7)

SB 34 - Continuation of certain exceptions to disclosure under the open records act.

Representative King made the motion to report SB 34 favorably for passage. Representative Jack seconded the motion.

Representative Grange made the substitute motion to amend the bill and provided the committee with a balloon that covers the insertion of language to provide directives for confidentiality and disclosure regarding wage and salary surveys. (Attachment 8)

Representative Goyle seconded the motion. Motioned carried.

Representative Goyle made a motion to extend the sunset date of all the items under discussion in this bill to the year 2013. Representative Kuether seconded the motion.

CONTINUATION SHEET

Minutes of the House Judiciary Committee at 3:30 p.m. on March 10, 2009, in Room 143-N of the Capitol.

With permission of the second, Representative Goyle changed the sunset date to 2014 in order to add five years from the current year. Motion carried.

Representative Kuether made the motion to report **SB 34** favorably for passage as amended. Representative Brookens seconded the motion. Motion carried.

The next meeting is scheduled for March 11, 2009.

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

JUDICIARY COMMITTEE GUEST LIST

DATE: 3-10-09

NAME	REPRESENTING
Chris Gigstad	Federico Consulting
DEBORAH STEVEN	MS. HCSP. ASSN.
Gilbert Cruz	KS Long-Term Care Ombudsman
Joe Enns	KANSAS
Chad Austin	KAA
Kathy Sachs	Sec. of State
Vivian Carlin	Dist 66 Rep.
Loren Snell	KS AG
Don Gibbs	KSAB
Richard Hammond	KPA
Ashley Riggs	Intern
James T. ...	KS Judicial Council PLAC
Wendy M. Kearrell	"
JERRY ...	KAS
Bill Sneed	State Farm
JOHN C. BOTTENBERG	Westar Energy
Line Walsh	Judicial Branch



KANSAS JUDICIAL COUNCIL

JUSTICE LAWTON R. NUSS, CHAIR, SALINA
JUDGE JERRY G. ELLIOTT, WICHITA
JUDGE ROBERT J. FLEMING, PARSONS
JUDGE JEAN F. SHEPHERD, LAWRENCE
SEN. THOMAS C. (TIM) OWENS, OVERLAND PARK
REP. LANCE Y. KINZER, OLATHE
J. NICK BADGEROW, OVERLAND PARK
GERALD L. GOODELL, TOPEKA
JOSEPH W. JETER, HAYS
STEPHEN E. ROBISON, WICHITA

Kansas Judicial Center
301 S.W. Tenth Street, Suite 140
Topeka, Kansas 66612-1507

Telephone (785) 296-2498
Facsimile (785) 296-1035

judicial.council@ksjc.state.ks.us
www.kansasjudicialcouncil.org

EXECUTIVE DIRECTOR
RANDY M. HEARRELL
STAFF ATTORNEYS
NANCY J. STROUSE
CHRISTY R. MOLZEN
NATALIE F. GIBSON
ADMINISTRATIVE ASSISTANTS
JANELLE L. WILLIAMS
MARIAN L. CLINKENBEARD
BRANDY M. WHEELER

MEMORANDUM

TO: House Judiciary Committee

FROM: Kansas Judicial Council False Claims Act Advisory Committee

DATE: March 10, 2009

RE: 2009 SB 44 - Kansas False Claims Act

BACKGROUND

In March 2008, Rep. Mike O'Neal, former Chair of the House Judiciary Committee, requested that the Judicial Council study and make recommendations to the Legislature regarding 2008 HB 2943, which established a Kansas False Claims Act. The Kansas Judicial Council formed the False Claims Act Advisory Committee to undertake the study.

The impetus behind the bill studied by the Committee, 2008 HB 2943, was originally a desire to obtain for Kansas a higher percentage of monies recovered in Medicaid fraud cases. The federal Deficit Reduction Act of 2005 ("DRA") included a cash incentive to encourage states to pass false claims acts modeled on the federal False Claims Act. The pertinent provision of the DRA states that the federal government will decrease by 10% its share of the recovery in cases brought under a qualifying state false claims law.

However, there are strict requirements that a state false claims act must meet in order to be deemed in compliance with the DRA. One requirement is that the state act must provide for civil penalties at least as high as those in the federal law. Also required is the inclusion of "provisions that are at least as effective in rewarding and facilitating qui tam actions for false or fraudulent claims" as those in the federal law.

House Judiciary
Date 3-10-09
Attachment # 1

When Rep. Sydney Carlin learned of the DRA's incentive offer to states, she became interested in seeing Kansas qualify for an increased percentage of Medicaid fraud recoveries. Earlier versions of her proposal were drafted to meet all of the DRA's requirements for qualifying for the 10% increase, but the version ultimately submitted as 2008 HB 2943 did not contain a qui tam provision. This issue was extensively discussed and debated by the Committee, but there was not sufficient support for the addition of a qui tam provision to this legislation.

It should be noted that although Medicaid fraud was an important consideration for both the drafters of 2008 HB 2943 and the Judicial Council False Claims Act Advisory Committee, this proposed act has a broader application and covers any type of claim or demand for payment, property or services made to the state or a political subdivision of the state.

The Committee, after thorough review of and deliberation on the provisions of 2008 HB 2943, proposed an alternative, which is set forth in this bill. The Committee's report, which was approved by the Judicial Council on December 9, 2008, is attached to this testimony.

SUMMARY OF THE BILL

- The act imposes liability on a wide range of fraudulent acts related to submitting claims to the state or any subdivision of the state for payment, property, or services. It covers the making of false claims, causing false claims to be made, and conspiring to commit any violation of the act.
- The act applies to intentional misrepresentations as well as reckless conduct. "Knowing" and "knowingly" include actual knowledge, deliberate ignorance, and reckless disregard of the truth or falsity of the information.
- The act provides for treble damages and civil penalties of not less than \$1,000 and not more than \$11,000 for each violation. The federal act provides for a minimum penalty of \$5,500 per violation.
- The Attorney General is charged with enforcing the act. Local prosecutors may participate at the request of, and under the direction of, the Attorney General.
- The statute of limitations contained in the act is six years.
- The act contains a provision intended to protect the rights of employees who suffer retaliation for initiating, assisting, or testifying in an action brought under the act, but the provision is more limited than that contained in the federal act.
- Unlike the federal law, the act does not contain a qui tam provision and thus does not allow private actions to be brought by individuals.

**REPORT OF THE JUDICIAL COUNCIL
FALSE CLAIMS ACT ADVISORY COMMITTEE
ON 2008 HB 2943**

NOVEMBER 19, 2008

BACKGROUND

In March 2008, Rep. Mike O'Neal, Chair of the House Judiciary Committee, requested that the Judicial Council study and make recommendations to the Legislature regarding 2008 HB 2943, which establishes the Kansas false claims act. The Judicial Council formed the False Claims Act Advisory Committee to undertake the study.

COMMITTEE MEMBERSHIP

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

1. **Stephen E. Robison, Chair**; practicing attorney in Wichita and member of the Judicial Council.
2. **Rep. Sydney Carlin**, Manhattan; Sponsor of the bill.
3. **Robert Collins**, Topeka; K-TAF Policy Research Group.
4. **Patrick Hurley**, Topeka; Chief Counsel, Kansas Department of Administration.
5. **Loren Snell**, Topeka; Asst. Attorney General, Medicaid Fraud and Abuse Division.
6. **Deborah Stern**, Topeka; General Counsel, Kansas Hospital Association.
7. **Catherine Walberg**, Topeka; General Counsel, KaMMCO.
8. **Melanie Wilson**, Lawrence; Associate Professor, University of Kansas School of Law.
9. **Nancy Zogleman**, Leawood; Director, State Government Relations, Pfizer, Inc.

INTRODUCTION

The federal False Claims Act, 31 U.S.C. 3729 et seq., was passed in 1863 and has been used to fight a myriad of schemes aimed at stealing taxpayer dollars. A copy of the federal False Claims Act is attached to this report at page 23. In more recent years, the U. S. Department of Justice has used the False Claims Act to go after fraud in federal health care programs and has recovered billions of dollars.¹ States get a share of the recoveries in cases dealing with Medicaid fraud because the Medicaid program is funded jointly by state and federal governments (the federal government share is between 50% and 83%, depending on the state's per capita income). Despite some large recoveries, a huge amount of health care fraud goes unchecked. Experts estimate that anywhere from 3% to 10% of all health care spending is lost to fraud.² Seeking more state involvement in fighting Medicaid fraud, Congress included in the Deficit Reduction Act of 2005 ("DRA") a cash incentive to encourage states to pass false claims acts modeled on the federal act. Pursuant to § 6032 of the DRA, a new provision in the Social Security Act states that the federal government will decrease by 10% its share of the recovery in cases brought under a qualifying state false claims law. 42 U.S.C 1909. A copy of § 6032 of the DRA is attached to this report at page 38.

In order to be deemed in compliance with the DRA, a state false claims act must meet several requirements. One requirement is that the state act must provide for civil penalties at least as high as those in the federal law. Also required is the inclusion of "provisions that are at least as effective in rewarding and facilitating qui tam actions for false or fraudulent claims" as those in the federal

¹ *Information On False Claims Litigation*, United States Government Accountability Office, <http://www.gao.gov/new.items/d06320r.pdf> (Accessed November 19, 2008).

² *The Problem of Health Care Fraud*, National Health Care Fraud Association, http://www.nhcaa.org/eweb/DynamicPage.aspx?webcode=anti_fraud_resource_centra&wpscode=TheProblemOfHCFraud#2 (Accessed November 19, 2008).

law. 42 U.S.C 1909(b)(2). Some states had false claims acts in place prior to the passage of the DRA, and others have passed new legislation in response to the incentive of an increased share of recovery in Medicaid fraud cases.

The requirement of including a qui tam provision, which allows “whistleblowers” to bring private causes of action and share in the recovery, has been a sticking point in some state legislatures. Opponents view the prospect of a new qui tam provision as a windfall for plaintiffs’ attorneys and are concerned that it would spur the filing of a high number of meritless actions. Supporters credit the qui tam provision of the federal law with the dramatic increase in the amount of taxpayer money recovered since the law was revised in 1986, and believe similar success is virtually guaranteed at the state level.³

When Rep. Sydney Carlin learned of the DRA’s incentive offer to states, she became interested in seeing Kansas qualify for an increased percentage of Medicaid fraud recoveries. Earlier versions of her proposal were drafted to meet all of the DRA’s requirements for qualifying for the 10% increase, but the version ultimately submitted as HB 2943 no longer contains a qui tam provision. It should be noted that, although Medicaid fraud was an important consideration for the drafters and for this Committee, HB 2943 has a broader application and covers any type of claim or demand for payment, property or services made to the state or a political subdivision of the state.

³ See John Gibeaut, *Seeking the Cure*, 92 A.B.A. J., 44 (October 2006).

COMMITTEE'S REVIEW OF 2008 HB 2943

2008 HB 2943 establishes a Kansas false claims act. The language in the bill is largely drawn from § 3729 of the federal False Claims Act. However, Sec. 3(a)(8) through 3(a)(11) are additions that are not found in the federal law. As noted earlier, HB 2943 also does not contain the qui tam and whistleblower provisions appearing in § 3730 of the federal act. A copy of the bill is attached to this report at page 18.

The Committee met on September 5, September 29, and November 19, 2008. In addition to review of the new false claims act proposed in 2008 HB 2943, the Committee reviewed the federal False Claims Act, the false claims laws from other states, Kansas common law on retaliatory discharge, and the Kansas whistleblower act.

Before considering the specific provisions of the bill, the Committee first debated the threshold issue of whether false claims legislation is needed in Kansas. There was no real opposition to the basic idea of enacting a false claims act. All Committee members agreed that fraud occurs and that all taxpayers are affected by the theft of public monies. As the Committee debated whether existing criminal statutes are sufficient, it was noted that the addition of civil provisions would be a valuable tool for the attorney general's office and could benefit even those under investigation for making false claims. The Committee acknowledged that a civil act could provide more flexibility for the attorney general's office on a case by case basis, even allowing a provider to stay in business as a case develops and progresses. The importance of the potential deterrent value of a false claims act was also noted. At the end of this discussion, the Committee unanimously agreed that it would support the proposal of a Kansas false claims act and agreed to move on to a more detailed consideration of the substance of HB 2943.

DRA Compliance

The original incentive for the drafters of HB 2943 was to enable Kansas to qualify for a 10% increase in recoveries from Medicaid fraud cases. In order to qualify for the 10% increase, a state false claims act must meet certain requirements that ensure the state act is substantially similar to the federal False Claims Act. The four requirements are:

1. The law must establish liability to the State for false or fraudulent claims described in 31 U.S.C. 3729 with respect to any expenditure described in section 1903(a) of the Act;
2. The law must contain provisions that are at least as effective in rewarding and facilitating qui tam actions for false or fraudulent claims as those described in 31 U.S.C. 3730–3732;
3. The law must contain a requirement for filing an action under seal for 60 days with review by the State Attorney General; and
4. The law must contain a civil penalty that is not less than the amount of the civil penalty authorized under 31 U.S.C. 3729.⁴

Qui Tam

HB 2943 appears to meet the first and last of the four DRA requirements, but not the second or third. The Committee discussed the fact that Kansas would not qualify for the increased 10% in recoveries from Medicaid fraud in actions brought under a Kansas false claims act unless it met all of the requirements, including qui tam provisions. There were Committee members on both sides of this debate. Some members were strongly in favor of the protections that qui tam affords whistleblowers, noting that without such people willing to come forward, a great deal of fraud would simply remain undiscovered. It was also expressed that in the current economic climate, Kansas

⁴ “Publication of OIG’s Guidelines for Evaluating State False Claims Acts,” 71 Federal Register 161 (21 August 2006), pp. 48552 - 48554.

should take advantage of every opportunity to recover taxpayer dollars. On the other side of this debate were members who were very concerned about the potential for baseless suits and the high cost to defend them. These concerns were magnified when also considering that one can be found liable under HB 2943 without a finding of intent.

A suggestion was made to explore the possibility of some variation on qui tam in which the attorney general would serve as a gatekeeper for the lawsuits. The Committee agreed to review the false claims acts of other states to see how many had adopted qui tam and whether any variations on the federal qui tam provisions had thus far been deemed in compliance with DRA requirements.

This review showed that, to date, 20 states have submitted their false claims laws to the Office of Inspector General of the Department of Health and Human Services ("OIG") for a determination of whether they meet the DRA requirements. A chart is attached to this report at page 39 showing which states have submitted their laws for certification and whether they have been deemed to be in compliance. Review of the six rejection letters sent out by OIG made clear that states must adhere very closely to the federal law in order to be certified. It is very unlikely that any variation in the structure of the qui tam section would be approved. Information about OIG review of state false claims acts and copies of the OIG response letters can be viewed at this web address: <http://www.oig.hhs.gov/fraud/falseclaimsact.asp>.

Although the Committee members who were opposed to qui tam expressed a willingness to at least consider some kind of modified or creative application of the principle, there was not sufficient support on the Committee for the idea of adding to HB 2943 qui tam and whistleblower provisions that mirror the federal law. The Committee acknowledged that the decision not to add qui tam provisions would guarantee that the legislation would not meet DRA requirements. However, the Committee still supports the adoption of a false claims act for the reasons previously stated.

COMMITTEE'S RECOMMENDATIONS REGARDING 2008 HB 2943

The Judicial Council False Claims Act Advisory Committee recommends several revisions to 2008 HB 2943. The recommended changes are set forth and discussed below. The complete text of the bill, with the Committee's suggested changes shown in underline and strikethrough type, immediately follows this report at page 11.

Sec. 2(e)

(e) "Knowing" and "knowingly" mean that a person, with respect to information, does any of the following:

- (1) Has actual knowledge of the information;
- (2) acts in deliberate ignorance of the truth or falsity of the information; ~~and or~~
- (3) acts in reckless disregard of the truth or falsity of the information.

The Committee unanimously agreed to changing the word "and" to "or." The federal False Claims Act uses "or" and the Committee believes this was simply an error in the bill that should be corrected to properly set forth the three subsections as alternatives.

Sec. 3(a)

Sec. 3. (a) A person who commits any of the following acts shall be liable to the state or any affected political subdivision thereof, for three times the amount of damages which the state or such political subdivision sustains because of the act of that person and shall be liable to the state for a civil penalty of not less than ~~\$5,500~~ \$1,000 and not more than \$11,000 for each violation. A person found to have committed any of the following acts shall be liable to the state or such affected political subdivision for all reasonable costs and attorney fees incurred in a civil action brought to recover any of those penalties or damages. The following acts constitute violations for which civil penalties, costs and attorney fees may be recovered by a civil action under this act:

The penalty provisions of the bill engendered spirited debate among the Committee members at all three meetings. Some Committee members were very concerned about the \$5,500 minimum penalty because the penalty is "per claim." In a case involving health care, there could be hundreds of "claims" in a single day, and with a mandatory minimum set this high, the penalty becomes draconian. It was suggested that the mandatory minimum be deleted to give the judge the discretion to apply an appropriate amount of penalty for the circumstances of the case. Other Committee members argued just as strongly to retain the mandatory minimum penalty of \$5,500, noting that one of the great values of this act will be its deterrent value, and the penalty provisions are an integral part of that deterrence.

The penalty provision discussions included the idea of changing "shall" to "may" to give the courts more discretion and to softening the treble damages provision by amending it to say "up to" three times the amount of damages. Some changes were made and then changed back. Ultimately, the discussion focused on amending the minimum penalty amount. After much discussion, by a vote of 7 to 2, the minimum penalty was changed from \$5,500 to \$1,000 per claim.

Sec. 3(a)(8) to 3(a)(11)

These sections were added by the drafters of the bill and did not come from the federal False Claims Act. Some Committee members were in agreement with the inclusion of these sections in the bill, noting that these are known problem areas and are worthy of being set forth clearly. Other members countered that the added sections seem to target the pharmaceutical industry and that "kickback" in section 3(a)(8) is ambiguous and not clearly defined. It was acknowledged that all of the acts set forth in these sections are currently prosecuted under the federal law in the absence of this language. At the end of the discussion, the Committee unanimously agreed that these sections be removed entirely.

Sec. 3(b)

This section provides for a reduction in the damages that can be assessed when the person alleged to have violated the act cooperates with the investigation. HB 2943, like the federal False Claims Act, provides that “the court may assess not less than two times the amount of damages” sustained by the state because of the false claim violation, which is a reduction from the usual treble damages. The Committee amended this section to read that “the court may assess not more than two times the amount of damages” sustained. The Committee agreed that cooperation with false claims investigations should be encouraged, and that providing for a maximum of two times the amount of damages is a better incentive than merely lowering the mandatory damages from treble to double.

Sec. 5(a)

Sec. 5. (a) A civil action under section 3, and amendments thereto, may not be brought more than ~~10~~ 6 years after the date on which the violation was committed.

In the discussion of the statute of limitations set forth in Sec. 5(a), some Committee members expressed that 10 years is far too long. However, it was noted that these cases take a long time to develop and that any period of time less than 5 years would not be practical. The Committee settled on 6 years, noting that this is the same amount of time that providers are required to keep records of Medicaid claim submissions in Kansas. The Committee approved the change in the statute of limitations on a vote of 6 to 3.

Sec. 6 Addition

Sec. 6. Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner retaliated against in the terms and conditions of employment by his or her employer because of lawful acts undertaken in good faith by the employee on behalf of the employee or others, in furtherance of an action

under this act, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this act, shall be entitled to all relief necessary to make the employee whole. An employee may bring an action in the appropriate district court of the state of Kansas for the relief provided in this section. This section shall not be construed to create any private cause of action for violations of this act, and is limited to the remedies expressly created by this section related to employment retaliation.

This section was added in response to concerns by some Committee members that, without a qui tam provision modeled after the federal act, employees who report or assist in a false claims investigation do not have adequate protection. The language in this section was originally copied from § 3730(h) of the federal law. It was argued by some Committee members that common law already provides a remedy for retaliatory discharge and that this section is not necessary. The majority of the Committee did not want to include language that could substantively impact existing common law and a sentence from the federal language that set forth specific relief, such as 2 times the amount of back pay, special damages, and litigation costs and reasonable attorneys' fees, was deleted. The Committee approved the addition of this section by a vote of 8 to 1. The one Committee member who opposed the language would have included the deleted sentence to ensure that whistleblowers are entitled to appropriate relief, including litigation costs and attorneys' fees, if the employer takes retaliatory action.

CONCLUSION

The Judicial Council False Claims Act Advisory Committee is unanimous in its support for the adoption of a false claims act in Kansas. The Committee recommended several amendments to 2008 HB 2943, which changes are set forth in this report. Although votes were split on some of the individual changes to the bill, the Committee unanimously approved submission to the Kansas Judicial Council of this report and the proposed legislation contained herein.

HOUSE BILL No. 2943

AS REVISED BY THE
JUDICIAL COUNCIL FALSE CLAIMS ACT ADVISORY COMMITTEE

1 **Section 1.** Sections 1 through ~~11~~ 12, and amendments thereto, shall be known and may be
2 cited as the “Kansas false claims act.”

3 **Sec. 2.** For purposes of this act:

4 (a) “Act” means the Kansas false claims act.

5 (b) “Claim” includes any request or demand, whether under contract or otherwise, for
6 money, property or services made to any employee, officer or agent of the state or any political
7 subdivision thereof or made to any contractor, grantee or other recipient if the state or any political
8 subdivision thereof provides any portion of the money, property or services which is requested or
9 demanded, or if the state will reimburse such contractor, grantee or other recipient for any portion
10 of the money or property which is requested or demanded.

11 (c) “Political subdivision” includes political or taxing subdivisions of the state, including
12 municipal and quasi-municipal corporations, boards, commissions, authorities, councils, committees,
13 subcommittees and other subordinate groups or administrative units thereof, receiving or expending
14 and supported, in whole or in part, by public funds and any municipality as defined in K.S.A. 75-
15 1117, and amendments thereto.

16 (d) “Person” includes any natural person, corporation, firm, association, organization,
17 partnership, business or trust.

18 (e) “Knowing” and “knowingly” mean that a person, with respect to information, does any
19 of the following:

- 1 (1) Has actual knowledge of the information;
- 2 (2) acts in deliberate ignorance of the truth or falsity of the information; ~~and~~ or
- 3 (3) acts in reckless disregard of the truth or falsity of the information.

4 **Sec. 3.** (a) A person who commits any of the following acts shall be liable to the state or any
5 affected political subdivision thereof, for three times the amount of damages which the state or such
6 political subdivision sustains because of the act of that person and shall be liable to the state for a
7 civil penalty of not less than ~~\$5,500~~ \$1,000 and not more than \$11,000 for each violation. A person
8 found to have committed any of the following acts shall be liable to the state or such affected
9 political subdivision for all reasonable costs and attorney fees incurred in a civil action brought to
10 recover any of those penalties or damages. The following acts constitute violations for which civil
11 penalties, costs and attorney fees may be recovered by a civil action under this act:

12 (1) Knowingly presents or causes to be presented to any employee, officer or agent of the
13 state or political subdivision thereof or to any contractor, grantee or other recipient of state funds or
14 funds of any political subdivision thereof, a false or fraudulent claim for payment or approval;

15 (2) knowingly makes, uses or causes to be made or used, a false record or statement to get
16 a false or fraudulent claim paid or approved;

17 (3) defrauds the state or any political subdivision thereof by getting a false claim allowed or
18 paid or by knowingly making, using or causing to be made or used, a false record or statement to
19 conceal, avoid or decrease an obligation to pay or transmit money or property to the state or to any
20 political subdivision thereof;

21 (4) has possession, custody or control of public property or money used or to be used by the
22 state or any political subdivision thereof and knowingly delivers or causes to be delivered less
23 property or money than the amount for which the person receives a certificate or receipt;

1 (5) is authorized to make or deliver a document certifying receipt of property used or to be
2 used by the state or any political subdivision thereof and knowingly makes or delivers a receipt that
3 falsely represents the property received;

4 (6) knowingly buys or receives as a pledge of an obligation or debt, public property from any
5 person who lawfully may not sell or pledge the property;

6 (7) is a beneficiary of an inadvertent submission of a false claim to any employee, officer or
7 agent of the state or political subdivision thereof, or to any contractor, grantee or other recipient of
8 state funds or funds of any political subdivision thereof, who subsequently discovers the falsity of
9 the claim and fails to disclose the false claim and make satisfactory arrangements for repayment to
10 the state or affected political subdivision thereof within a reasonable time after discovery of the false
11 claim;

12 ~~(8) obtains unlawful remuneration through any violation of federal or state anti-kickback~~
13 ~~provisions contained in 42 U.S.C. 1320(a)-7b, 41 U.S.C. 51-54, and K.S.A. 21-3487, and~~
14 ~~amendments thereto, where kickback leads to the defrauding of any publicly funded Kansas~~
15 ~~healthcare plan;~~

16 ~~(9) knowingly sells to any publicly funded Kansas healthcare plan any expired or adulterated~~
17 ~~medicine or defunct medical equipment;~~

18 ~~(10) knowingly sells to any publicly funded Kansas healthcare plan any restocked or re-~~
19 ~~shelved medicine or medical equipment without having first fully reimbursed the first purchaser and~~
20 ~~fully disclosed the merchandise status to the new government purchasing agent;~~

21 ~~(11) promotes or markets any prescription drug, dosage or medical device in a way or for a~~
22 ~~purpose that is not approved by the federal food and drug administration and thereby, in any way~~
23 ~~wrongfully obtains remuneration from any publicly funded Kansas healthcare plan; or~~

1 (b) Nothing in this act shall be construed to create a private cause of action, except as
2 provided in Sec. 6.

3 **Sec. 5.** (a) A civil action under section 3, and amendments thereto, may not be brought more
4 than ~~10~~ 6 years after the date on which the violation was committed.

5 (b) A civil action under section 3, and amendments thereto, may be brought for activity prior
6 to the effective date of this act if the limitation period set in subsection (a) has not lapsed.

7 (c) In any action brought under section 3, and amendments thereto, the state shall be required
8 to prove all essential elements of the cause of action, including damages, by a preponderance of the
9 evidence.

10 (d) Notwithstanding any other provision of law, a guilty verdict rendered in a criminal
11 proceeding charging false statements or fraud, whether upon a verdict after trial or upon a plea of
12 guilty or nolo contendere, shall estop the defendant from denying the essential elements of the
13 offense in any action which involves the same transaction as in the criminal proceeding and which
14 is brought under section 3, and amendments thereto.

15 **Sec. 6.** Any employee who is discharged, demoted, suspended, threatened, harassed, or in
16 any other manner retaliated against in the terms and conditions of employment by his or her
17 employer because of lawful acts undertaken in good faith by the employee on behalf of the employee
18 or others, in furtherance of an action under this act, including investigation for, initiation of,
19 testimony for, or assistance in an action filed or to be filed under this act, shall be entitled to all relief
20 necessary to make the employee whole. An employee may bring an action in the appropriate district
21 court of the state of Kansas for the relief provided in this section. This section shall not be construed
22 to create any private cause of action for violations of this act, and is limited to the remedies
23 expressly created by this section related to employment retaliation.

1 **Sec. 67.** (a) The provisions of this act are not exclusive and the remedies provided for in this
2 act shall be in addition to any other remedies provided for in any other law or available under
3 common law.

4 (b) This act shall be liberally construed and applied to promote the public interest.

5 **Sec. 78.** (a) Proceeds recovered as a result of an action filed pursuant to this act shall be
6 distributed in the following order:

7 (1) To refund moneys falsely obtained from the federal government, state government or
8 political subdivision thereof pursuant to subsection (b); and

9 (2) to the state treasurer for deposit in the state general fund pursuant to subsection (c).

10 (b) A portion of the recovery equal to the amount of moneys falsely obtained from the federal
11 government, state government, affected political subdivision thereof or state agencies, or a
12 combination thereof, shall be remitted to the appropriate entity shown to be defrauded, subject to
13 any further requirements established by federal or state law.

14 (c) That portion of any recovery remitted to the state treasurer pursuant to subsection (a) shall
15 be remitted to the state treasurer in accordance with the provisions of K.S.A. 75-4215, and
16 amendments thereto. Upon receipt of such remittance, the state treasurer shall deposit the entire
17 amount in the state general fund and, subject to any relevant guidelines of the federal department of
18 health and human services' office of inspector general regarding repayment of fees or recoveries,
19 shall credit 10% of such remittance to the false claims litigation revolving fund, which is hereby
20 established in the state treasury. Moneys in the false claims litigation revolving fund may be
21 expended by the attorney general for the purpose of hiring necessary staff and to defray the costs of
22 investigating and litigating ongoing false claims cases and may be shared at the direction of the
23 attorney general with the Kansas medicaid fraud control unit, Kansas bureau of investigation or any

1 county, city or private attorneys who may be utilized or contracted with pursuant to section 4, and
2 amendments thereto, in carrying out the purposes of this act and any other operating expenses
3 incurred in administering the Kansas false claims act. All expenditures from the false claims
4 litigation revolving fund shall be made in accordance with appropriation acts upon warrants of the
5 director of accounts and reports issued pursuant to vouchers approved by the attorney general or the
6 attorney general's designee.

7 **Sec. ~~8~~ 9**. Liability pursuant to this act is joint and several for any violation done by two or
8 more persons.

9 **Sec. ~~9~~ 10**. Any action under this act may be brought in any county or district court in which
10 the defendant or, in the case of multiple defendants, any one defendant can be found, resides or
11 transacts business or in which any act prohibited by section 3, and amendments thereto, occurred.

12 **Sec. ~~10~~ 11**. If any provision of this act or the application thereof to any person or
13 circumstance is held invalid, the invalidity shall not affect other provisions or applications of the act
14 which can be given effect without the invalid provision or application, and to this end the provisions
15 of this act are severable.

16 **Sec. ~~11~~ 12**. This act shall take effect and be in force from and after its publication in the
17 Kansas register.

HOUSE BILL No. 2943

By Committee on Appropriations

2-26

9 AN ACT concerning civil actions and civil penalties; relating to the sub-
10 mission of false or fraudulent claims to or the performance of fraud-
11 ulent acts upon the state or a political subdivision thereof.

12

13 *Be it enacted by the Legislature of the State of Kansas:*

14 Section 1. Sections 1 through 11, and amendments thereto, shall be
15 known and may be cited as the "Kansas false claims act."

16 Sec. 2. For purposes of this act:

17 (a) "Act" means the Kansas false claims act.

18 (b) "Claim" includes any request or demand, whether under contract
19 or otherwise, for money, property or services made to any employee,
20 officer or agent of the state or any political subdivision thereof or made
21 to any contractor, grantee or other recipient if the state or any political
22 subdivision thereof provides any portion of the money, property or serv-
23 ices which is requested or demanded, or if the state will reimburse such
24 contractor, grantee or other recipient for any portion of the money or
25 property which is requested or demanded.

26 (c) "Political subdivision" includes political or taxing subdivisions of
27 the state, including municipal and quasi-municipal corporations, boards,
28 commissions, authorities, councils, committees, subcommittees and other
29 subordinate groups or administrative units thereof, receiving or expend-
30 ing and supported, in whole or in part, by public funds and any munic-
31 ipality as defined in K.S.A. 75-1117, and amendments thereto.

32 (d) "Person" includes any natural person, corporation, firm, associa-
33 tion, organization, partnership, business or trust.

34 (e) "Knowing" and "knowingly" mean that a person, with respect to
35 information, does any of the following:

36 (1) Has actual knowledge of the information;

37 (2) acts in deliberate ignorance of the truth or falsity of the infor-
38 mation; and

39 (3) acts in reckless disregard of the truth or falsity of the information.

40 Sec. 3. (a) A person who commits any of the following acts shall be
41 liable to the state or any affected political subdivision thereof, for three
42 times the amount of damages which the state or such political subdivision
43 sustains because of the act of that person and shall be liable to the state

1 for a civil penalty of not less than \$5,500 and not more than \$11,000 for
2 each violation. A person found to have committed any of the following
3 acts shall be liable to the state or such affected political subdivision for
4 all reasonable costs and attorney fees incurred in a civil action brought to
5 recover any of those penalties or damages. The following acts constitute
6 violations for which civil penalties, costs and attorney fees may be recov-
7 ered by a civil action under this act:

8 (1) Knowingly presents or causes to be presented to any employee,
9 officer or agent of the state or political subdivision thereof or to any
10 contractor, grantee or other recipient of state funds or funds of any po-
11 litical subdivision thereof, a false or fraudulent claim for payment or
12 approval;

13 (2) knowingly makes, uses or causes to be made or used, a false record
14 or statement to get a false or fraudulent claim paid or approved;

15 (3) defrauds the state or any political subdivision thereof by getting
16 a false claim allowed or paid or by knowingly making, using or causing to
17 be made or used, a false record or statement to conceal, avoid or decrease
18 an obligation to pay or transmit money or property to the state or to any
19 political subdivision thereof;

20 (4) has possession, custody or control of public property or money
21 used or to be used by the state or any political subdivision thereof and
22 knowingly delivers or causes to be delivered less property or money than
23 the amount for which the person receives a certificate or receipt;

24 (5) is authorized to make or deliver a document certifying receipt of
25 property used or to be used by the state or any political subdivision
26 thereof and knowingly makes or delivers a receipt that falsely represents
27 the property received;

28 (6) knowingly buys or receives as a pledge of an obligation or debt,
29 public property from any person who lawfully may not sell or pledge the
30 property;

31 (7) is a beneficiary of an inadvertent submission of a false claim to
32 any employee, officer or agent of the state or political subdivision thereof,
33 or to any contractor, grantee or other recipient of state funds or funds of
34 any political subdivision thereof, who subsequently discovers the falsity
35 of the claim and fails to disclose the false claim and make satisfactory
36 arrangements for repayment to the state or affected political subdivision
37 thereof within a reasonable time after discovery of the false claim;

38 (8) obtains unlawful remuneration through any violation of federal or
39 state anti-kickback provisions contained in 42 U.S.C. 1320(a)-7b; 41
40 U.S.C. 51-54; and K.S.A. 21-3487, and amendments thereto, where kick-
41 back leads to the defrauding of any publicly funded Kansas healthcare
42 plan;

43 (9) knowingly sells to any publicly funded Kansas healthcare plan any

1 expired or adulterated medicine or defunct medical equipment;

2 (10) knowingly sells to any publicly funded Kansas healthcare plan
3 any restocked or re-shelved medicine or medical equipment without hav-
4 ing first fully reimbursed the first purchaser and fully disclosed the mer-
5 chandise status to the new government purchasing agent;

6 (11) promotes or markets any prescription drug, dosage or medical
7 device in a way or for a purpose that is not approved by the federal food
8 and drug administration and thereby, in any way wrongfully obtains re-
9 muneratation from any publicly funded Kansas healthcare plan; or

10 (12) conspires to commit any violation set forth in paragraphs (1)
11 through (11), above.

12 (b) Notwithstanding the provisions of subsection (a), the court may
13 assess not less than two times the amount of damages which the state or
14 any political subdivision thereof sustains because of the act of the person
15 in violation of paragraphs (1) through (12) of subsection (a) and no civil
16 penalty shall be imposed, if the court finds all of the following:

17 (1) The person committing the violation furnished officials of the
18 state who are responsible for investigating false claims violations with all
19 information known to that person about the violation with 30 days after
20 the date on which the person first obtained the information;

21 (2) the person fully cooperated with any investigation by the state;
22 and

23 (3) at the time the person furnished the state with information about
24 the violation, no criminal prosecution, civil action or administrative action
25 had commenced with respect to the violation and the person did not have
26 actual knowledge of the existence of an investigation into the violation.

27 (c) In a civil action brought pursuant to subsection (a), proof of spe-
28 cific intent to defraud is not required.

29 (d) This section does not apply to claims, records or statements made
30 under the state revenue and taxation code.

31 Sec. 4. (a) The attorney general shall diligently investigate a violation
32 under section 3, and amendments thereto. If the attorney general finds
33 that a person has violated or is violating section 3, and amendments
34 thereto, the attorney general may bring a civil action under this section
35 against that person. Further, the attorney general may utilize the assis-
36 tance of city and county attorneys in cases involving their respective po-
37 litical subdivisions or may utilize funds available pursuant to section 8,
38 and amendments thereto, to engage the services of private attorneys to
39 assist in carrying out the purposes of this act, or both, at times when the
40 attorney general determines the need exists. All local prosecutors and
41 private attorneys shall only participate at the request, and under the di-
42 rection of, the attorney general.

43 (b) Nothing in this act shall be construed to create a private cause of

1 action.

2 Sec. 5. (a) A civil action under section 3, and amendments thereto,
3 may not be brought more than 10 years after the date on which the
4 violation was committed.

5 (b) A civil action under section 3, and amendments thereto, may be
6 brought for activity prior to the effective date of this act if the limitation
7 period set in subsection (a) has not lapsed.

8 (c) In any action brought under section 3, and amendments thereto,
9 the state shall be required to prove all essential elements of the cause of
10 action, including damages, by a preponderance of the evidence.

11 (d) Notwithstanding any other provision of law, a guilty verdict
12 rendered in a criminal proceeding charging false statements or fraud,
13 whether upon a verdict after trial or upon a plea of guilty or nolo con-
14 tendere, shall estop the defendant from denying the essential elements
15 of the offense in any action which involves the same transaction as in the
16 criminal proceeding and which is brought under section 3, and amend-
17 ments thereto.

18 Sec. 6. (a) The provisions of this act are not exclusive and the rem-
19 edies provided for in this act shall be in addition to any other remedies
20 provided for in any other law or available under common law.

21 (b) This act shall be liberally construed and applied to promote the
22 public interest.

23 Sec. 7. (a) Proceeds recovered as a result of an action filed pursuant
24 to this act shall be distributed in the following order:

25 (1) To refund moneys falsely obtained from the federal government,
26 state government or political subdivision thereof pursuant to subsection
27 (b); and

28 (2) to the state treasurer for deposit in the state general fund pursuant
29 to subsection (c).

30 (b) A portion of the recovery equal to the amount of moneys falsely
31 obtained from the federal government, state government, affected polit-
32 ical subdivision thereof or state agencies, or a combination thereof, shall
33 be remitted to the appropriate entity shown to be defrauded, subject to
34 any further requirements established by federal or state law.

35 (c) That portion of any recovery remitted to the state treasurer pur-
36 suant to subsection (a) shall be remitted to the state treasurer in accord-
37 ance with the provisions of K.S.A. 75-4215, and amendments thereto.
38 Upon receipt of such remittance, the state treasurer shall deposit the
39 entire amount in the state general fund and, subject to any relevant guide-
40 lines of the federal department of health and human services' office of
41 inspector general regarding repayment of fees or recoveries, shall credit
42 10% of such remittance to the false claims litigation revolving fund, which
43 is hereby established in the state treasury. Moneys in the false claims

1 litigation revolving fund may be expended by the attorney general for the
2 purpose of hiring necessary staff and to defray the costs of investigating
3 and litigating ongoing false claims cases and may be shared at the direc-
4 tion of the attorney general with the Kansas medicaid fraud control unit,
5 Kansas bureau of investigation or any county, city or private attorneys
6 who may be utilized or contracted with pursuant to section 4, and amend-
7 ments thereto, in carrying out the purposes of this act and any other
8 operating expenses incurred in administering the Kansas false claims act.
9 All expenditures from the false claims litigation revolving fund shall be
10 made in accordance with appropriation acts upon warrants of the director
11 of accounts and reports issued pursuant to vouchers approved by the
12 attorney general or the attorney general's designee.

13 Sec. 8. Liability pursuant to this act is joint and several for any vio-
14 lation done by two or more persons.

15 Sec. 9. Any action under this act may be brought in any county or
16 district court in which the defendant or, in the case of multiple defen-
17 dants, any one defendant can be found, resides or transacts business or
18 in which any act prohibited by section 3, and amendments thereto,
19 occurred.

20 Sec. 10. If any provision of this act or the application thereof to any
21 person or circumstance is held invalid, the invalidity shall not affect other
22 provisions or applications of the act which can be given effect without
23 the invalid provision or application, and to this end the provisions of this
24 act are severable.

25 Sec. 11. This act shall take effect and be in force from and after its
26 publication in the Kansas register.

FEDERAL FALSE CLAIMS ACT

TITLE 31. MONEY AND FINANCE

SUBTITLE III. FINANCIAL MANAGEMENT

CHAPTER 37. CLAIMS

SUBCHAPTER III. CLAIMS AGAINST THE UNITED STATES GOVERNMENT

3729. False claims

(a) Liability for certain acts. Any person who--

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government, is liable to the United States Government for a civil penalty of not less than \$ 5,000 and not more than \$10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that--

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Knowing and knowingly defined. For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information--

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.

(c) Claim defined. For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) Exemption from disclosure. Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) Exclusion. This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986 [Title 26, USCS].

3730. Civil actions for false claims

(a) Responsibilities of the Attorney General. The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) Actions by private persons.

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall--

(A) proceed with the action, in which case the action shall be conducted by the Government;
or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) Rights of the parties to *qui tam* actions.

(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2) (A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as--

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) Award to *qui tam* plaintiff.

(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) Certain actions barred.

(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2) (A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4) (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

(f) Government not liable for certain expenses. The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) Fees and expenses to prevailing defendant. In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

3731. False claims procedure

(a) A subpoena requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title [31 USCS | 3730] may be served at any place in the United States.

(b) A civil action under section 3730 may not be brought--

- (1) more than 6 years after the date on which the violation of section 3729 is committed, or
- (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.

(c) In any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(d) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.

3732. False claims jurisdiction

(a) Actions under section 3730. Any action under section 3730 may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

(b) Claims under state law. The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730.

3733. Civil investigative demands

(a) In general.

(1) Issuance and service. Whenever the Attorney General has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation, the Attorney General may, before commencing a civil proceeding under section 3730 or other false claims law, issue in writing and cause to be served upon such person, a civil investigative demand requiring such person--

(A) to produce such documentary material for inspection and copying,

(B) to answer in writing written interrogatories with respect to such documentary material or information,

(C) to give oral testimony concerning such documentary material or information, or

(D) to furnish any combination of such material, answers, or testimony. The Attorney General may not delegate the authority to issue civil investigative demands under this subsection. Whenever a civil investigative demand is an express demand for any product of discovery, the Attorney General, the Deputy Attorney General, or an Assistant Attorney General shall cause to be served, in any manner authorized by this section, a copy of such demand upon the person from whom the discovery was obtained and shall notify the person to whom such demand is issued of the date on which such copy was served.

(2) Contents and deadlines.

(A) Each civil investigative demand issued under paragraph (1) shall state the nature of the conduct constituting the alleged violation of a false claims law which is under investigation, and the applicable provision of law alleged to be violated.

(B) If such demand is for the production of documentary material, the demand shall--

(i) describe each class of documentary material to be produced with such definiteness and certainty as to permit such material to be fairly identified;

(ii) prescribe a return date for each such class which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying; and

(iii) identify the false claims law investigator to whom such material shall be made available.

(C) If such demand is for answers to written interrogatories, the demand shall--

(i) set forth with specificity the written interrogatories to be answered;

(ii) prescribe dates at which time answers to written interrogatories shall be submitted; and

(iii) identify the false claims law investigator to whom such answers shall be submitted.

(D) If such demand is for the giving of oral testimony, the demand shall--

(i) prescribe a date, time, and place at which oral testimony shall be commenced;

(ii) identify a false claims law investigator who shall conduct the examination and the custodian to whom the transcript of such examination shall be submitted;

(iii) specify that such attendance and testimony are necessary to the conduct of the investigation;

(iv) notify the person receiving the demand of the right to be accompanied by an attorney and any other representative; and

(v) describe the general purpose for which the demand is being issued and the general nature of the testimony, including the primary areas of inquiry, which will be taken pursuant to the demand.

(E) Any civil investigative demand issued under this section which is an express demand for any product of discovery shall not be returned or returnable until 20 days after a copy of such demand has been served upon the person from whom the discovery was obtained.

(F) The date prescribed for the commencement of oral testimony pursuant to a civil investigative demand issued under this section shall be a date which is not less than seven days after the date on which demand is received, unless the Attorney General or an Assistant Attorney General designated by the Attorney General determines that exceptional circumstances are present which warrant the commencement of such testimony within a lesser period of time.

(G) The Attorney General shall not authorize the issuance under this section of more than one civil investigative demand for oral testimony by the same person unless the person requests otherwise or unless the Attorney General, after investigation, notifies that person in writing that an additional demand for oral testimony is necessary. The Attorney General may not, notwithstanding section 510 of title 28, authorize the performance, by any other officer, employee, or agency, of any function vested in the Attorney General under this subparagraph.

(b) Protected material or information.

(1) In general. A civil investigative demand issued under subsection (a) may not require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony if such material, answers, or testimony would be protected from disclosure under--

(A) the standards applicable to subpoenas or subpoenas duces tecum issued by a court of the United States to aid in a grand jury investigation; or

(B) the standards applicable to discovery requests under the Federal Rules of Civil Procedure, to the extent that the application of such standards to any such demand is appropriate and consistent with the provisions and purposes of this section.

(2) Effect on other orders, rules, and laws. Any such demand which is an express demand for any product of discovery supersedes any inconsistent order, rule, or provision of law (other than this section) preventing or restraining disclosure of such product of discovery to any person. Disclosure of any product of discovery pursuant to any such express demand does not constitute a waiver of any right or privilege which the person making such disclosure may be entitled to invoke to resist discovery of trial preparation materials.

(c) Service; jurisdiction.

(1) By whom served. Any civil investigative demand issued under subsection (a) may be served by a false claims law investigator, or by a United States marshal or a deputy marshal, at any place within the territorial jurisdiction of any court of the United States.

(2) Service in foreign countries. Any such demand or any petition filed under subsection (j) may be served upon any person who is not found within the territorial jurisdiction of any court of the United States in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign country. To the extent that the courts of the United States can assert jurisdiction over any such person consistent with due process, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance with this section by any such person that such court would have if such person were personally within the jurisdiction of such court.

(d) Service upon legal entities and natural persons.

(1) Legal entities. Service of any civil investigative demand issued under subsection (a) or of any petition filed under subsection (j) may be made upon a partnership, corporation, association, or other legal entity by--

(A) delivering an executed copy of such demand or petition to any partner, executive officer, managing agent, or general agent of the partnership, corporation, association, or entity, or to any agent authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity;

(B) delivering an executed copy of such demand or petition to the principal office or place of business of the partnership, corporation, association, or entity; or

(C) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to such partnership, corporation, association, or entity at its principal office or place of business.

(2) Natural persons. Service of any such demand or petition may be made upon any natural person by--

(A) delivering an executed copy of such demand or petition to the person; or

(B) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to the person at the person's residence or principal office or place of business.

(e) Proof of service. A verified return by the individual serving any civil investigative demand issued under subsection (a) or any petition filed under subsection (j) setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f) Documentary material.

(1) Sworn certificates. The production of documentary material in response to a civil investigative demand served under this section shall be made under a sworn certificate, in such form as the demand designates, by--

(A) in the case of a natural person, the person to whom the demand is directed, or

(B) in the case of a person other than a natural person, a person having knowledge of the facts and circumstances relating to such production and authorized to act on behalf of such person. The certificate shall state that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the false claims law investigator identified in the demand.

(2) Production of materials. Any person upon whom any civil investigative demand for the production of documentary material has been served under this section shall make such material available for inspection and copying to the false claims law investigator identified in such demand at the principal place of business of such person, or at such other place as the false claims law investigator and the person thereafter may agree and prescribe in writing, or as the court may direct under subsection (j)(1). Such material shall be made so available on the return date specified in such demand, or on such later date as the false claims law investigator may prescribe in writing. Such person may, upon written agreement between the person and the false claims law investigator, substitute copies for originals of all or any part of such material.

(g) Interrogatories. Each interrogatory in a civil investigative demand served under this section shall be answered separately and fully in writing under oath and shall be submitted under a sworn certificate, in such form as the demand designates, by--

(1) in the case of a natural person, the person to whom the demand is directed, or

(2) in the case of a person other than a natural person, the person or persons responsible for answering each interrogatory.

If any interrogatory is objected to, the reasons for the objection shall be stated in the certificate instead of an answer. The certificate shall state that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted. To the extent that any information is not furnished, the information shall be identified and reasons set forth with particularity regarding the reasons why the information was not furnished.

(h) Oral examinations.

(1) Procedures. The examination of any person pursuant to a civil investigative demand for oral testimony served under this section shall be taken before an officer authorized to administer oaths and affirmations by the laws of the United States or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall, personally or by someone acting under the direction of the officer and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically and shall be transcribed. When the testimony is fully transcribed, the officer before whom the testimony is taken shall promptly transmit a copy of the transcript of the testimony to the custodian. This subsection shall not preclude the taking of testimony by any means authorized by, and in a manner consistent with, the Federal Rules of Civil Procedure.

(2) Persons present. The false claims law investigator conducting the examination shall exclude from the place where the examination is held all persons except the person giving the testimony, the attorney for and any other representative of the person giving the testimony, the attorney for the Government, any person who may be agreed upon by the attorney for the Government and the person giving the testimony, the officer before whom the testimony is to be taken, and any stenographer taking such testimony.

(3) Where testimony taken. The oral testimony of any person taken pursuant to a civil investigative demand served under this section shall be taken in the judicial district of the United States within which such person resides, is found, or transacts business, or in such other place as may be agreed upon by the false claims law investigator conducting the examination and such person.

(4) Transcript of testimony. When the testimony is fully transcribed, the false claims law investigator or the officer before whom the testimony is taken shall afford the witness, who may be accompanied by counsel, a reasonable opportunity to examine and read the transcript, unless such examination and reading are waived by the witness. Any changes in form or substance which the witness desires to make shall be entered and identified upon the transcript by the officer or the false claims law investigator, with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness, unless the witness in writing waives the signing, is ill, cannot be found, or refuses to sign. If the transcript is not signed by the witness within 30 days after being afforded a reasonable opportunity to examine it, the officer or the false claims law investigator shall sign it and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with the reasons, if any, given therefor.

(5) Certification and delivery to custodian. The officer before whom the testimony is taken shall certify on the transcript that the witness was sworn by the officer and that the transcript is a true record of the testimony given by the witness, and the officer or false claims law investigator shall promptly deliver the transcript, or send the transcript by registered or certified mail, to the custodian.

(6) Furnishing or inspection of transcript by witness. Upon payment of reasonable charges therefor, the false claims law investigator shall furnish a copy of the transcript to the witness only, except that the Attorney General, the Deputy Attorney General, or an Assistant Attorney General may, for good cause, limit such witness to inspection of the official transcript of the witness' testimony.

(7) Conduct of oral testimony.

(A) Any person compelled to appear for oral testimony under a civil investigative demand issued under subsection (a) may be accompanied, represented, and advised by counsel. Counsel may advise such person, in confidence, with respect to any question asked of such person. Such person or counsel may object on the record to any question, in whole or in part, and shall briefly state for the record the reason for the objection. An objection may be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on the grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. Such person may not otherwise object to or refuse to answer any question, and may not directly or through counsel otherwise interrupt the oral examination. If such person refuses to answer any question, a petition may be filed in the district court of the United States under subsection (j)(1) for an order compelling such person to answer such question.

(B) If such person refuses to answer any question on the grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of part V of title 18.

(8) Witness fees and allowances. Any person appearing for oral testimony under a civil investigative demand issued under subsection (a) shall be entitled to the same fees and allowances which are paid to witnesses in the district courts of the United States.

(i) Custodians of documents, answers, and transcripts.

(1) Designation. The Attorney General shall designate a false claims law investigator to serve as custodian of documentary material, answers to interrogatories, and transcripts of oral testimony received under this section, and shall designate such additional false claims law investigators as the Attorney General determines from time to time to be necessary to serve as deputies to the custodian.

(2) Responsibility for materials; disclosure.

(A) A false claims law investigator who receives any documentary material, answers to interrogatories, or transcripts of oral testimony under this section shall transmit them to the custodian. The custodian shall take physical possession of such material, answers, or transcripts and shall be responsible for the use made of them and for the return of documentary material under paragraph (4).

(B) The custodian may cause the preparation of such copies of such documentary material, answers to interrogatories, or transcripts of oral testimony as may be required for official use by any false claims law investigator, or other officer or employee of the Department of Justice, who is authorized for such use under regulations which the Attorney General shall issue. Such material, answers, and transcripts may be used by any such authorized false claims law investigator or other officer or employee in connection with the taking of oral testimony under this section.

(C) Except as otherwise provided in this subsection, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, while in the possession of the custodian, shall be available for examination by any individual other than a false claims law investigator or other officer or employee of the Department of Justice authorized under subparagraph (B). The prohibition in the preceding sentence on the availability of material, answers, or transcripts shall not apply if consent is given by the person who produced such material, answers, or transcripts, or, in the case of any product of discovery produced pursuant to an express demand for such material, consent is given by the person from whom the discovery was obtained. Nothing in this subparagraph is intended to prevent disclosure to the Congress, including any committee or subcommittee of the Congress, or to any other agency of the United States for use by such agency in furtherance of its statutory responsibilities. Disclosure of information to any such other agency shall be allowed only upon application, made by the Attorney General to a United States district court, showing substantial need for the use of the information by such agency in furtherance of its statutory responsibilities.

(D) While in the possession of the custodian and under such reasonable terms and conditions as the Attorney General shall prescribe--

(i) documentary material and answers to interrogatories shall be available for examination by the person who produced such material or answers, or by a representative of that person authorized by that person to examine such material and answers; and

(ii) transcripts of oral testimony shall be available for examination by the person who produced such testimony, or by a representative of that person authorized by that person to examine such transcripts.

(3) Use of material, answers, or transcripts in other proceedings. Whenever any attorney of the Department of Justice has been designated to appear before any court, grand jury, or Federal agency in any case or proceeding, the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony received under this section may deliver to such attorney such material, answers, or transcripts for official use in connection with any such case or proceeding as such attorney determines to be required. Upon the completion of any such case or proceeding, such attorney shall return to the custodian any such material, answers, or transcripts so delivered which have not passed into the control of such court, grand jury, or agency through introduction into the record of such case or proceeding.

(4) Conditions for return of material. If any documentary material has been produced by any person in the course of any false claims law investigation pursuant to a civil investigative demand under this section, and--

(A) any case or proceeding before the court or grand jury arising out of such investigation, or any proceeding before any Federal agency involving such material, has been completed, or

(B) no case or proceeding in which such material may be used has been commenced within a reasonable time after completion of the examination and analysis of all documentary material and other information assembled in the course of such investigation,

the custodian shall, upon written request of the person who produced such material, return to such person any such material (other than copies furnished to the false claims law investigator under subsection (f)(2) or made for the Department of Justice under paragraph (2)(B)) which has not passed into the control of any court, grand jury, or agency through introduction into the record of such case or proceeding.

(5) Appointment of successor custodians. In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony produced pursuant to a civil

investigative demand under this section, or in the event of the official relief of such custodian from responsibility for the custody and control of such material, answers, or transcripts, the Attorney General shall promptly--

(A) designate another false claims law investigator to serve as custodian of such material, answers, or transcripts, and

(B) transmit in writing to the person who produced such material, answers, or testimony notice of the identity and address of the successor so designated. Any person who is designated to be a successor under this paragraph shall have, with regard to such material, answers, or transcripts, the same duties and responsibilities as were imposed by this section upon that person's predecessor in office, except that the successor shall not be held responsible for any default or dereliction which occurred before that designation.

(j) Judicial proceedings.

(1) Petition for enforcement. Whenever any person fails to comply with any civil investigative demand issued under subsection (a), or whenever satisfactory copying or reproduction of any material requested in such demand cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of the civil investigative demand.

(2) Petition to modify or set aside demand.

(A) Any person who has received a civil investigative demand issued under subsection (a) may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon the false claims law investigator identified in such demand a petition for an order of the court to modify or set aside such demand. In the case of a petition addressed to an express demand for any product of discovery, a petition to modify or set aside such demand may be brought only in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending. Any petition under this subparagraph must be filed--

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person. During the pendency of the petition in the court, the court may stay, as it deems proper, the running of the time allowed for compliance with the demand, in whole or in part, except that the person filing the petition shall comply with any portions of the demand not sought to be modified or set aside.

(3) Petition to modify or set aside demand for product of discovery.

(A) In the case of any civil investigative demand issued under subsection (a) which is an express demand for any product of discovery, the person from whom such discovery was obtained may file, in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending, and serve upon any false claims law investigator identified in the demand and upon the recipient of the demand, a petition for an order of such court to modify or set aside those portions of the demand requiring production of any such product of discovery. Any petition under this subparagraph must be filed--

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the portions of the demand from which relief is sought to comply with the provisions of this section, or upon any constitutional or other legal right or privilege of the petitioner. During the pendency of the petition, the court may stay, as it deems proper, compliance with the demand and the running of the time allowed for compliance with the demand.

(4) Petition to require performance by custodian of duties. At any time during which any custodian is in custody or control of any documentary material or answers to interrogatories produced, or transcripts of oral testimony given, by any person in compliance with any civil investigative demand issued under subsection (a), such person, and in the case of an express demand for any product of discovery, the person from whom such discovery was obtained, may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian, a petition for an order of such court to require the performance by the custodian of any duty imposed upon the custodian by this section.

(5) Jurisdiction. Whenever any petition is filed in any district court of the United States under this subsection, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry out the provisions of this section. Any final order so entered shall be subject to appeal under section 1291 of title 28. Any disobedience of any final order entered under this section by any court shall be punished as a contempt of the court.

(6) Applicability of Federal Rules of Civil Procedure. The Federal Rules of Civil Procedure shall apply to any petition under this subsection, to the extent that such rules are not inconsistent with the provisions of this section.

(k) Disclosure exemption. Any documentary material, answers to written interrogatories, or oral testimony provided under any civil investigative demand issued under subsection (a) shall be exempt from disclosure under section 552 of title 5.

(l) Definitions. For purposes of this section--

(1) the term "false claims law" means--

(A) this section and sections 3729 through 3732; and

(B) any Act of Congress enacted after the date of the enactment of this section [enacted Oct. 27, 1986] which prohibits, or makes available to the United States in any court of the United States any civil remedy with respect to, any false claim against, bribery of, or corruption of any officer or employee of the United States;

(2) the term "false claims law investigation" means any inquiry conducted by any false claims law investigator for the purpose of ascertaining whether any person is or has been engaged in any violation of a false claims law;

(3) the term "false claims law investigator" means any attorney or investigator employed by the Department of Justice who is charged with the duty of enforcing or carrying into effect any false claims law, or any officer or employee of the United States acting under the direction and supervision of such attorney or investigator in connection with a false claims law investigation;

(4) the term "person" means any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State;

(5) the term "documentary material" includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document, or data compilations stored in or accessible through computer or other information retrieval systems, together with instructions and all other materials necessary to use or interpret such data compilations, and any product of discovery;

(6) the term "custodian" means the custodian, or any deputy custodian, designated by the Attorney General under subsection (i)(1); and

(7) the term "product of discovery" includes--

(A) the original or duplicate of any deposition, interrogatory, document, thing, result of the inspection of land or other property, examination, or admission, which is obtained by any method of discovery in any judicial or administrative proceeding of an adversarial nature;

(B) any digest, analysis, selection, compilation, or derivation of any item listed in subparagraph (A); and

(C) any index or other manner of access to any item listed in subparagraph (A).

CHAPTER 3--ELIMINATING FRAUD, WASTE, AND ABUSE IN MEDICAID

SEC. 6032. ENCOURAGING THE ENACTMENT OF STATE FALSE CLAIMS ACTS.

(a) IN GENERAL- Title XIX of the Social Security Act (42 U.S.C. 1396 et seq.) is amended by inserting after section 1908A the following:

STATE FALSE CLAIMS ACT REQUIREMENTS FOR INCREASED STATE SHARE OF RECOVERIES

SEC. 1909. (a) IN GENERAL- Notwithstanding section 1905(b), if a State has in effect a law relating to false or fraudulent claims that meets the requirements of subsection (b), the Federal medical assistance percentage with respect to any amounts recovered under a State action brought under such law, shall be decreased by 10 percentage points.

(b) REQUIREMENTS- For purposes of subsection (a), the requirements of this subsection are that the Inspector General of the Department of Health and Human Services, in consultation with the Attorney General, determines that the State has in effect a law that meets the following requirements:

- (1) The law establishes liability to the State for false or fraudulent claims described in section 3729 of title 31, United States Code, with respect to any expenditure described in section 1903(a).
- (2) The law contains provisions that are at least as effective in rewarding and facilitating qui tam actions for false or fraudulent claims as those described in sections 3730 through 3732 of title 31, United States Code.
- (3) The law contains a requirement for filing an action under seal for 60 days with review by the State Attorney General.
- (4) The law contains a civil penalty that is not less than the amount of the civil penalty authorized under section 3729 of title 31, United States Code.

(c) DEEMED COMPLIANCE- A State that, as of January 1, 2007, has a law in effect that meets the requirements of subsection (b) shall be deemed to be in compliance with such requirements for so long as the law continues to meet such requirements.

(d) NO PRECLUSION OF BROADER LAWS- Nothing in this section shall be construed as prohibiting a State that has in effect a law that establishes liability to the State for false or fraudulent claims described in section 3729 of title 31, United States Code, with respect to programs in addition to the State program under this title, or with respect to expenditures in addition to expenditures described in section 1903(a), from being considered to be in compliance with the requirements of subsection (a) so long as the law meets such requirements.

(b) EFFECTIVE DATE- Except as provided in section 6035(e), the amendments made by this section take effect on January 1, 2007.

AS OF NOVEMBER 19, 2008

States with False Claims Acts Certified by OIG	States with False Claims Acts REJECTED by OIG	States with False Claims Acts including Qui Tam Provisions (No OIG certification yet)	States with laws for prosecuting false medicaid claims - no qui tam
California Georgia Hawaii Illinois Indiana Massachusetts Michigan Nevada New York Rhode Island Tennessee Texas Virginia Wisconsin	Florida Louisiana Michigan New Hampshire New Mexico Oklahoma	Delaware D.C. Montana New Jersey	Arkansas Colorado Maine Missouri Nebraska South Carolina South Dakota Utah



STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

STEVE SIX
ATTORNEY GENERAL

120 SW 10TH AVE., 2ND FLOOR
TOPEKA, KS 66612-1597
(785) 296-2215 • FAX (785) 296-6296
WWW.KSAG.ORG

House Judiciary Committee
Senate Bill 44
Deputy Attorney General Loren Snell
March 10, 2009

Mr. Chairman and members of the committee, thank you for allowing me to provide testimony in support of Senate Bill 44, otherwise known as the Kansas False Claims Act. I am the Deputy Attorney General and Director of the Medicaid Fraud Division of the office of Attorney General Steve Six. Attorney General Six is a strong proponent of this legislation and believes it will enable our office to better prosecute fraud and waste, while at the same time recouping taxpayer money.

The primary mission of the Kansas Medicaid Fraud and Abuse Division is the pursuit of criminal fraud but, in keeping with federal guidance issued in 1999, and later reinforced in the Deficit Reduction Act of 2005, states have been encouraged to use civil enforcement tools in their battles against fraud. The Kansas Medicaid Fraud Control Unit needs more legislative tools to fulfill the mission envisioned for it by Congress - tools that Medicaid Fraud Control Units in 31 other states already have and are using to their advantage in protecting their states' Medicaid dollars.

The Kansas Medicaid program, having a budget in FY 2008 of approximately \$2.4 billion dollars, is an extremely large consumer of taxpayer dollars. Moreover, based upon reports published by the National Health Care Anti-Fraud Association in 2008 that "at least 3 percent of that spending (United States spends more than \$2 trillion on healthcare annually) is lost to fraud each year." The intent of this bill is to provide Kansans with a tool that will allow for the recovery of taxpayer dollars that have been obtained by providers through fraudulent means, and in the process, return a portion of those dollars to the State of Kansas

It goes without saying that given the prospect of being criminally convicted or subjected to a civil judgment, most providers would prefer the civil judgment. This allows them to avoid the stigma of having a criminal conviction on their record that could potentially follow them forever. With that being said, passage of this bill is not being urged as a means to avoid any further criminal prosecutions by our office. Under our current system of prosecution, our only option is to prosecute criminal violations. Based on our experience, however, criminal charges may not be appropriate in each and every situation. The dilemma often faced by our unit is that if we pursue a criminal case that

House Judiciary

Date 3-10-09

Attachment # 2

results in a conviction, we are required by federal law to submit information concerning that conviction to the Department of Health and Human Services, Office of Inspector General for possible exclusion of that provider from being able to participate as a provider in any federally funded health care program. Exclusion is a serious consequence that can jeopardize providers' existence. Having a civil false claims act would give us an alternative to criminal prosecution. Cases we pursue with a civil false claims act could avoid such a dramatic conclusion as exclusion, instead allowing for a Corporate Integrity Agreement to be entered into (a form of civil probation), under which the provider can be monitored while still being permitted to operate and receive federal health care dollars. The potential impact of a criminal conviction that may involve a large corporation could be far reaching and very detrimental, yet under the current system we are left with no other options.

In the Report of the Judicial Council False Claims Act Advisory Committee, one of the primary areas of discussion was whether or not a qui tam provision should be included. Specifically, there were those on the committee that expressed a desire to pass a bill that would satisfy the requirements set forth in the Deficit Reduction Act of 2005, thereby allowing for the State of Kansas to increase the share of any amount recovered from a state action brought under a qualifying false claims act. In regards to a qui tam provision, it is the position of the Attorney General's office that this bill should be passed, as written, without such a provision, at this time.

Having served as one of several members of a subcommittee within the Kansas Judicial Council who helped draft SB 44, I know first hand that the Judicial Council gave careful consideration when drafting this legislation. We received and included input from all of the interested parties, including industry, legal, legislative, and taxpayer representatives. The final version of the bill that you have before you today received broad, unanimous support from within the Judicial Council. I encourage you to report SB 44 out of committee favorably, as written.



623 SW 10th Avenue
Topeka KS 66612-1627
785.235.2383
800.332.0156
fax 785.235.5114

www.KMSonline.org

To: House Judiciary Committee

From: Jerry Slaughter
Executive Director

Date: March 9, 2009

Subject: SB 44; False Claims Act

The Kansas Medical Society appreciates the opportunity to appear today as you consider SB 44, which establishes a state-level false claims act that is for the most part consistent with the Federal False Claims Act (31 U.S.C. 3729 *et seq.*). This bill is the result of a study of 2008 HB 2943, which was conducted during the last interim by the False Claims Act Advisory Committee of the Judicial Council. We would like to express our appreciation to the Judicial Council for allowing us to participate in the study. We can support the bill as it is written.

The bill represents a compromise among the various organizations and individuals who participated in the Advisory Committee process. We believe it is a reasonable approach, one that strikes an appropriate balance. It is very similar to the federal false claims law, with only a couple of exceptions. The principle difference is that it does not include a private cause of action, or *qui tam*, provision. We objected to including the *qui tam* section because we felt that it would encourage the filing of unmeritorious allegations of fraud by private individuals since they, and their attorneys, would stand to gain financially from any settlements or judgments arising from the action.

As you know, there already exist an abundance of programs and agencies which are charged with identifying fraudulent activities in Medicaid and its related programs. The Surveillance and Utilization Review Subsystem (SURS), which is mandated by federal rules, does continuous and thorough analyses of provider billing practices and utilization of services in Medicaid. The Office of Inspector General also investigates fraud in the programs, and works with the Medicaid Fraud Control Unit (MFCU) at the Kansas Attorney General's office to prosecute fraud and false claims. The Centers for Medicare and Medicaid Services (CMS) supervises Medicaid Integrity Contractors (MICs), who perform audits of contracting health care providers. Inpatient hospital claims are also reviewed by the Kansas Foundation for Medical Care (KFMC) for medical necessity and appropriateness of payment. In addition, the Quality Assurance programs, the Prior Authorization programs, and the extensive audits/edits contained in the Medicaid Management Information System, are all dedicated to maintaining program integrity by identifying and eliminating fraud.

House Judiciary

Date 3-10-09

Attachment # 3

Having said that, one compelling argument in favor of a state-level false claims act is that it would allow the Attorney General to file a civil action in lieu of a criminal action, which would not automatically result in loss of license for a defendant while the case is being developed and prosecuted.

Our support for this legislation is predicated on maintaining the language which is found Section 4 (b) on page 3, lines 28-29, which makes it clear that, except for the whistleblower protection found in Section 6, nothing in the act shall be construed to create a private cause of action. We believe this approach is appropriate because it relies on the Attorney General to bring an action for violations of the Act, presumably after an investigation and a showing that there is a reasonable basis to suspect actual fraud. We believe that strikes an appropriate balance between protecting the public and not subjecting providers to meritless and costly litigation.

Thank you for the opportunity to comment on SB 44.



Tom Bell
President and CEO

March 10, 2009

TO: House Judiciary Committee

FROM: Chad Austin
Vice President, Government Relations

RE: Senate Bill 44 – Kansas False Claims Act

The Kansas Hospital Association appreciates the opportunity to provide written testimony regarding the provisions of SB 44. This bill creates a state-level “false claims act” targeting the submission of any false or fraudulent claim submitted to the state for payment.

We would like to stress that Kansas hospitals have no tolerance for Medicaid fraud and abuse and feel strongly that it should be vigorously prosecuted to the fullest extent of the law. It should be noted that several current state and federal statutes already exist to curb such activity. Currently, Kansas has the Medicaid Fraud Control Act found at K.S.A. 21-3844, *et. seq.*, which provides for criminal penalties, recovery of monies and the imposition of civil monetary penalties. Additionally, existing SRS regulations allow the agency to terminate a provider for civil or criminal fraud against Kansas Medicaid [K.A.R. 30-5-60(a)(12)]. Further, the Federal False Claims Act has been used specifically to target Medicaid Fraud and authorizes the federal government to assess both criminal and civil monetary penalties against any offender. As a result of the Deficit Reduction Act of 2005 and taking effect as of January 1, 2007, state Medicaid directors were required to implement certain education requirements for providers and others who receive at least \$5 million a year in Medicaid payments. Those providers that meet this threshold must establish written policies for all employees, contractors and agents that include detailed information about the Federal False Claims Act and outline the organization’s policies and procedures for detecting and preventing waste, fraud, and abuse. Lastly, a Medicaid Fraud Control Unit is located with the Attorney General’s office and serves as the watch dog for Medicaid fraud committed in Kansas. Acknowledgement should be given to the various existing federal and state statutes and regulations dealing with Medicaid fraud and abuse.

KHA appreciated the opportunity to participate in the False Claims Act Advisory Committee and supports the language contained in subsection (b) of section 4, found at lines 28-29 on page three of the bill dealing with the prohibition of a private cause of action except as outlined in section 6 of the bill. We are in agreement with those who believe that private causes of action could encourage the filing of frivolous and unwarranted lawsuits.

Thank you very much for your consideration of our comments.

Kansas Hospital Association

215 S.E. 8th Ave. • Topeka, KS 66603-3906 • Phone: (785) 233-7436 • Fax: (785) 233-6

House Judiciary

Date 3-10-09

Attachment # 4



Jim Bush

KANSAS JUDICIAL COUNCIL

JUSTICE LAWTON R. NUSS, CHAIR, SALINA
JUDGE JERRY G. ELLIOTT, WICHITA
JUDGE ROBERT J. FLEMING, PARSONS
JUDGE JEAN F. SHEPHERD, LAWRENCE
SEN. THOMAS C. (TIM) OWENS, OVERLAND PARK
REP. LANCE Y. KINZER, OLATHE
J. NICK BADGEROW, OVERLAND PARK
GERALD L. GOODELL, TOPEKA
JOSEPH W. JETER, HAYS
STEPHEN E. ROBISON, WICHITA

Kansas Judicial Center
301 S.W. Tenth Street, Suite 140
Topeka, Kansas 66612-1507

Telephone (785) 296-2498
Facsimile (785) 296-1035

judicial.council@ksjc.state.ks.us
www.kansasjudicialcouncil.org

EXECUTIVE DIRECTOR
RANDY M. HEARRELL
STAFF ATTORNEYS
NANCY J. STROUSE
CHRISTY R. MOLZEN
NATALIE F. GIBSON
ADMINISTRATIVE ASSISTANTS
JANELLE L. WILLIAMS
MARIAN L. CLINKENBEARD
BRANDY M. WHEELER

MEMORANDUM

TO: House Judiciary Committee

FROM: Kansas Judicial Council

DATE: March 10, 2009

RE: Testimony on 2009 SB 45 Relating to Amendments to the Kansas Power of Attorney Act.

BACKGROUND

In 2003, the Kansas Power of Attorney Act was passed by the Legislature. The act was drafted by the Kansas Judicial Council's Probate Advisory Committee (PLAC) and recommended by the Judicial Council

In July of 2006, the National Conference of Commissioners on Uniform State Laws approved the Uniform Power of Attorney Act. The PLAC reviewed the Uniform Power of Attorney Act and noted that in several respects the Kansas act was more comprehensive. Therefore, PLAC did not recommend the adoption of the Uniform act at this time. However, it was the consensus of the Committee that after a number of states (including some that border Kansas) have adopted the act, that the PLAC will again review the Uniform act.

Though the PLAC did not recommend adoption of the Uniform Power of Attorney act at this time, the Committee did propose three amendments to the Kansas Power of Attorney act which are based on the Uniform Act.

House Judiciary
Date 3-10-09
Attachment # 5



To: Representative Lance Kinzer, Chair, and Members House Judiciary Committee.
From: Joe Ewert, KAHSA Government Affairs Coordinator
Date: March 10th, 2009
Re: Senate Bill 45

Thank you, Chairman Kinzer, and members of the Committee, for this opportunity to provide testimony on Senate Bill 45. The Kansas Association of Homes and Services for the Aging represents 160 not-for-profit long term care provider organizations throughout the state. Over 20,000 senior Kansans are served by our members, which include retirement communities, nursing homes, hospital-based long term care units, assisted living residences, senior housing and community service providers.

Addressing the 2008 Combating Elder Abuse and Financial Exploitation Summit, May 14, 2008, Kansas Attorney General Steve Six stated, "financial exploitation, or fiduciary abuse is the most common form of reported elder abuse in our state, but it's not always viewed as a crime." Our members witness this abuse every day across Kansas, and far too often it is perpetrated by those who operate as a Power of Attorney (POA) and do not distinguish their funds from those of another for which they have taken responsibility.

We support the action in SB 45 that would prohibit a Power of Attorney from comingling the funds of their principal with those of their own, and would require a POA to maintain a record of transactions made from their principal's accounts. We believe this bill will prevent certain types of fiduciary abuse and will strengthen the ability of those investigating these crimes to effectively prosecute. SB 45 does not address the penalties for failing to meet these expectations, but it is definite progress in the effort to reduce financial exploitation and fiduciary abuse in Kansas. We urge the committee to pass SB 45 this year, and to continue working toward a comprehensive plan to eliminate this growing problem in Kansas.

Thank you for allowing me to present today. I would be pleased to stand for questions.

785.233.7443
kahsainfo@kahsa.org

fax 785.233.9471

House Judiciary
Date 3-10-09
Attachment # 6



OFFICE OF THE STATE
LONG-TERM CARE OMBUDSMAN

Kathleen Sebelius, Governor
Gilbert Cruz, RRT MPA
State Long-Term Care Ombudsman
Gilbert.Cruz@da.ks.gov

TESTIMONY

Judiciary Committee
Chairman ~~Thomas Owens~~ Kinzer

Presented by Gilbert Cruz
Kansas State Long-Term Care Ombudsman
March 10, 2009

Chairman Owens and Members of the Committee:

Thank you for allowing the ombudsman program to testify in support of Senate Bill 45. Our program is concerned about the rise in fiduciary abuse and the methods used to perpetrate abuse. We believe this bill will stop the practice of co-mingling accounts of residents and responsible parties.

The State Long-Term Care (LTC) Ombudsman Program represents the rights of nearly 28,000 individuals located in adult care homes throughout Kansas. This coverage is comprised of nursing home facilities, assisted living facilities, board and care homes, residential health care facilities, home plus facilities, adult day cares and LTC units (LTCU) in hospitals. The ombudsman program provides FREE advocacy assistance to LTC residents as per the Older Americans Act (OAA) guidelines. Presently, ombudsman services do not include nursing facilities for the mental health or for the mentally retarded, private homes or other non-licensed settings.

Every year the State LTC Ombudsman Office submits an annual report of complaint history. In this report, we use categories that breakdown complaints into five main groups. In analyzing 2005-2007 report data, an increase in complaint history is evident. Particularly, resident rights and the non-provider section where financial exploitation and fiduciary abuse occur.

Stronger laws when it comes to Fiduciary Abuse would protect residents from:

- Mental anguish and trauma occurring after such incidents
- Issues of possible discharge due non-payment
- Premature decrease or loss of assets collected over a lifetime

Advocating for resident rights is paramount to the LTC ombudsman program. Stronger laws offer a pathway in dealing with the growing number of fiduciary abuse cases, which is a serious matter to residents residing in adult care homes throughout Kansas. The ombudsman program strongly encourages the committee to champion this cause to protect the health and property of residents.

OFFICE OF THE STATE LONG-TERM CARE OMBUDSMAN
900 S.W. Jackson, Suite 1041 • Topeka, KS 66612-1220
Ph: (785) 296-3017 • Fax: (785) 296-3916 • Toll-Free: 1 (877) 662
E-mail: LTCO@da.ks.gov • Website: http://www.da.ks.gov/care

House Judiciary
Date 3-10-09
Attachment # 7

RESIDENT FUNDS

28-39-149. Protection of resident funds and possessions in nursing facilities. The nursing facility shall have written policies and procedures which ensure the security of residents' possessions and residents' funds accepted by the facility for safekeeping.

(a) The facility shall afford each resident the right to manage the resident's own financial affairs and the facility shall not require any resident to deposit the resident's personal funds with the facility.

(b) Upon written authorization of a resident, the resident's legal representative or power of attorney or an individual who has been appointed conservator for the resident, the facility shall hold, safeguard, manage, and account for the personal funds of the resident deposited with the facility.

(c) The facility shall establish and maintain a system that assures a full, complete, and separate accounting, according to generally accepted accounting principles, of each resident's personal funds entrusted to the facility on the resident's behalf.

(1) The facility shall designate in writing the person responsible for the accounting system.

(2) A record shall be made each time there is a disbursement or addition to the resident's personal fund.

(3) The facility shall provide a written report which includes accounting for all transactions and which states the current fund balance to the resident or the resident's legal representative at least quarterly.

(4) The facility shall deposit any resident's funds in excess of \$50 in one or more interest bearing accounts which are separate from any of the facility's operating accounts, and which credit all interest when earned on the resident's account to the personal account of the resident.

(5) All resident funds deposited by the facility shall be deposited in a Kansas financial institution.

(6) Within 30 days after the death of a resident with personal funds deposited with the facility, the facility shall convey the resident's funds and a final accounting of those funds to the individual or probate jurisdiction administering the resident's estate.

(7) The facility shall purchase a surety bond to assure the security of all residents' personal funds deposited with the facility.

(d) The facility shall have written policies and procedures which ensure the security of each resident's personal possessions.

(1) A written inventory of the resident's personal possessions, signed by the resident or the resident's legal representative shall be completed at the time of admission and updated at least annually.

(2) If a resident requests that the facility hold personal possessions within the facility for safekeeping, the facility shall:

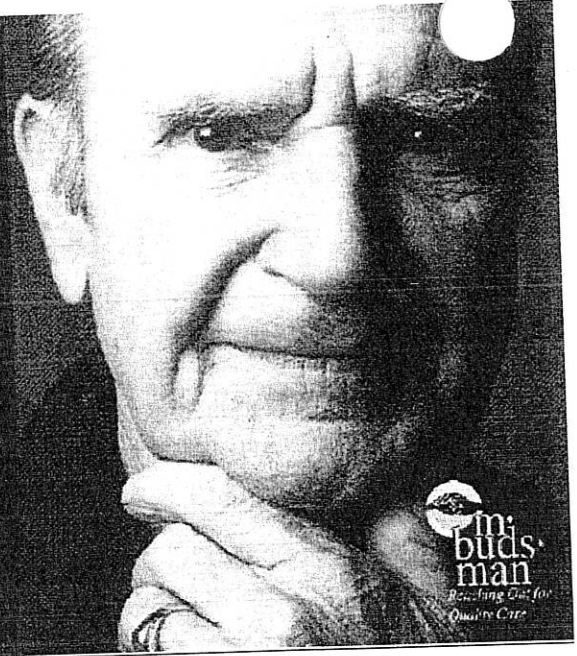
(A) Maintain a written record; and

(B) give a receipt to the resident or the resident's legal representative.

(Authorized by and implementing K.S.A. 39-932; effective Nov. 1, 1993; amended Feb. 21, 1997.)

**Kathleen Sebelius,
Governor**

**Gilbert Cruz, RRT MPA
State LTC Ombudsman**



OFFICE OF THE STATE

Kansas Long-Term Care Ombudsman

**Annual Report
2008**

KANSAS

February 14, 2009

The Honorable Kathleen Sebelius, Governor of Kansas
Members of the Legislature and Fellow Kansans

The Office of the State Long-Term Care (LTC) Ombudsman is pleased to submit the 2008 Annual Advocacy Report as required by K.S.A. 75-7306 (c). This report provides a comprehensive evaluation of the Kansas LTC Ombudsman Program emphasizing efforts made to promote the well-being for adult care home residents in Kansas.

This summary of the Kansas Ombudsman Program is also found in the National Ombudsman Reporting System (NORS), generated for the Administration on Aging. This information encompasses the program's mission statement, overview, history, funding breakdown, structure, recommendations, number of complaints according to category, certified volunteer ombudsman synopsis, and regional ombudsman assignments by county.

During the past year, the state ombudsman office has introduced and/or continued significant initiatives in order to enhance our ability to serve seniors. The program

- Coordinated the efforts of the Governor's Task Force at Fort Dodge. This role improved the quality of life for veterans receiving long-term care.
- Participated with a program that helps relocate nursing home residents to their homes (Money Follows the Person Demonstration Grant).
- Launched "OMBUDDY" an abuse, neglect, and exploitation prevention program that trains residents, family members and staff of nursing homes.
- Facilitated a volunteer training and retention advisory committee to guide decisions to address the needs and goals of the certified volunteer program.
- Created a residents rights brochure in Spanish.
- Awarded Johnson County Nursing Center the first Annual Ombudsman Excellence Award.
- Developed interactive website www.KansasOmbudsman.ks.gov for the public and certified volunteer ombudsman

Finally, we are assisted long-term care professionals to embrace culture change in their facilities throughout the state.

I am convinced these initiatives will continue to improve the quality of life for citizens of Kansas that reside in adult care homes.

Respectfully submitted,



Gilbert Cruz RRT, MPA
Kansas State Long-Term Care Ombudsman

5
7-4

Mission Statement

To advocate for the well-being, safety, and rights of residents of Kansas long-term care facilities by assisting them in attaining the highest possible quality of life.

Program Overview

The Older Americans Act and the Kansas Long-Term Care Ombudsman statute 75-7301 through 75-7314 set forth a number of purposes for the program. A primary purpose is to investigate and resolve complaints on behalf of residents relating to action, inaction, or decisions of long-term care facilities. This is accomplished through the use of a paid program staff and a statewide contingent of certified volunteers.

Furthermore, the state ombudsman, staff, and certified volunteers are required by law to do the following:

1. Develop continuing education programs to inform residents, their family members, and other persons regarding the rights and responsibilities of residents.
2. Analyze and monitor federal, state and local government laws with respect to long-term care facilities.
3. Provide for the training of each regional and volunteer long-term care ombudsman.
4. Provide Governor and the state legislature with an annual report containing a complaint summary and frequency of problems experienced by long-term care residents including policy recommendations to improve the quality of care in facilities.
5. Provide program information to media representatives, public agencies, and others advocacy agencies.

Program History *42 U.S.C. 3058f, Title VII Sec. 712*

Long-Term Care (LTC) Ombudsman Programs were created in the mid-1970's to advocate for the rights and needs of long-term care residents. The program operates in all 50 states and two U.S. Territories as required by the Older Americans Act. Every state has an Office of the State Long-Term Care Ombudsman which guides efforts to improve the lives of residents in LTC facilities. The Kansas LTC Ombudsman program was established in 1980.

2006-2008 Program Funding

Fiscal Year 2006

Older Americans Act	Title IIIB:	FY 2006	\$135,483
Older American Act	Title VII:	FY 2006	\$162,017
Medicaid Match	Title XIX:	FY 2006	\$150,361
State General Fund		FY 2006	\$224,058
Civil Monetary Penalty		FY 2006	\$0

Total \$671,919.00

Fiscal Year 2007

Older Americans Act	Title IIIB:	FY 2007	\$150,413
Older American Act	Title VII:	FY 2007	\$161,787
Medicaid Match	Title XIX:	FY 2007	\$169,000
State General Fund		FY 2007	\$281,465
Civil Monetary Penalty		FY 2007	\$16,314

Total \$778,979.00

Fiscal Year 2008

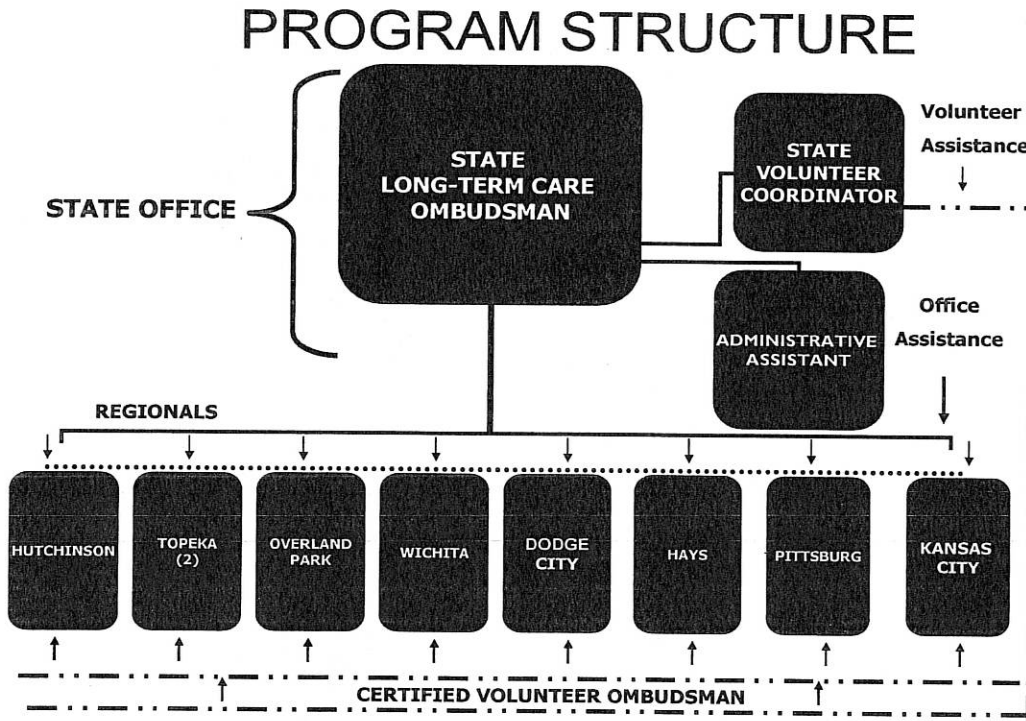
Older Americans Act	Title IIIB:	FY 2008	\$149,744.00
Older American Act	Title VII:	FY 2008	\$165,055.00
Medicaid Match	Title XIX:	FY 2008	\$169,000.00
State General Fund		FY 2008	\$332,948.00
Civil Monetary Penalty		FY 2008	\$16,829.00

Total \$833,576.00

Program Structure

There are twelve paid staff members at the Office of the State Long-Term Care Ombudsman which includes: the State LTC Ombudsman, State Volunteer Coordinator, nine Regional Ombudsmen, and a Sr. Administrative Assistant. The State Long-Term Care Ombudsman is appointed by the Governor and confirmed by the Kansas Senate. The ombudsman program has nine regional offices: two in

Topeka, Overland Park, Kansas City, Wichita, Hutchinson, Hays, Pittsburg, and Dodge City. From those locations, the regional ombudsmen investigate, handle complaints and visit all long-term care facilities in Kansas. In addition, paid staff also provides support and guidance to certified volunteer ombudsmen, consult with facility staff, and conduct in-service training on a variety of topics.



2009 - 2010 Recommendations

In order to effectively advocate for residents in LTC facilities, the Office of the State LTC Ombudsman Program recommends the following:

- Two additional regional ombudsmen to fulfill the Institute of Medicine recommendation of one ombudsman for every 2,000 residents.
- One veteran ombudsman to serve all veterans and the two veteran LTC communities in Fort Dodge and Winfield.
- Amend K.S.A. 75-7303 to expand the ombudsman jurisdiction to include the Kansas Soldiers Home and Kansas Veterans Home.
- Fund a community ombudsman pilot project to gather needed information to begin covering the persons who entered a nursing facility and returned home.

The ombudsman program's resolve is to continue to improve the quality in Kansas LTC facilities. As a result, the program would like to emphasize the approval of the 2009 - 2010 recommendations, as the program advocates for Culture Change in Kansas.

7-8

Complaint Types

- Abuse, Neglect, and Exploitation
- Dignity & Respect Issues
- Medicare
- Medicaid
- Privacy
- Call lights
- Food Service
- Access to own records
- Personal Hygiene
- Dental Services
- Care Plan
- Resident and Family Councils
- Home Care
- Exercise Right to Refuse Care
- Access to facility survey
- Grievance Procedure
- Facility Cleanliness
- Restraints
- Activities
- Discharge
- Legal Guardianship, Conservatorship, Power of Attorney
- Level of Care
- Family Conflict or Interference

2006 - 2008

Categories and Number of Complaints

Ombudsmen are advocates for residents of long-term care facilities in Kansas.

Our advocacy role takes two forms:

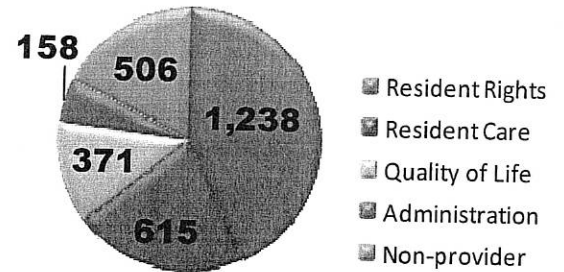
- Receiving and resolving individual complaints and concerns by, or on behalf of, these residents; and
- Pursuing resident advocacy in the long-term care system, its laws, policies, regulations, and administration through public education and collaboration.

Ombudsmen investigate the situation, determine what steps the resident has taken towards resolution, suggest ways in which the resident can advocate for himself or herself, or personally advocate on the residents behalf.

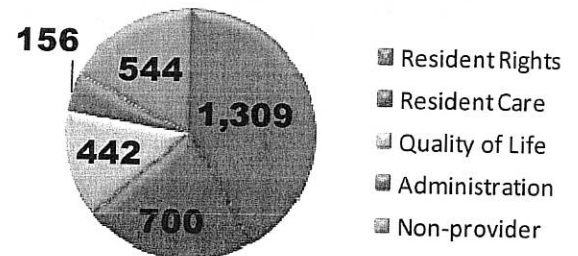
The Administration on Aging defines 133 types of complaints that are grouped into the five main categories

- Resident Rights
- Resident Care
- Quality of Life
- Administration
- Non-Provider

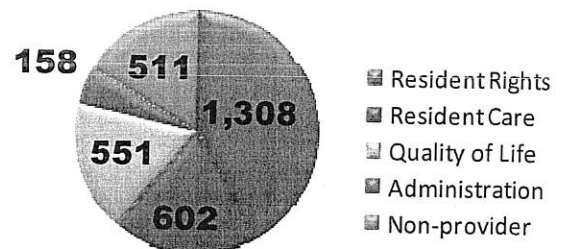
2006 Categories & Number of Complaints Total = 2,888



2007 Categories & Number of Complaints Total = 3,151



2008 Categories & Number of Complaints Total = 3,130



Resident Rights

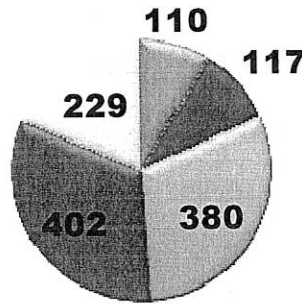
- To exercise your rights as a resident and as a citizen
- To be treated with consideration, respect, and dignity
- To voice grievances without fear or reprisal
- To be free from mental and physical abuse, and to be free from chemical and physical restraints
- To have privacy in care and treatment and to associate and communicate privately with whomever you choose
- To manage your personal and financial affairs; to make choices and independent decisions
- To keep and use personal belongings and to maintain a secure place for those possessions.
- To participate in planning your care and treatment
- To participate in social, religious, and community activities; to participate in the resident council
- To be discharged or transferred only for medical reasons, own welfare or that of others, or for non-payment.
- A problem solver and mediator
- An objective investigator of complaints

2006-2008

Resident Rights

2006 Resident Rights

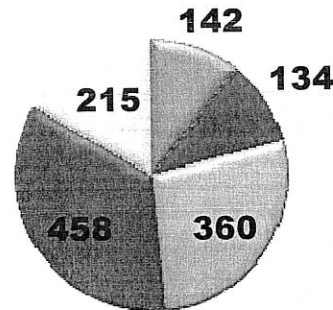
Total = 1,238 Complaints



- Abuse, Neglect, Exploitation
- Access to Information
- Admission, Transfer, Discharge
- Autonomy, Choice
- Financial, Property

2007 Resident Rights

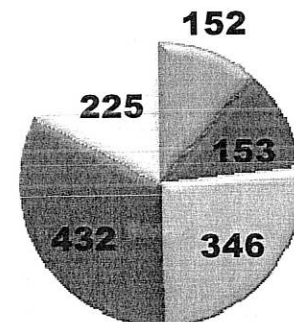
Total = 1,309 Complaints



- Abuse, Neglect, Exploitation
- Access to Information
- Admission, Transfer, Discharge
- Autonomy, Choice
- Financial, Property

2008 Resident Rights

Total = 1,308 Complaints



- Abuse, Neglect, Exploitation
- Access to Information
- Admission, Transfer, Discharge
- Autonomy, Choice
- Financial, Property

10
7-8

Resident Care

Culture Change "Resident-Centered Care"

Culture Change is a national movement transforming our nursing homes from a medical model approach to a resident-centered care model.

A medical approach is an institutional method where staff knows residents by their diagnosis. The residents care plan is written in third person based on what they think is best for the diagnosis scheduled at the facilities convenience.

The resident-centered approach encourages nursing home facilities to create a "home" environment for residents, rather than the institutionalized environment long-term care residents are residing in nursing homes today.

Empowering residents to decide when they want to bathe, what time to eat, what time to wake up or go to bed, or continuing their vocation in the nursing homes are a few examples of the resident-centered approach many Kansas facilities are moving towards.

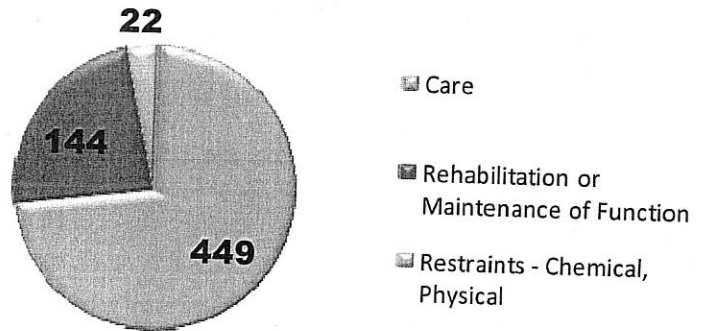
The resident-centered model also supports:

- Resident Empowerment
- Care plans written in "I" format
- Care plan meetings scheduled at resident and family convenience
- Choose activities rather than being told what activity to participate
- Day-to-day decision making
- Consistent nurse staffing

2006-2008 Resident Care

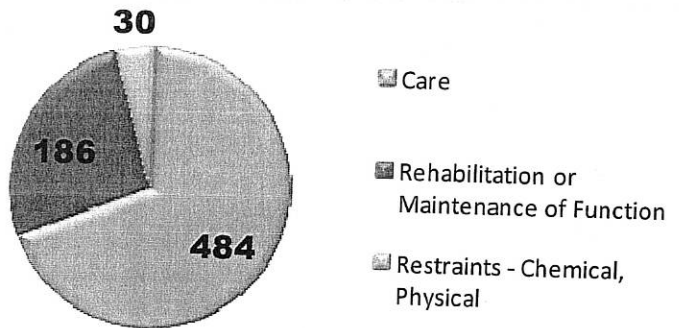
2006 Resident Care

Total = 615 Complaints



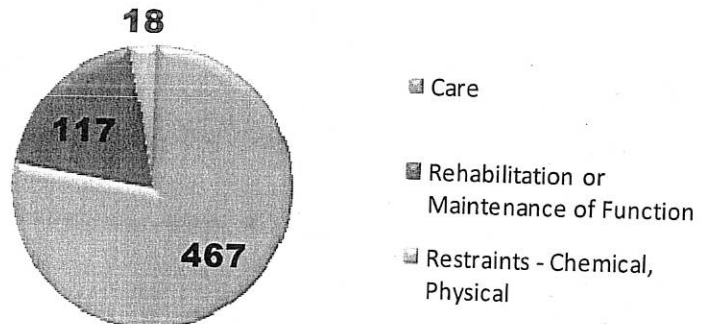
2007 Resident Care

Total = 700 Complaints



2008 Resident Care

Total = 602 Complaints



7-11

Quality of Life

Residents' Rights Guarantee Quality of Life

The 1987 Nursing Home Reform Law requires each nursing home to care for its residents in a manner that promotes and enhances the quality of life of each resident, ensuring dignity, choice, and self-determination.

All nursing homes are required "to provide services and activities to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident in accordance with a written plan of care that... is initially prepared, with participation, to the extent practicable, of the resident, the resident's family, or legal representative." This means a resident should not decline in health or well-being as a result of the way a nursing facility provides care.

1987 Nursing Home Reform Law protects the following rights of nursing home residents:

- The right to be fully informed
- Right to complain
- Right to participate in one's own care
- Right to privacy and confidentiality
- Rights during transfer or discharges
- Right to Dignity, Respect, and Freedom
- Right to Visits
- Rights to make independent choices

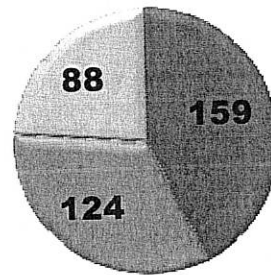
** Additional Resident Rights on page 7*

National Citizens' Coalition for Nursing Home Reform (NCCNHR)

2006 - 2007 Quality of Life

2006 Quality of Life

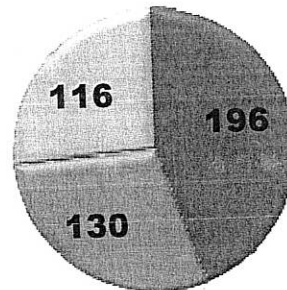
Total = 371 Complaints



- Activities & Social Services
- Dietary
- Environment

2007 Quality of Life

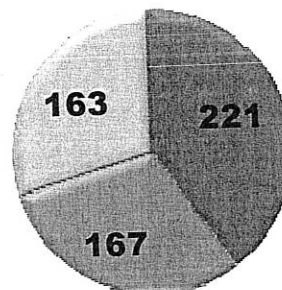
Total = 422 Complaints



- Activities & Social Services
- Dietary
- Environment

2008 Quality of Life

Total = 551 Complaints



- Activities & Social Services
- Dietary
- Environment

Certified Volunteer Ombudsman Information

Ombudsman is an advocate, facilitator and problem solver, educator and extension of the resident's will.

Facility Jurisdiction

Nursing Facility, Home Plus, Adult Day Care, Boarding Care Home, Assisted Living, Hospital Long-Term Care Units, and Resident Care Facility

30 Hour Training Course

Week 1	3 Hours
Introduction to Long-Term Care Systems in Kansas— Navigating Complex Systems	
Week 2	3 Hours
Resident Rights	
Week 3	3 Hours
Advocacy, Legal Issues, Advance Directives, Abuse, Neglect, and Exploitation	
Week 4	3 Hours
Stages of Aging, Medications, Disease Process	
Week 5	3 Hours
Communication Technique and Conflict Resolution	
Week 6	3 Hours
Networking and Reports	
Two Facility Visits	3 Hours
Mini Internship	3 Hours

Certified Volunteer Ombudsman Program
 Created August 1996

Volunteers



The Heart of the Ombudsman Program

Year-To-Date Synopsis

- Total Long-Term Care Facilities: **650**
- Total Certified Volunteer Ombudsman: **183**
- Kansas Facilities Covered: **28%**

Programs

1. *Certified Volunteer Ombudsman Advisory Board*
State LTC Ombudsman, State Volunteer Coordinator, two Regional Ombudsmen, two Certified Volunteer Ombudsmen
2. *Newsletter Editorial Team*
State Volunteer Coordinator, two Certified Volunteer Ombudsmen

Support Services

1. *Volunteer Voice*
An educational newsletter published on a quarterly basis by the state office.
2. *Regional Monthly Meetings*
Direct training by regional ombudsman.
3. *Certified Volunteer Conference*
Statewide training held once a year.
4. *Services*
Badges and in-house business cards issued for identification, supplies, etc.
5. *Website*
Informative, volunteer sign-up, access to past newsletters, articles of interest, links to complaint forms

KANSAS

Gilbert Cruz, RRT MPA
LTC State Ombudsman
Email: Gilbert.Cruz@da.ks.gov

Nancy Ochoa, MCJ
State Volunteer Coordinator
Email: Nancy.Ochoa@da.ks.gov

Tanya Turner
Sr. Administrative Assistant
Email: Tanya.Turner@da.ks.gov

Kansas LTC Ombudsman
900 SW Jackson, Ste. 1041
Topeka, KS 66612

(877) 662-8362 - Toll Free
(785) 296-3017 - Phone
(785) 296-3016 - Fax

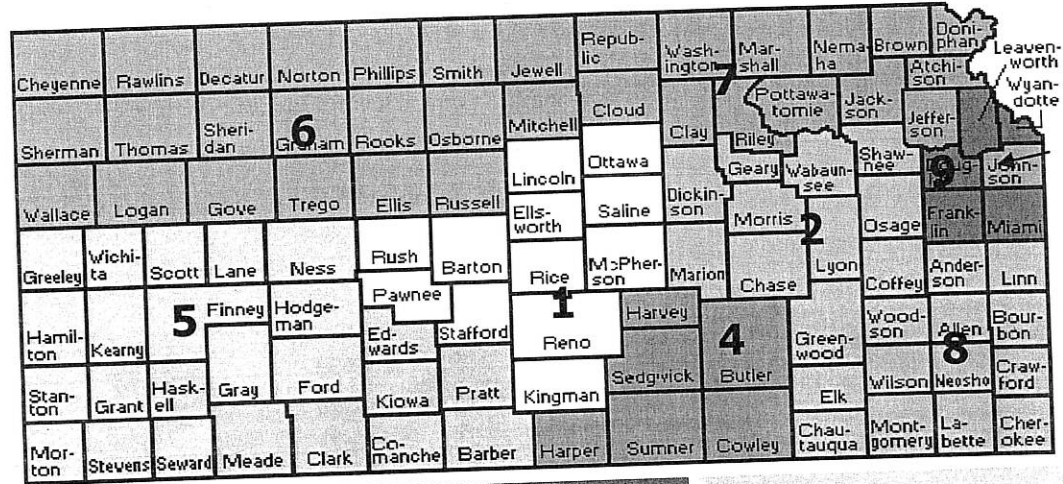
Email: LTCO@da.ks.gov
Website: www.KansasOmbudsman.ks.gov

REGION 1

Lori Myers
Regional Ombudsman
600 Andrew Ave.
So. Hutchinson, KS 67505

(620) 728-0180 - Phone
(620) 728-0180 - Fax
(877) 662-8362 - Toll Free

Email:
Lori.Myers@da.ks.gov



REGION 2

Cynthia Bailey
Regional Ombudsman
900 SW Jackson, Ste. 1041
Topeka, KS 66612

(785) 296-2962 - Phone
(785) 296-3916 - Fax
(877) 662-8362 - Toll Free

Email:
Cynthia.Bailey@da.ks.gov

REGION 3

Joe Dobson
Regional Ombudsman
7700 Shawnee Mission
Pkwy, RM 203
Overland Park, KS 66202

(913) 236-9378 - Phone
(913) 236-9378 - Fax
(877) 662-8362 - Toll Free

Email:
Joe.Dobson@da.ks.gov

REGION 4

Gloria Simpson
Regional Ombudsman
130 S. Market, Ste. 5063
Wichita, KS 67202

(316) 337-7379 - Phone
(785) 337-6023 - Fax
(877) 662-8362 - Toll Free

Email:
Gloria.Simpson@da.ks.gov

REGION 5

Jan Scoggins
Regional Ombudsman
1509 Avenue P
Dodge City, KS 67801

(620) 225-2439 - Phone
(620) 227-6498 - Fax
(877) 662-8362 - Toll Free

Email:
Jan.Scoggins@da.ks.gov

REGION 6

Velvet Johnson
Regional Ombudsman
332 E. 8th
Hays, KS 67601

(785) 628-3121 - Phone
(785) 625-0092 - Fax
(877) 662-8362 - Toll Free

Email:
Velvet.Johnson@da.ks.gov

REGION 7

James Grooms
Regional Ombudsman
900 SW Jackson, Ste. 1041
Topeka, KS 66612

(785) 296-6017 - Phone
(785) 296-3916 - Fax
(877) 662-8362 - Toll Free

Email:
James.Grooms@da.ks.gov

REGION 8

Gina Johnston
Regional Ombudsman
320 S. Broadway
Pittsburg, KS 66762

(620) 230-0743 - Phone
(620) 231-1921 - Fax
(877) 662-8362 - Toll Free

Email:
Gina.Johnston@da.ks.gov


REGION 9

Phylis Tumberlin
Regional Ombudsman
7700 Shawnee Mission
Pkwy, RM 203
Overland Park, KS 66202

(913) 236-9385 - Phone
(913) 236-9378 - Fax
(877) 662-8362 - Toll Free

Email:
Phylis.Tumberlin@da.ks.gov

14
7-18



KANSAS

*Making a Difference in the Lives of
30,000 Residents*

**Office of the State
Care Ombudsman**

Long-Term

900 SW JACKSON
SUITE 1041
TOPEKA, KS 66612

(785) 296-3017 - Phone
(785) 296-3916 - Fax

Visit Our Website at:
www.Kansasombudsman.ks.gov



SENATE BILL No. 34

By Special Committee on Judiciary

1-15

Balloon 1

9 AN ACT concerning open records; relating to the exceptions to disclo-
10 sure; amending K.S.A. 2008 Supp. 45-229 and repealing the existing
11 section; also repealing K.S.A. 2008 Supp. 45-229c.
12

13 *Be it enacted by the Legislature of the State of Kansas:*

14 Section 1. K.S.A. 2008 Supp. 45-229 is hereby amended to read as
15 follows: 45-229. (a) It is the intent of the legislature that exceptions to
16 disclosure under the open records act shall be created or maintained only
17 if:

18 (1) The public record is of a sensitive or personal nature concerning
19 individuals;

20 (2) the public record is necessary for the effective and efficient ad-
21 ministration of a governmental program; or

22 (3) the public record affects confidential information.

23 The maintenance or creation of an exception to disclosure must be
24 compelled as measured by these criteria. Further, the legislature finds
25 that the public has a right to have access to public records unless the
26 criteria in this section for restricting such access to a public record are
27 met and the criteria are considered during legislative review in connection
28 with the particular exception to disclosure to be significant enough to
29 override the strong public policy of open government. To strengthen the
30 policy of open government, the legislature shall consider the criteria in
31 this section before enacting an exception to disclosure.

32 (b) Subject to the provisions of subsection (h), all exceptions to dis-
33 closure in existence on July 1, 2000, shall expire on July 1, 2005, and any
34 new exception to disclosure or substantial amendment of an existing ex-
35 ception shall expire on July 1 of the fifth year after enactment of the new
36 exception or substantial amendment, unless the legislature acts to con-
37 tinue the exception. A law that enacts a new exception or substantially
38 amends an existing exception shall state that the exception expires at the
39 end of five years and that the exception shall be reviewed by the legis-
40 lature before the scheduled date.

41 (c) For purposes of this section, an exception is substantially amended
42 if the amendment expands the scope of the exception to include more
43 records or information. An exception is not substantially amended if the

New Section 1. (a) Except as otherwise provided by this section, the information contained in responses to wage and salary surveys conducted by the director of personnel services to provide wage and salary information about jobs in other public and private employment under K.S.A. 75-2938, and amendments thereto, shall be confidential and shall not be subject to disclosure under the open records act, K.S.A. 45-215 et seq., and amendments thereto, or any other statute. The information contained in responses to such wage and salary surveys shall not be subject to subpoena, discovery or other demand in any administrative, criminal or civil action. The confidentiality prescribed by this section is not subject to expiration pursuant to K.S.A. 45-229, and amendments thereto, or any other statute.

(b) The information contained in such responses to wage and salary surveys conducted by the director of personnel services to provide wage and salary information about jobs in other public and private employment under K.S.A. 75-2938, and amendments thereto, shall be disclosed upon written request if no person or entity can be identified in the information to be disclosed as determined by the director of personnel services.

[Renummer remaining sections.]

House Judiciary
Date 3-10-09
Attachment # 8

8-2

1 amendment narrows the scope of the exception.

2 (d) This section is not intended to repeal an exception that has been
3 amended following legislative review before the scheduled repeal of the
4 exception if the exception is not substantially amended as a result of the
5 review.

6 (e) In the year before the expiration of an exception, the revisor of
7 statutes shall certify to the president of the senate and the speaker of the
8 house of representatives, by July 15, the language and statutory citation
9 of each exception which will expire in the following year which meets the
10 criteria of an exception as defined in this section. Any exception that is
11 not identified and certified to the president of the senate and the speaker
12 of the house of representatives is not subject to legislative review and
13 shall not expire. If the revisor of statutes fails to certify an exception that
14 the revisor subsequently determines should have been certified, the re-
15 visor shall include the exception in the following year's certification after
16 that determination.

17 (f) "Exception" means any provision of law which creates an excep-
18 tion to disclosure or limits disclosure under the open records act pursuant
19 to K.S.A. 45-221, and amendments thereto, or pursuant to any other
20 provision of law.

21 (g) A provision of law which creates or amends an exception to dis-
22 closure under the open records law shall not be subject to review and
23 expiration under this act if such provision:

24 (1) Is required by federal law;

25 (2) applies solely to the legislature or to the state court system.

26 (h) (1) The legislature shall review the exception before its scheduled
27 expiration and consider as part of the review process the following:

28 (A) What specific records are affected by the exception;

29 (B) whom does the exception uniquely affect, as opposed to the gen-
30 eral public;

31 (C) what is the identifiable public purpose or goal of the exception;

32 (D) whether the information contained in the records may be ob-
33 tained readily by alternative means and how it may be obtained;

34 (2) An exception may be created or maintained only if it serves an
35 identifiable public purpose and may be no broader than is necessary to
36 meet the public purpose it serves. An identifiable public purpose is served
37 if the legislature finds that the purpose is sufficiently compelling to over-
38 ride the strong public policy of open government and cannot be accom-
39 plished without the exception and if the exception:

40 (A) Allows the effective and efficient administration of a govern-
41 mental program, which administration would be significantly impaired
42 without the exception;

43 (B) protects information of a sensitive personal nature concerning

1 individuals, the release of which information would be defamatory to such
2 individuals or cause unwarranted damage to the good name or reputation
3 of such individuals or would jeopardize the safety of such individuals.
4 Only information that would identify the individuals may be excepted
5 under this paragraph; or

6 (C) protects information of a confidential nature concerning entities,
7 including, but not limited to, a formula, pattern, device, combination of
8 devices, or compilation of information which is used to protect or further
9 a business advantage over those who do not know or use it, the disclosure
10 of which information would injure the affected entity in the marketplace.

11 (3) Records made before the date of the expiration of an exception
12 shall be subject to disclosure as otherwise provided by law. In deciding
13 whether the records shall be made public, the legislature shall consider
14 whether the damage or loss to persons or entities uniquely affected by
15 the exception of the type specified in paragraph (2)(B) or (2)(C) of this
16 subsection (h) would occur if the records were made public.

17 (i) Exceptions contained in the following statutes as certified by the
18 revisor of statutes to the president of the senate and the speaker of the
19 house of representatives pursuant to subsection (e) of this section on June
20 1, 2004, are hereby continued in existence until July 1, 2010, at which
21 time such exceptions shall expire: 1-401, 2-1202, 5-512, 9-1137, 9-1712,
22 9-2217, 10-630, 11-306, 12-189, 12-1,108, 12-1694, 12-1698, 12-2819, 12-
23 4516, 16-715, 16a-2-304, 17-1312e, 17-2227, 17-5832, 17-7503, 17-7505,
24 17-7511, 17-7514, 17-76,139, 19-4321, 21-2511, 22-3711, 22-4707, 22-
25 4909, 22a-243, 22a-244, 23-605, 23-9,312, 25-4161, 25-4165, 31-405, 34-
26 251, 38-1508, 38-1520, 38-1565, 38-1609, 38-1610, 38-1618, 38-1664, 39-
27 709b, 39-719e, 39-934, 39-1434, 39-1704, 40-222, 40-2,156, 40-2c20,
28 40-2c21, 40-2d20, 40-2d21, 40-409, 40-956, 40-1128, 40-2807, 40-3012,
29 40-3304, 40-3308, 40-3403b, 40-3421, 40-3613, 40-3805, 40-4205, 44-
30 510j, 44-550b, 44-594, 44-635, 44-714, 44-817, 44-1005, 44-1019, *sub-*
31 *sections (a)(1) through (43) of* 45-221, 46-256, 46-259, 46-2201, 47-839,
32 47-844, 47-849, 47-1709, 48-1614, 49-406, 49-427, 55-1,102, 56-1a606,
33 56-1a607, 56a-1201, 56a-1202, 58-4114, 59-2135, 59-2802, 59-2979, 59-
34 29b79, 60-3333, 60-3336, 65-102b, 65-118, 65-119, 65-153f, 65-170g, 65-
35 177, 65-1,106, 65-1,113, 65-1,116, 65-1,157a, 65-1,163, 65-1,165, 65-
36 1,168, 65-1,169, 65-1,171, 65-1,172, 65-436, 65-445, 65-507, 65-525,
37 65-531, 65-657, 65-1135, 65-1467, 65-1627, 65-1831, 65-2422d, 65-2438,
38 65-2836, 65-2839a, 65-2898a, 65-3015, 65-3447, 65-34,108, 65-34,126,
39 65-4019, 65-4608, 65-4922, 65-4925, 65-5602, 65-5603, 65-6002, 65-
40 6003, 65-6004, 65-6010, 65-67a05, 65-6803, 65-6804, 66-101c, 66-117,
41 66-151, 66-1,190, 66-1,203, 66-1220a, 66-2010, 72-996, 72-4311, 72-4452,
42 72-5214, 72-53,106, 72-5427, 72-8903, 73-1228, 74-2424, 74-2433f, 74-
43 4905, 74-4909, 74-50,131, 74-5515, 74-7308, 74-7338, 74-7405a, 74-8104,

H-8

1 74-8307, 74-8705, 74-8804, 74-9805, 75-104, 75-712, 75-7b15, 75-1267,
2 75-2943, 75-4332, 75-4362, 75-5133, 75-5266, 75-5665, 75-5666, 75-
3 7310, 76-355, 76-359, 76-493, 76-12b11, 76-3305, 79-1119, 79-1437f, 79-
4 15,118, 79-3234, 79-3395, 79-3420, 79-3499, 79-34,113, 79-3614, 79-
5 3657, 79-4301 and 79-5206.

6 (j) Exceptions contained in the following statutes as certified by the
7 revisor of statutes to the president of the senate and the speaker of the
8 house of representatives pursuant to subsection (e) of this section on June
9 1, 2005, are hereby continued in existence until July 1, 2011, at which
10 time such exceptions shall expire: 1-501, 9-1303, 12-4516a, 38-1692, 39-
11 970, 40-4913, 65-525, 65-5117, 65-6016, 65-6017 and 74-7508.

12 (k) *Exceptions contained in the following statutes as certified by the*
13 *revisor of statutes to the president of the senate and the speaker of the*
14 *house of representatives pursuant to subsection (e) during 2006 and 2007,*
15 *are hereby continued in existence until July 1, 2012, at which time such*
16 *exceptions shall expire: 8-240, 8-247, 8-1324, 8-1325, 12-17,150, 12-2001,*
17 *40-5006, 40-5108, 41-2905, 41-2906, 44-706, 44-1518, 65-3239 and 66-*
18 *1233.*

19 (l) *Exceptions contained in the following statutes as certified by the*
20 *revisor of statutes to the president of the senate and the speaker of the*
21 *house of representatives pursuant to subsection (e) on June 1, 2008, are*
22 *hereby continued in existence until July 1, 2013, at which time such ex-*
23 *ceptions shall expire: 8-255c, 12-5332, 17-12a607, 38-1008, 38-2209, sub-*
24 *sections (a) (44), (45), (46) and (47) of 45-221, 56-1a610, 56a-1204, 65-*
25 *1,243, 74-50,184, 74-8134, 74-99b06 and 82a-2210.*

26 Sec. 2. K.S.A. 2008 Supp. 45-229 and 45-229c are hereby repealed.

27 Sec. 3. This act shall take effect and be in force from and after its
28 publication in the statute book.