

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Lance Kinzer at 3:30 p.m. on February 9, 2010, in Room 346-S of the Capitol.

All members were present.

Committee staff present:

Jason Long, Office of the Revisor of Statutes  
Matt Sterling, Office of the Revisor of Statutes  
Jill Wolters, Office of the Revisor of Statutes  
Jerry Donaldson, Kansas Legislative Research Department  
Sue VonFeldt, Committee Assistant

Conferees appearing before the Committee:

Quinn Bennion, City of Prairie Village  
Mike Taylor, Unified Government Public of Wyandotte County  
Moji Fanimokun, The League of Kansas Municipalities  
Eric Sartorius, City of Overland Park  
Loren Snell- Deputy Attorney General  
Joe Ewert-Kansas Association of Homes and Services for the Aging  
Bob Harvey, AARP of Kansas  
Joe Molina, Kansas Bar Association

Others attending:

See attached list.

The hearing on **HB 2583 - Open records; individual's email address, cell phone number and other contact information given to a public agency for receiving publications or notifications not to be disclosed** was opened.

Jill Wolters, Revisor of Statutes, provided an overview of the bill that would provide the following three criteria:

- 1) Any voluntary subscription list of public record which contains email addresses would not be disclosed.
- 2) It will be included as a part of and supplemental to the Open Records Act.
- 3) It shall take effect and be in force from and after its publication in the statute book.

Representative Kay Wolf addressed the committee as a proponent and sponsor of the bill. She stated they originally had requested for email addresses and cell phone numbers but had decided to just request the non-disclosure of the email addresses for now and address the cell phones later.

Quinn Bennion, City Administrator, spoke on behalf of the city of Prairie Village, Kansas as a proponent of the bill. He explained voluntary subscription lists are becoming a common and effective way for local governments and elected officials to communicate with citizens and constituents. They use the emails to provide time sensitive information such as community events, city council agendas and major crime events. He stated that currently email subscription lists created and maintained by the city are considered an open public record and therefore by registering to receive information about their community, a resident must compromise their privacy and expose their private email address for public review and use and may receive unwanted commercial, political or religious solicitation. He urged the committee to pass this bill to ensure the privacy of citizens email addresses. (Attachment 1)

Mike Taylor, Public Relations Director for United Government Public Relations addressed the committee as a proponent and explained in order to communicate with citizens and to promote local government business as transparent and open, they produce an electronic newsletter called the UG Enews Source and email the publication to 3,000 subscribers weekly. He further stated their concern if those email addresses are considered an open record and made public to anyone who might ask, they would be compromising the

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Minutes of the House Judiciary Committee at 3:30 p.m. on February 9, 2010, in Room 346-S of the Capitol.

privacy of individuals who voluntarily signed up to receive their newsletter and this could also put citizens at risk for unwanted spam e-mails, make them targets for scams and subject them to solicitations from political groups, non-profit fund-raisers, commercial enterprises and other possible risks and urged the committee to pass this bill. (Attachment 2)

Moji Fanimokun, Staff Attorney, spoke before the committee as a proponent on behalf of the League of Kansas Municipalities. She stated as we currently evolve in the technological age, so must the way in which cities communicate with their citizenry but also balance the need to protect citizens by not disclosing their email addresses and privacy. Any person, regardless of their motive, can request the email lists be provided to them under the current Kansas Open Records Act. She also stated there is little, if any, public interest served in allowing the private email addresses of its citizens to be subject to the Kansas Open Records Act. (Attachment 3)

Eric Sartorius, spoke in support of the bill on behalf of the City of Overland Park, Kansas. He stated they are seeing more and more of how society is using technology and seeking to connect with the City via electronic means and they currently have email lists to send out such items as City Source, a weekly newsletter, press releases, job notices, Overview, the city's quarterly newsletter, council agendas, and planning agenda. In choosing electronic delivery, few citizens probably suspect there could be a situation where the email addresses they supplied could be considered an open record. He asked the committee to pass this bill so email addresses would be treated as an exception to the Kansas Open Records Act to balance open government with insuring the right to privacy of individuals. (Attachment 4)

Written testimony in support of the bill was provided by Matt Shatto, Assistant City Administrator of Lenexa, Kansas. (Attachment 5)

There were no opponents.

The hearing on **HB 2583** was closed.

The hearing on **HB 2585 - Concerning marriage license fees and poverty** was opened.

Representative Patton addressed the committee in support and as sponsor of the bill. He explained the current marriage fee is \$69, which is split among various funds, and those whom are unable to pay the fee will be able to file a poverty affidavit and have it waived much like Kansas courts do with docket fees. He further explained that families are the backbone of our culture and we need to make sure we are doing everything we can to promote solid families and gave testimony about various studies that support the belief that marriage helps produce strong families. (Attachment 6)

There were no opponents.

The hearing on **HB 2585** was closed.

The hearing on **HB 2568 - Requiring recording of durable power of attorney** was opened.

Jason Long, Revisor of Statutes, provided the committee with an overview of the bill and explained under current law a durable power of attorney (DPOA) is effective if: (1) it is denominated a "durable power of attorney;"

(2) it contains a provision that the authority of the attorney in fact does not terminate upon the disability of the principal, or the uncertainty of whether the principal is alive or dead, and (3) the principal signs, dates and acknowledges the document.

He then explained this bill would require that a durable power of attorney contain three attestations; (1) by the principal acknowledging the delegation of powers to the attorney in fact; (2) by the attorney in fact acknowledging the fiduciary responsibilities of the attorney in fact; and (3) by a witness acknowledging the principal was of sound mind, voluntarily signed the document, and that the witness is not related to the principal or entitled to any portion of the principal's estate. The bill also requires that a durable power of

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Minutes of the House Judiciary Committee at 3:30 p.m. on February 9, 2010, in Room 346-S of the Capitol.

attorney be filed and recorded with a register of deeds in order to be valid. In addition, this bill adds criminal provisions with respect to the actions of the attorney in fact and requires that person to maintain adequate records of the receipts, disbursements, and transactions made on behalf of the principal with failure to maintain adequate records being a class A nonperson misdemeanor and the destruction or concealment of such records a severity level 9, nonperson felony. (Attachment 7)

Loren Snell, on behalf of the Kansas Attorney General, spoke as a proponent, and also acknowledged why they felt compelled to draft the amendments proposed in this bill. He explained during his service with the Kansas Medicaid Fraud and Abuse Division, he has had many opportunities to review cases of files of individuals who were the unsuspecting victims of financial exploitation. He stated the proposed amendments have been carefully considered, trying to balance the need to maintain the ease of acquiring and utilizing the DPOA, with the increasing desire to protect our vulnerable citizens from exploitation and these changes would serve to create an awareness openness, transparency and provide guidance, for those utilizing and relying upon DPOAs. He also listed five technical amendments they request be made to the bill. (Attachment 8)

Joe Ewert, Government Affairs Director for the Kansas Association of Homes and Services for the Aging (KAHSA), appeared as a proponent. He reported financial abuse of senior citizens is a serious and increasing problem in Kansas and they are witnessing a growing trend of individuals operating as Power of Attorney who simply do not distinguish a difference between the funds of their principal and their own and use deceit, coercion, intimidation and emotional abuse to get their way. In addition, these victims of fiduciary abuse are often left destitute, in mental anguish and in increased jeopardy because they cannot pay for necessary services to maintain their health and safety. He stated this bill strengthens power of attorney instruments by improving the transparency of their use and establishing criminal provisions for those who refuse to act responsibility as a power of attorney. (Attachment 9)

Robert Harvey addressed the committee on behalf of the AARP in strong support of this bill. He told of the AARP's Public Policy Institute sponsoring a report entitled "Power of Attorney Abuse: What States Can Do About It." He also advised several elements of the Uniform Power of Attorney Act are designed to reduce abuse and promote effective use of POA and while existing Kansas law does contain several provisions, it does not contain all of the recommended provisions and they support this bill as a vital step in reducing POA abuse. (Attachment 10)

Cindy Luxem, CEO, Kansas Health Care Association (KHCA), provided written testimony in support of the bill. (Attachment 11)

Joseph Molina, spoke in opposition of the bill, on behalf of the Kansas Bar Association's (KBA) Standards for Title Examination Committee and the KBA's Real Estate, Probate and Trust Section. While the KBA appreciates the underlying goals of this bill and applauds the sponsors for taking a proactive step in protecting vulnerable adults, they pointed out several inherent problems that need more attention. Therefore on behalf of the KBA, they request **HB 2568** be referred to the Office of the Judicial Council for further study. (Attachment 12)

The hearing on **HB 2568** was closed.

The next meeting is scheduled for February 10, 2010.

The meeting was adjourned at 4:50 p.m.

# JUDICIARY COMMITTEE GUEST LIST

DATE: 2-9-10

NAME	REPRESENTING
Moji Fanimokun	UCM
Quinn Bennion	City of Prairie Village
Eli H. Allen	Attorney General's Office
David Rounes	Hearney & Assoc.
Alex Rausch	Intern / Talia
Susan Andrews	KS Dept. on Aging
MIKE Taylor	Unified Government / Wyandotte County
SEAN MILLER	CAPITAL STRATEGIES
Mike Roesch	Sprint
Jeff Bottenborg	State Farm
Natalie Salsaj	Kansas Judicial Council
Gert Kelly	AARP
Robert Davy	AARP
Loren Snell	KS AG
Joseph McClure	KS BAA KESU

# THE CITY OF PRAIRIE VILLAGE

*Star of Kansas*

Testimony before the House Judiciary Committee  
In support of **House Bill 2583**  
Presented by Quinn Bennion, City Administrator

February 9, 2010

The City of Prairie Village is a proponent of House Bill 2583 relating to the disclosure of email subscription lists maintained by governmental entities.

The proposed House Bill 2583 would keep email addresses gathered as part of a voluntary subscription list from being disclosed to the public without the consent of the email owner. The bill is intended to encourage communication with residents without compromising an individual's privacy.

Email subscriptions are becoming a common and effective venue for local governments and elected officials to communicate with citizens and constituents. The City of Prairie Village maintains three email subscription lists with over 1200 email addresses. The e-updates include time sensitive information such as community events, city council agendas and major crime events.

The City of Prairie Village faces an unusual dilemma as a local government attempting to improve communication with the public. Currently, email subscription lists created and maintained by the city are considered an open public record. By registering for a subscription list to learn more about their community, a resident must compromise their privacy and expose their private email address for public review and use.

Some residents are unwilling to sign up for the City's subscription list or remove their name from the list once they discover their email address can be disclosed as part of an open records request. Once it is released to the public, the email address is no longer within control of City staff and can be used for a variety of purposes. The citizen who volunteered their email address for civic related news may receive unwanted commercial, political or religious solicitation.

This bill is limited to email addresses only. The content of the email updates sent to subscribers is an open record. The media and other interested citizens are encouraged to subscribe to the e-updates.

The City of Prairie Village supports House Bill 2583 and respectfully requests that the committee recommend it favorably for passage.

House Judiciary  
Date 2/09/10  
Attachment # 1



# Testimony

Unified Government Public Relations  
701 N. 7<sup>th</sup> Street, Room 620  
Kansas City, Kansas 66101

Mike Taylor, Public Relations Director  
913.573.5565 mtaylor@wycokck.org

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## House Bill 2583 Open Records and Email Addresses

Delivered February 3, 2010  
House Judiciary Committee

The Unified Government of Wyandotte County/Kansas City supports House Bill 2583.

In an effort to communicate with our citizens and make local government business transparent and open, the Unified Government produces an electronic newsletter called the UG ENews Source. We e-mail the publication to 3,000 subscribers weekly. Citizens voluntarily sign-up to receive the newsletter by going to the Unified Government website and filling out a simple form.

The Unified Government is concerned that if those e-mail addresses are considered an open record and made public to anyone and everyone who might ask, we will compromise the privacy of individual citizens and hinder our ability to keep citizens informed.

Providing e-mail addresses to anyone who files an open records request could put our citizen subscribers at risk for unwanted spam e-mails, make them targets for scams and subject them to solicitations from political groups, non-profit fundraisers, commercial enterprises or who knows what else.

E-mail lists are valuable commodities to many entities. Obtaining a list of 3,000 e-mail addresses would be like hitting the jackpot for all kinds of organizations and individuals. If those private e-mail addresses are turned over to anyone who asks, the citizens who provided them have every right to feel violated. The Unified Government feels the need to protect those citizens who voluntarily provide us their e-mail for the sole purpose of receiving news about their local government and community.

House Judiciary  
Date 2/09/10  
Attachment # 2



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To: House Judiciary Committee  
From: Moji Fanimokun, Staff Attorney  
Date: February 9<sup>th</sup>, 2010  
Re: Proponent for HB 2583

First, I would like to thank the committee for allowing the League an opportunity to stand in support of HB 2583. The intent of the bill furthers two important governmental goals; to be able to communicate with its citizens in an easy and efficient manner and to allow better transparency in government.

As we currently evolve in the technological age, so must the way in which cities communicate with their citizenry. Currently, many municipalities offer the option for citizens to receive vital information and useful updates pertaining to city business through emails. In order to do so, municipalities create email lists that contain private citizens' email addresses. Under the current version of the Kansas Open Records Act, a city is required to disclose the private email addresses of citizens to anyone who makes a proper open records request. Although we strongly believe that the information contained in the emails should be disclosed through the Open Records Act, the League does not believe the actual email addresses themselves should be subject to disclosure. The cities' purpose in compiling the private email addresses is so that it may effectively distribute information, and it is for this purpose that citizens are open to giving their email address to the city, to be more accessible in receiving information. Citizens will be very reluctant to share their email addresses with the city, and will likely choose not to, if in doing so, any person, regardless of their motive or message will be able to send them an email.

The primary purpose of the Open Records Act is to allow for better transparency in government. In doing so, one must balance the need for the public to be informed against the interest of individual privacy. A city can easily and efficiently communicate with citizens via email. By allowing email addresses of citizens to be easily obtained through a simple open records request, the State hinders this purpose. There is little, if any, public interest served in allowing the private email addresses of citizens to be subject to the Kansas Open Record Act. Municipalities are at risk of not being able to utilize an effective and easy way of disbursing information to the public if the possibility remains that private email addresses can be acquired through the Act. Most view their private email addresses as being just that, private, and would rather not share those address with the city if any person can receive them upon request without their consent. Thus, without HB 2583, cities will not be able to effectively use one of the most common means of communication without the possibility of disclosing the private information of its citizens.

Because HB 2583 will continue to allow cities to efficiently distribute information to citizens and ensures better transparency in government the League would like to offer its support for HB 2583. I will be happy to stand for any questions the committee may have.

House Judiciary  
Date 2/09/10  
Attachment # 3

# OVERLAND PARK

K A N S A S

ABOVE AND BEYOND. BY DESIGN.

8500 Santa Fe Drive  
Overland Park, Kansas 66212  
913-895-6000 | www.opkansas.org

Testimony Before The  
House Judiciary Committee  
Regarding House Bill 2583  
Presented by Erik Sartorius

February 9, 2010

The City of Overland Park appreciates the opportunity to offer support for House Bill 2583. The Kansas Open Records Act assures public access to important public records. At the same time, the law allows essential exceptions to protect the privacy of citizens and allow the effective and efficient administration of government programs.

House Bill 2583 brings forward an important concern reflective of how society is utilizing technology in civic life. Traditionally, government has "pushed out" communications to residents about current events involving the government.

What we are seeing at the City of Overland Park is that more and more residents are seeking to connect with the City via electronic means. For instance:

- City Source, a weekly newsletter, is received by 1,415 persons.
- Press Releases are received by 2,314.
- Jobs notice - 3,252 electronic recipients.
- Overview, the City's quarterly newsletter, has 1,498 electronic recipients.
- Council agenda, with 704 recipients.
- Planning agenda, received by 758 electronic recipients.

In choosing electronic delivery, few citizens probably suspect that there could be a situation where the information they supplied to the City could be considered an open record. Concern that one's information could be gained from a records request could have a dampening effect on peoples' willingness to sign up to receive information.

As with any information that is retained by a public entity, critical consideration must be given to just whose data is generally contained in records held by the government. More often than not, the information contained in governmental records either belongs to or refers to private individuals.

The exceptions to the Kansas Open Records Act balance open government with insuring the right to privacy of individuals. Because of this, the City of Overland Park supports House Bill 2583 and requests the committee report is favorably for passage.

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Attachment # 4





TO: Members of the House Judiciary Committee

FROM: Matt Shatto, Assistant City Administrator

RE: House Bill 2583 regarding disclosure of e-mail addresses

DATE: February 8, 2010

The City of Lenexa supports House Bill 2583, which prohibits disclosure of individual e-mail addresses contained in voluntary e-mail subscription lists.

Lenexa, like many other communities, utilizes electronic communications as a method of keeping its citizens informed and permits citizens to voluntarily subscribe to a variety of e-news features through the City's website. By enacting House Bill 2583, you can ensure that citizen's who wish to receive information from the City electronically can do so without fear that a subscription will lead to unwanted communication or solicitation from third parties (commonly referred to as "SPAM").

HB 2583 facilitates improved communication and transparency by cities and does so in a manner that protects our citizens' rights and privacy. For this reason, the City of Lenexa urges you to support HB 2583. Thank you in advance for your consideration.

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Date 2/09/10  
Attachment # 5

STATE OF KANSAS



TOPEKA

HOUSE OF  
REPRESENTATIVES

**JOE PATTON**

REPRESENTATIVE, 54TH DISTRICT  
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COMMITTEE ASSIGNMENTS

VICE CHAIRMAN: CORRECTIONS AND JUVENILE  
JUSTICE

MEMBER: JUDICIARY  
ADMINISTRATIVE RULES AND  
REGULATIONS

**Testimony in support of HB 2585**

February 10, 2010

Chairman Kinzer and Committee members, thank you for the opportunity to appear before you today in support of HB 2585.

Families are the backbone of our culture. We need to make sure we are doing everything we can to promote solid families. It is important to evaluate the public policy in Kansas in light of how it affects marriage and the family.

As part of this effort to help families, I have sponsored HB 2585 that will allow waiver of the marriage fee for those that cannot afford it. Currently the marriage fee is \$69 which is split among various funds. Those that are unable to pay the fee will be able to file a poverty affidavit and have it waived much like Kansas courts do with docket fees.

House Judiciary  
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Attachment # 6

MARY ANN TORRENCE, ATTORNEY  
REVISOR OF STATUTES  
JAMES A. WILSON III, ATTORNEY  
FIRST ASSISTANT REVISOR  
GORDON L. SELF, ATTORNEY  
FIRST ASSISTANT REVISOR



OFFICE OF REVISOR OF STATUTES  
KANSAS LEGISLATURE

Legal Consultation—  
Legislative Committees and Legislators  
Legislative Bill Drafting  
Legislative Committee Staff  
Secretary—  
Legislative Coordinating Council  
Kansas Commission on  
Interstate Cooperation  
Kansas Statutes Annotated  
Editing and Publication  
Legislative Information System

**Briefing on House Bill 2568**  
**Durable Power of Attorney**

Jason B. Long  
Assistant Revisor  
Office of Revisor of Statutes

February 9, 2010

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HB 2568 makes various amendments to the statutes governing durable powers of attorney (K.S.A. 58-650 *et seq.*). Under current law a durable power of attorney is effective if: (1) it is denominated a “durable power of attorney”; (2) it contains a provision that the authority of the attorney in fact does not terminate upon the disability of the principal, or the uncertainty of whether the principal is alive or dead; and (3) the principal signs, dates and acknowledges the document.

In addition to the current statutory requirements, section 2 of the bill requires that a durable power of attorney contain three attestations. The first is by the principal acknowledging the delegation of powers to the attorney in fact. The second is by the attorney in fact acknowledging the fiduciary responsibilities of the attorney in fact. The third attestation is by a witness acknowledging the principal was of sound mind, voluntarily signed the document, and that the witness is not related to the principal or entitled to any portion of the principal’s estate.

HB 2568 also requires that a durable power of attorney be filed and recorded with a register of deeds in order to be valid. The document may be recorded in the county designated in the document, or the county of the principal’s legal residence. If the principal has no legal

residence, then the document may be recorded in a county in which the principal owns real or personal property, or a county in which one of the attorneys in fact reside. The bill further provides that a durable power of attorney executed in another state is governed by the laws of that state, unless the principal establishes legal residence in Kansas. In such event, the durable power of attorney must be recorded in the county where the legal residence is established.

HB 2568 also adds criminal provisions with respect to the actions of the attorney in fact. The attorney in fact is required to maintain adequate records of the receipts, disbursements and transactions made on behalf of the principal. Failure to maintain adequate records is a class A, nonperson misdemeanor. Destruction or concealment of such records is a severity level 9, nonperson felony.



Loren Snell

STATE OF KANSAS  
OFFICE OF THE ATTORNEY GENERAL

STEPHEN N. SIX  
ATTORNEY GENERAL

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House Judiciary Committee  
House Bill 2568  
Deputy Attorney General Loren Snell  
February 9, 2010

Dear Chairman Kinzer and Members of the Committee:

I would like to begin by thanking you for the opportunity to appear today on behalf of Attorney General Steve Six and to testify in support of House Bill No 2568. My name is Loren Snell, and I am a Deputy Attorney General and the Director of the Medicaid Fraud and Abuse Division of the Kansas Attorney General's Office.

While the primary mission of the Kansas Medicaid Fraud and Abuse Division is the pursuit of fraud committed against the Kansas Medicaid Program, our Division is also charged with investigating and prosecuting physical abuse, financial exploitation and neglect perpetrated against patients in residential care facilities operating in the State of Kansas. This is why our office felt compelled to draft the amendments proposed in HB 2568, and why I am testifying before you today.

During my service in the Kansas Medicaid Fraud and Abuse Division I have had many opportunities, too many, to review case files of individuals who were the unsuspecting victims of financial exploitation. Exploitation that has occurred despite their best efforts to protect their assets. Exploitation that has most often occurred at a time in their lives when they lack the ability to fully understand or comprehend the full impact of what has taken place. One example of this is "Rita". "Rita" and her now deceased spouse had spent their lifetimes working to provide for themselves. In fact, at the time of her husband's passing, "Rita" had sufficient assets, including the home that they had shared their lives in, to take care of her for the remaining days of her life. Having reached her eighties, and having begun to develop some physical limitations, "Rita" acknowledged that the time had arrived for her to seek assistance with the important day-to-day responsibilities of life, primarily her finances. "Rita" contacted her nearest living relative who offered to serve as her attorney-in-fact. A Durable Power of Attorney (DPOA) was prepared naming this relative as her attorney-in-fact, with the power to handle her financial obligations. Unsuspecting, "Rita" executed the DPOA authorizing her relative to handle her financial affairs. Within approximately four (4) years, the relative moved "Rita" into a retirement facility, sold her home, and spent all of "Rita's" assets. "Rita" was not even made aware that this had happened until she was visited by administrators from the

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retirement facility advising that her bills were not being paid. Upon contacting the bank where her funds had been deposited she was told that not only was all of her money gone, but one of her accounts was overdrawn. By the time all was said and done, more than \$390,000 was stolen from "Rita" and spent by the relative for their own benefit, not "Rita's".

This is only one example from the many cases that are referred to our office on a regular basis. Unfortunately, there are many people that are forced to swallow the same bitter pill "Rita" had to swallow a few years ago. Even more unfortunate is the fact that this is a growing problem. All studies and reports seem to indicate that as our population continues to age, coupled with the stringent economic times, the problem of financial exploitation of our elderly adults will become more pervasive.

Looking at the problem economically, from the State's vantage point, it is a reason for serious concern. As if it were not enough that "Rita" lost all of the money that she and her husband had worked so hard to accumulate; now she must rely upon the State for her care. At one point "Rita" had sufficient finances saved to pay for her accommodations and care for the remainder of her days. Because of the actions of one unscrupulous relative she is now forced to rely on the State of Kansas to pay for her care. Now she has to rely on the Kansas Medicaid program to pay for her skilled nursing facility, doctor services, prescriptions, and any other medical services she might receive. Payments are being made by the State, on "Rita's" behalf, that could be used to pay for services for someone else, someone who is truly in need and does not have the financial resources available that "Rita" once had. "Rita", is just one of many unsuspecting victims of financial exploitation being taken advantage of under a DPOA.

Since January of 2000, the Medicaid Fraud and Abuse Division has opened active investigations in thirty-six (36) cases involving suspected financial exploitation through the use of a DPOA. All but four (4) of these cases were opened since 2005, with twenty (20) of those cases being reported in the past two (2) years alone. This is just a scratch on the surface as many suspected cases are outside of the jurisdiction of our office or simply go unreported. According to statistics provided by the Abuse, Neglect and Exploitation Unit of the Kansas Attorney General's Office, more than fifty-three percent (53%) of the adult case findings from last year, or more than 230 cases, involved financial exploitation and fiduciary abuse. While those may or may not have all involved exploitation through the use of a DPOA, the telling figure is that this constitutes an increase of almost six percent (6%) over the previous year. This is a problem that is not going to go away.

House Bill 2568 does not propose to solve all exploitation problems. In fact, I am not sure there is any way that we could possibly do away with all exploitation. What it does do is propose changes that will result in more awareness, openness, guidance and transparency in the use of the DPOA. It requires steps to be taken that will result in more awareness by all involved of the expectations and requirements that go along with executing a DPOA. These steps will create more openness and transparency in handling these matters. All which will result in fewer opportunities for unscrupulous actors to take advantage of unsuspecting

relatives or friends who are simply looking for someone to assist them in their day-to-day activities.

An inherent conflict exists between the basic assumptions of agency law and the operation of DPOAs. Agency law presumes that the person executing a power of attorney will retain the capacity to oversee the agent appointed to manage his or her affairs. A DPOA is designed to do the exact opposite; it creates a situation where the agent appointed continues to have the power to manage and control assets even if the grantor loses the ability to oversee. Once the person granting the power of attorney becomes incapacitated, there is essentially no oversight or supervision of the person managing his or her affairs. This can lead to a situation where the appointed agent exploits the finances of the incapacitated principal for their own benefit.

DPOAs are created and governed by state statutes, and therefore the requirements to create a DPOA vary from state to state. In general, the requirements to create a DPOA are simple: the principal must be competent at the time the DPOA is created, the durable power of attorney must be in writing and signed by the principal, and the principal must express the intention that the power be durable. A number of states today also require the power of attorney to be notarized or witnessed, and some require both. In Kansas, the current statutes require only that:

1. The power of attorney be described as a DPOA,
2. The power of attorney be signed by the principal,
3. Dated and acknowledged by the principal in the same manner as K.S.A. 53-501 et.seq. (Notary statutes)

The proposed amendments have been carefully considered, trying to balance the need to maintain the ease of acquiring and utilizing the DPOA, with the increasing desire to protect our vulnerable citizens from exploitation. In order to foster openness and awareness, we have proposed additional requirements at signing. First, the principal would be required to attest to certain facts at signing. Namely that they understand the magnitude of the power they are giving to the attorney-in-fact. The attorney-in-fact will also be required to attest to their knowledge of the powers being conferred upon them. Finally, and this is an amendment we are recommending to the Bill as it currently reads, in accordance with the statutory requirements for executing a Will, two competent witnesses will attest to their having witnessed the execution of the DPOA, as well as their lack of a family relationship to the principal and their observations of the principal's competence. These requirements will increase the parties' understanding of the authority being conferred by the DPOA, and will provide independent, disinterested witnesses to the execution, thereby decreasing the possibility of improper "secret" dealings at the outset.

Second, including the amendment that failure to act in accordance with the DPOA may result in criminal prosecution, although simple, is a critical component to this Bill. The common misperception throughout the state seems to be that exploitation committed by an attorney-in-fact, acting under the color of the DPOA is a civil matter that falls outside of the purview of the

criminal courts. While I would openly disagree with this perception, and have successfully prosecuted or supervised prosecution of a number of these cases, I acknowledge that this perception exists nonetheless. This simple statement puts the world on notice, along with prosecutors throughout the state, that these matters are not simply civil matters, and that appropriate prosecutorial steps may be taken when warranted by the law.

Next is the recording requirement. Again, this goes directly to the idea of openness and transparency. Recording the DPOA with a government agency creates, at the very least, the perception that "someone" is aware of the existence of this DPOA. It removes the mystique and secrecy from the instrument making it at least a little more likely that someone may find out not only that the DPOA exists, but what powers are conferred in the DPOA. While under current law the only ones fully aware of what is covered under a DPOA are the principal, assuming they still have capacity, the attorney-in-fact, and possibly the bank, these changes would make this document more open, without revealing protected information of the principal. It puts the world on notice, while at the same time putting the attorney-in-fact on notice that the world is aware. This is not a new or novel concept as it is currently the law in twenty-one (21) states that DPOAs must be recorded. Recording with the Register of Deeds simply is a logical choice as the Register of Deeds is equipped to handle these types of recording requirements. Furthermore, since the DPOA carries the potential to be used for transacting real property, the DPOA would be subject to recording with the Register of Deeds anyway in order to satisfy chain of title requirements. When compared to alternative recording locations, the Register of Deeds was the most logical for this instrument. Additionally, it is worth noting that recording with the Register of Deeds does not create any undue burden because the cost of recording is nominal.

It is worth noting that the amendments would also require that revocations of DPOAs be recorded in the same county Register of Deeds office in which the original DPOA was recorded. Furthermore, for purpose of demonstrating that a DPOA is current and effective, copies can be easily obtained from the Register of Deeds, again, at a nominal cost.

The final major amendment set forth in this legislation, is aimed at completing what was started last legislative session. In SB 45, the Legislature required the attorney-in-fact to maintain records of all transactions, and prohibited the commingling of funds. That was a well intentioned first step, but requires more in order to be effective. The amendments impose potential criminal penalties for failure to maintain adequate records. The first potential penalty is a misdemeanor violation for failing to maintain the records. While I understand that there may be accidents, in which records are lost or not obtained, this is intended to deal with those individuals that blatantly disregard the statutory requirements. The discretion in handling these cases, and determining which ones should be filed would be left with the prosecutor having jurisdiction over the matter. The second potential penalty is more severe, a level 9 non-person felony, for destruction or concealment of records. This amendment contemplates and handles those situations in which there is an intentional obstruction of justice by the attorney-in-fact. Destroying records that may be necessary to conduct a thorough and efficient investigation of alleged financial exploitation is the equivalent to lying to investigators. In



furtherance of the efforts being made to better protect our most vulnerable citizens, it is important that we encourage cooperation by those involved. This can serve to do just that.

It is important to recognize that beyond the economic impact financial exploitation has on the innocent victims, there is also an impact on every citizen of the State of Kansas, especially those that rely on the services paid for and provided under the Kansas Medicaid Program. That is not to say that it does not affect other programs or private industry as well, but these are impacts that all tax payers are feeling during these economic times.

Careful consideration was given to the changes being proposed when drafting this legislation. Again, the changes being proposed will serve to create an awareness, openness, transparency and provide guidance, for those utilizing and relying upon DPOAs. While we do not profess to have created legislation that will end all financial exploitation of the elderly in Kansas, we do believe it is a very positive step in the right direction and will help to better protect our most vulnerable citizens from future victimization. I encourage you to report HB 2568 out of committee favorably, as written.

Respectfully,

OFFICE OF THE ATTORNEY GENERAL  
STEVE SIX



Loren F. Snell Jr.,  
Deputy Attorney General, Director  
Kansas Medicaid Fraud and Abuse Division

## HB 2568 Supplemental Amendments

**Pg. 3**, K.S.A. 58-652 §§ (a)(3)(C): An attestation signed by ~~a witness, who is not a member two~~ *competent witnesses, who is are* not a members of the principal's immediate family, stating that by signing as a witness they are acknowledging the following:

**Pg. 4**, K.S.A. 58-652 §§ (a)(4): The power of attorney is signed by the principal, *the grantee, and the two witnesses*, and dated and acknowledged in the manner prescribed by K.S.A. 53-501 et seq., and amendments thereto...

**Pg. 4-5**, K.S.A. 58-652 §§ (b): All acts done by an attorney in fact pursuant to a durable power of attorney shall inure to the benefit of and bind the principal and the principal's successors in interest, notwithstanding any disability of the principal. Any acts by the attorney in fact not strictly for the benefit of the principal or the principal's estate are in violation of the durable power of attorney, *unless otherwise specifically provided for in the durable power of attorney*, ~~making such acts void~~ and may result in prosecution under all applicable laws.

**Pg. 6**, K.S.A. 58-652 §§ (e): No durable power of attorney executed pursuant to the provisions of K.S.A. 58-650 et seq., and amendments thereto, shall be valid ~~subsequent to the principal's incapacity or mental incompetence~~ unless it is ~~drafted and~~ recorded in accordance with the ~~provisions~~ *paragraph (c) of this section prior to the principal's incapacity or mental incompetence.*

**Pg. 15**, K.S.A. 58-656 §§ (i): ~~The~~ Any attorney in fact *having been granted power of attorney either prior to or subsequent to the effective date of this amendment* shall, *from the date hereof*, keep an adequate record of receipts, disbursements and transactions made on behalf of the principal and shall not commingle funds or assets of the principal with the funds or assets of the attorney in fact.



**To: Representative Lance Kinzer, Chair, and Members House Judiciary Committee.**  
**From: Joe Ewert, KAHSA Government Affairs Director**  
**Date: February 9, 2010**  
**Re: HB 2568**

**Testimony in Support of HB 2568**

Thank you Chairman Kinzer, and members of the Committee, for this opportunity to provide testimony in support of HB 2568. I am Joe Ewert, and I am the Government Affairs Director for the Kansas Association of Homes and Services for the Aging. KAHSA represents 160 not-for-profit long term care provider organizations throughout the state. Roughly 20,000 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.

Financial abuse of senior citizens is a serious and increasing problem in Kansas. Our members are witnessing a growing trend of individuals operating as Power of attorney who simply do not distinguish a difference between the funds of their principal, and those of their own. They use deceit, coercion, intimidation and emotional abuse to get their way. They refuse to pay healthcare, pharmacy and other bills of their principal and instead use the elder's resources for their own personal pleasure and benefit. Victims of fiduciary abuse are often left destitute, in mental anguish, and in increased jeopardy because they cannot pay for necessary services to maintain their health and safety. Too often fiduciary abuse is not considered a crime by those involved.

KAHSA has worked with its members to increase education among older Kansans, and their powers of attorney as to the legal responsibilities and limitations placed on power of attorney instruments, and we continue to promote early intervention practices in financial abuse cases, however legislation is required to remedy the cases in which abusive POA's knowingly and willfully misappropriate the funds of their principal.

Last year, the Legislature passed SB 45, which prohibited a power of attorney from comingling the funds of their principal with their own, and required a power of attorney to maintain a record of the transactions they make from their principal's accounts. HB 2568 further strengthens power of attorney instruments by improving the transparency of their use, and establishing penalties for those who refuse to act responsibly as a power of attorney.

HB 2568 is a positive step in the right direction, and we urge the committee to pass this bill favorably this year. Thank you for allowing me to present today. I would be pleased to stand for questions.

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House Judiciary  
Date 2/09/10  
Attachment # 9



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February 9, 2010

The Honorable Lance Kinzer , Chair  
House Judiciary Committee

HB 2568 –Kansas Power of Attorney Act.

Good afternoon Chairman Kinzer and members of the House Judiciary Committee. My name is Robert Harvey and I serve as a member of the AARP National Policy Council. The council develops and makes public policy recommendations to the AARP Board of Directors regarding AARP's federal, state and local legislative and regulatory issues. In making public policy recommendations the NPC studies public policy options and considers opinions of members, guidance of staff and analysis from nationally-renowned policy experts. On behalf of our 359,000 Kansas members we thank you for this opportunity to express our comments on HB 2568.

AARP's Public Policy Institute sponsored a report entitled *Power of Attorney Abuse: What States Can Do About It*. The American Bar Association Commission on Law and Aging examined problems related to power of attorney abuse and reviewed the laws in the states.

Three categories of power of attorney (POA) were identified as:

- Transactions that exceed the intended scope of authority
- Transactions conducted for self-dealing purposes
- Transactions conducted in contravention of the principal's expectations.

Several elements of the Uniform Power of Attorney Act are designed to reduce abuse and promote effective use of a POA. Existing Kansas law does contain several, but not all, of the recommended provisions of the uniform act. Each state must provide the protection it deems appropriate, and we support the Attorney General in offering the amendments to the law contained in this legislation.

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Although House Bill 2568 does not attempt to adopt all of the elements of the Uniform Power of Attorney Act, we believe the proposal to require that a durable power of attorney executed in Kansas be recorded will be beneficial for individuals using a POA in our state.

Family members, friends and interested third parties will be able to obtain knowledge of the existence of a POA. This requirement will provide transparency, which can reduce fraud and abuse. Knowledge of the existence of a POA is essential to permit any action to hold the "attorney" accountable or commence court action to terminate the POA because of abuse.

AARP's members and the seniors of Kansas are at risk from POA abuse. We support HB 2568 as a vital step in reducing POA abuse. We respectfully request your support on this bill.

Robert Harvey



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Kansas House Judiciary Committee  
Chairman Kinzer and Member Pauls  
February 9, 2010  
Proponent for HB 2568

On behalf of residents and members of Kansas Health Care Association and Kansas Center for Assisted Living, we appreciate the opportunity to provide favorable testimony for HB 2568.

The issue of financial exploitation is an unfortunate fact of being an older citizen. And sadly providers see many examples of family members and others exploiting our residents. We appreciate Loren Snell and the Kansas Attorney General's office being proactive in trying to curtail illicit activity surrounding durable powers of attorney documents. The steps put forward in this legislation hopefully will dissuade those folks who might have exploitation on their minds.

The downside of tightening up the requirements might slow the process of attaining durable powers of attorney documents but if we can keep one elder from being exploited, it has achieved its purpose.

Thanks for the opportunity to offer support of HB 2568.

Cindy Luxem

CEO, Kansas Health Care Association/Kansas Center for Assisted Living

House Judiciary  
Date 2/09/10  
Attachment # 11



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TO: Lance Kinzer, Chair  
and Members of the House Judiciary Committee

FROM: Joseph N. Molina  
On Behalf of the Kansas Bar Association

Re: HB 2568 – Concerning durable powers of attorney

Date: February 9, 2010

Good afternoon Chairman Kinzer and Members of the House Judiciary Committee. I am Joseph Molina and I have provided the following testimony in opposition to HB 2568 on behalf of the Kansas Bar Association's (KBA) Standards for Title Examination Committee and the KBA's Real Estate, Probate, and Trust section.

The KBA has reviewed the current legislative measure and finds that HB 2568 would revise the Kansas Power of Attorney Act for the fourth time in 7 years. The original 2003 enactment can be found at KSA 58-650 *et seq.* KSA 58-650 *et seq.*, was amended in 2004 and yet again last year. Even with these numerous revisions it can be argued that HB 2568 provides the most substantial changes to this section. In order to fully evaluate the scope and effect of these amendments the KBA opposes the passage of HB 2568 and respectfully request that the House Judiciary Committee refer this matter to the Probate Advisory Committee for further study.

The depth and breath of HB 2568 would suggest a well researched and well drafted legislative initiative, however, several inherent problems contained within the bill require your attention. First, §2(a)(3)(A) grants the attorney in fact the power to "manage, dispose of, sell and convey ANY finances and real or personal property". This section allows an attorney in fact to dispose of all the grantor's real property, which in many cases would include the grantor's homestead. The attorney in fact could use this provision to exceed his actual authority and circumvent the bill's original intent. In addition, by allowing the attorney in fact this broad authority, well settled homestead principles are immediately called into question. Second, §2(a)(3)(C) requires a witness to sign the power of attorney (POA). This provision is inconsistent with wills and trust law. Under current law a valid will requires no less than two witnesses while the grantor of a revocable trust is under no obligation to provide any. Yet HB 2568 requires only one. An in-depth review of these laws could provide a more consistent approach to dealing with witness requirements for POAs, wills and revocable trusts. Third, §5(b) creates a criminal penalty for violations of this section. Under wills and trusts the penalty for violating the section is that the will or trust is void. Here, HB 2568 goes much further by allowing for prosecutions. It is difficult enough to retain competent and fiscally sound third parties to act as financial agents. The potential threat of criminal sanctions will only compound this issue. Furthermore, this section may create a conflict of interest. An attorney drafting a POA could not

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prepare it for a client and assume the position of legal counsel for the attorney in fact. The attorney in fact would need to be represented by separate legal counsel to avoid such a conflict. Fourth, §5(e) voids all POA's drafted prior to the principal's incapacity or mental incompetence that do not meet the requirements set out in HB 2568. Many POA's have been drafted using current law as a guidepost and the effect of noncompliant POA's would place the principal, attorney in fact, and any third party honoring the POA in an unfavorable financial position. The consequences of this provision alone merit serious discussion and review by the Judicial Council.

The KBA appreciates the underlying goals of HB 2568 and applauds the sponsors for taking a proactive step in protecting vulnerable adults. However, the KBA is concerned that HB 2568 would not significantly reduce the problem. Family members intending to defraud a family member only need to procure one additional signature and to record the POA for it to be acceptable. Furthermore, HB 2568 appears on its face to encompass more than durable powers of attorney, which could allow an unscrupulous individual to circumvent these provisions by using a power of attorney not durable in nature.

The KBA believes that the issues described above can be alleviated with additional review and collaboration with colleagues and stakeholders. By studying this bill now, we can avoid several other amendments and revisions that have surrounded the Kansas Power of Attorney Act since 2003. As such, the KBA respectfully request that HB 2568 be referred to the Office of the Judicial Council for further study.

On behalf of the Kansas Bar Association, I thank you for your time this afternoon and would be available to respond to any questions.

Respectfully,

Joseph N. Molina  
KBA Director of Government and Legal Affairs

*About the Kansas Bar Association:*

The Kansas Bar Association (KBA) was founded in 1882 as a voluntary association for dedicated legal professionals and has more than 6,900 members, including lawyers, judges, law students, and paralegals.