Approved: 3/10/10
Date

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Lance Kinzer at 3:30 p.m. on February 10, 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
Athena Andaya, Kansas Legislative Research Department
Jerry Donaldson, Kansas Legislative Research Department
Sue VonFeldt, Committee Assistant

Conferees appearing before the Committee:
Representative Jim Morrison
Representative Bill Otto
Richard Fry, November Patriots
Benjamin Hodge, Johnson County Community College Trustee
Doug Anstaett, Kansas Press Association, Inc.
Melissa Wangemann, Kansas Association of Counties
Don Moler, League of Kansas Municipalities
Tom Krebs, Kansas Association of School Boards
Eric Sartorius, City of Overland Park
Tyson Longhofer, Mortgage Electronic Registration Systems, Inc.

Others attending:
See attached list.

Chairman Kinzer advised the committee they were each provided a memorandum from the Kansas Commission On Judicial Performance answering questions that were raised at the hearing on February 3, 2010 **HB 2531**, relating to Docket Fees and the Commission on Judicial Performance. (Attachment 1)

The hearing on **HB 2612 - Concerning drivers' licenses, restrictions and judgments of restitution** was opened.

Matt Sterling, Assistant Revisor of Statutes, provided the committee with a brief overview of the bill that would give the Department of Revenue the authority to restrict driving privileges of an individual who has been ordered to pay a judgement restitution if that judgement has been properly filed, the individual is more than six months delinquent in paying the judgement and the individual has not agreed to a court approved payment plan. (Attachment 2)

Representative Jim Morrison appeared before the committee to support this bill, and as the originator, explained the request he received from his local sheriff and District Judge for a law that would provide a way to place restrictions on a driver's license to anyone who has failed to pay a judgement of restitution as outlined in the bill. (Attachment 3)

Written testimony in opposition of the bill was provided in a memorandum to the committee and signed by: (Attachment 4)
Karen Arnold-Burger, Presiding Judge, Overland Park Municipal Court
Maurice Ryan, Presiding Judge, Unified Government Wyandotte County
Randy McGrath, Presiding Judge, Lawrence Municipal Court
Steve Ebberts, Presiding Judge, Topeka Municipal Court
Brenda Stoss, Presiding Judge, Salina Municipal Court
Jennifer Jones, Presiding Judge, Wichita Municipal Court

Written testimony as a neutral position was provided by Marcy Ralston, Chief Driver Control Bureau, Division of Vehicles and had concerns of the additional workload the bill could create.(Attachment 5)

Minutes of the House Judiciary Committee at 3:30 p.m. on February 10, 2010, in Room 346-S of the Capitol.

The hearing on **HB 2612** was closed.

The hearing on **HB 2525 - Open meetings; recording of executive sessions** was opened.

Jill Wolters, Office of Revisor Statutes, provided the committee with an overview of the bill. She explained under current law, K.S.A. 75-4319 requires all meetings conducted by a public body or agency to be open, except under specific circumstances established by law. In a situation where a member of a public body or agency may object to participating in a closed or executive session if the member believes the action violates or subverts the intent of the open meetings act, and upon objection by the member, the closed session may commence or continue only if such meeting or session is recorded. She proceeded to explain the requirements that would need to be met regarding the recordings. (Attachment 6)

Representative Bill Otto spoke before the committee as the originator and a strong supporter of the bill and gave testimony of a personal experience of how closed and executive sessions are abused and this bill would provide a means for the honest person to stand up and take action. (Attachment 7)

Richard Fry, spoke on behalf of the November Patriots in support of the bill but believes the bill does not go far enough. (Attachment 8)

Benjamin Hodge, spoke as an individual and the experience of being a Johnson County Community College Trustee from 2005-2009. He spoke in support of the bill and while the open meetings law is good, he stated it needs to be improved. He believes it needs to be easier to enforce and asked to give local officials the funding and tools to take Kansas Open Meetings Act (KOMA) violations directly to court. He told of a personal experience with KOMA and Johnson County Community College regarding budget information that was "merely distributed and not discussed" during a closed meeting, He asked the Legislature to consider whether Legislature should clarify, as he finds it hard to believe that interpretation was the original intent of the law-that any discussion can take place, as long as "binding action" is discussed only later. He also stated most do not realize just how much fraud and corruption there is in local government and in the Kansas schools along with the abuse of KOMA. (Attachment 9)

Doug Anstaett, Executive Director addressed the committee as a proponent on behalf of the Kansas Press Association and stated KOMA was enacted by the Kansas Legislature in the mid-1980's and stated that open meetings are the declared policy of Kansas. This bill is asking to give the public and the press a realistic opportunity to make sure nothing else, nothing illegal, is being discussed when our elected officials go behind doors and a means to ascertain the facts when that trust is broken. The tape recording will provide the verification, if it should ever be needed to ensure the public body followed the law when it went behind the closed doors, and even then , only the portion of the meeting that is an issue would come under scrutiny. Boards, commissions, councils, and other public bodies will be able to freely and frankly discuss personnel issues, legal problems and other lawfully allowed topics without fear. There will be no "chilling" effect, unless they veer outside of Kansas public policy as stated in KOMA. (Attachment 10)

Melissa Wangemann, General Counsel/Director of Legislative Services, appeared as an opponent on behalf of the Kansas Association of Counties and stated the current law allows only certain reasons why an executive session may be held. The reasons most often used for executive sessions among county commissioners are discussion on personnel matters and attorney/client privileged communications. They believe adding a tape recorder to the discussion will "chill" the honest disclosure. It also raised concerns about county attorneys offering privileged information in an executive session. They are also concerned about keeping the recording sealed and what county personnel would have access to the record and the risk of information being leaked leading to liability for violating an employee's privacy rights. (Attachment11)

Don Moler, Executive Director for League of Kansas Municipalities (LKM), spoke as an opponent stating this bill would alter the delicate balance that KOMA currently strikes between the need for certain privacy and the right of the public to have access to information. He stated the current law provides adequate enforcement options for addressing any perceived violation and gives the county or district attorney, and the attorney general, the ability to subpoena witnesses and documents, take testimony under oath and review any other material pertinent to an investigation. (Attachment 12)

Tom Krebs, Governmental Relations Specialist for the Kansas Association of School Boards, (KSAB) addressed the committee as an opponent to this bill and that opposition can easily be traced back to a long-standing policy that is supported annually in their Delegate Assembly: KSAB opposes any requirement that executive sessions be recorded. KSAB also supports that current practices monitoring executive session limitations are sufficient. He reported the president of the board has an ethical and legal obligation to keep the conversation related to the reason the session was called and if he or she does not do that, another board member has the right to call it to the president's attention. If the conversation would continue to stray from the approved topic, any and all members who feel the intent of the law is being violated simply should leave the session and it will be recorded in the minutes; modeling the appropriate behavior of not engaging in such activity by leaving the meeting, the conscientious board member has done much more to encourage ethical and legal behavior over the long term among his or her peers than any threat of "I'll have this recorded" will ever have. (Attachment 13)

Eric Sartorius spoke as an opponent on behalf of the City of Overland Park, Kansas and believes KOMA currently strikes a fair balance to create open and efficient government. He stated their focus of the ability to go into executive session is to protect the privacy of individuals discussed in such sessions, to allow discussion of litigation strategies or other legal issues with the public entity's attorneys or to allow public entities to negotiate effectively for the purchase of land. Even though the bill purports to ensure the recording of the executive session will neither become an open public record nor a waiver of the attorney-client privilege, such measures are untested, and arguably will not maintain the protection of the attorney-client privilege and, arguably may not protect the recording from inappropriate disclosure under the KOMA. In addition the recording of the executive sessions will certainly have a "chilling" effect on frank discussions. (Attachment 14)

The hearing on **HB 2525** was closed.

The hearing on **HB 2613 - Concerning joinder of persons** was opened.

Representative Whitham addressed the committee in support of the bill and also proposed a technical amendment to the bill. (Attachment 15)

Tyson Langhofer, Esq., Partner, Stinson Morrison Hecker LLP, addressed the committee as a proponent of the bill on behalf of Mortgage Electronic Registration Systems, Inc. (MERS). He explained MERS was created to improve the efficiency of mortgage lending by reducing errors, costs, and delays associated with frequent and multiple assignments of the mortgage lien interest when servicing rights or beneficial ownership interests are sold. He further explained the process of how members contract with MERS. He added this bill to amend the statute is necessary due to a recent Kansas Supreme Court decision, Landmark National Bank v Boys a. Kesler, et al., 289 Kan.528, 216 P.3d 158 (2009) which has recently created some potential confusion as to whom is to be included in the class of contingently necessary parties. He urged the committee to support this bill to ensure all parties will be joined before a foreclosure action can be held to foreclose his or her rights to property in Kansas. (Attachment 16)

Chris St. John, President-Elect and Legislative Chair, Kansas Land and Title Association provided written testimony in support of the bill. (Attachment 17)

Barkley Clark, on behalf of Stinson Morrison Hecker, LLP, submitted written testimony in support of the bill. (Attachment 18)

Kathy Olson, on behalf of Kansas Bankers Association, presented written testimony in support of the bill. (Attachment 19)

There were no opponents to the bill.

The hearing on **HB 2613** was closed.

HB 2467 - Marking of vehicles owned by public subdivision; exception.

Minutes of the House Judiciary Committee at 3:30 p.m. on February 10, 2010, in Room 346-S of the Capitol.

Representative Pauls made the motion to move **HB 2467** favorably for passage.
Representative Kuether seconded the motion. Motion carried.

HB 2557 - Removing references to the inheritance tax and limiting the applicability of its provisions.

Representative Whitham made the motion to move **HB 2557** favorably for passage.
Representative Crow seconded the motion. With the permission the first and second, the motion was corrected to report **HB 2557** favorably for passage as amended, to include the technical amendment requested by the Department of Revenue when the bill was heard on February 8, 2010. (Attachment 20)
Motion carried.

The next meeting is scheduled for February 11, 2010.

The meeting was adjourned at 5:20 p.m.

JUDICIARY COMMITTEE GUEST LIST

DATE: 2-10-10

NAME	REPRESENTING
Carmen Alldritt	KDOR
Murray Balsters	KDOR
Kelly Bolton	KDOR
Don Moler	LKM
Melissa Wangemann	KAC
Erik Sartorius	City of Overland Park
Kent Cornish	KAB
Doug Anstaett	KPA
Richard Gannon	KPA
Ben Hodges	myself
Hannah Sanders	KHPA
Diane Gjerstad	USD 259
DICK CARTER	city of Manhattan
David Romney	Kearney & Assoc.
Tom Kuhn	KASB
Shannon Bell	LGR
Kevin Boese	The Capitol Lobby Group, LLC
Kathy Olsen	KS Bankers Assn
Doug Wareham	

JUDICIARY COMMITTEE GUEST LIST

DATE: 2-10-10

NAME	REPRESENTING
Luke Bell	Kansas Association of REALTORS

KANSAS COMMISSION ON JUDICIAL PERFORMANCE

Kansas Judicial Center
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Topeka, Kansas 66612-1507

Telephone (785) 296-8949
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www.kansasjudicialperformance.org

RANDY M. HEARRELL
Executive Director

MEMORANDUM

TO: **House Judiciary Committee**

FROM: **Randy M. Hearrell**

DATE: **February 9, 2010**

RE: **Questions Raised About 2010 HB 2531 Relating to Docket Fees and the Commission on Judicial Performance**

When the hearing on HB 2531 was held on February 3, 2010, I was asked the following questions, which I have answered in this memorandum:

1. Has the surveying for the 2010 judicial performance evaluation reports been completed?

No, continuous surveys about all Kansas judges and justices began over two years ago. The final group of surveys of attorneys and non-attorneys that will be included in the 2010 reports (regular and interim) is currently underway and will be completed in mid-March.

Surveys of appellate judges about the performance of district judges and surveys of district judges about appellate judges will be conducted in the next week or two. The surveys of employees have been completed and the self-evaluation surveys of judges and justices who will stand for retention election in 2010 are to be returned to the Commission by February 26, 2010.

2. What percentage of persons respond to questionnaires?

The following is a list of response rates by category of respondent from program inception through the evaluations of the elected judges (distributed November 2009).

House Judiciary
Date 2-10-10
Attachment # 1

Appellate Judges	83.3%
Attorneys	
Criminal:	
Prosecuting Attorneys	45.4%
Defense Attorneys	42.9%
Civil:	
Attorneys for Litigants	34.9%
Other Civil Attorneys (*i.e.*, guardians ad litem)	38.7%
Non-attorneys	
Criminal:	
Law Enforcement	46.4%
Defendants	13.0%
Victims	17.5%
Witnesses	19.0%
Civil:	
Litigants	13.8%
Witnesses	17.7%
Other (*i.e.*, CASA)	16.3%
Jurors	58.5%
Employees	69.5%

3. What is the money spent on?

The money appropriated for judicial performance is spent in the following categories:

Salaries and Wages:	Two staff attorneys and one secretary
Communication:	Postage, telephone, freight, computers, etc.
Commission:	Meeting and travel expenses for Commission and consultant
Office Expenses:	Office supplies, repairs, printing, copier rental, database modifications, internet services, DISC services, FMS

Professional Fees:	Data extraction fees from Justice Systems Inc., surveying and consulting by Talmey Drake Inc., preparation and installation of extraction and juror software
Dissemination:	Costs of publicizing reports. Includes radio, newspapers, internet, media guides, and possible social media
Other:	The Committee should be aware that in FY 10 approximately $88,000 was taken from the Judicial Council's fee funds to fund the work of the Kansas Criminal Code Recodification Commission. A great majority of this money was taken from the Judicial Performance Fund.

The current yearly income is $717,000. There has not yet been a typical year because in the first year the expenditures were lower because the program was not fully started and later years' expenses were higher because of catching up on surveying and start-up expenses (such as website creation, establishing databases and software writing and installation). The program will soon settle into a regular budget as follows:

Salaries and Wages	$210,000
Communication	$4,000
Commission Meetings	$23,000
Office Expenses	$25,000
Professional Fees	$420,000
Dissemination	$35,000*
TOTAL	$717,000

*$35,000 is in each year's budget but nearly all ($70,000) is spent in election years.

4. What could the Commission do with 50% of its current funding?

I cannot speak for the Commission because I am staff. But, having observed their meetings, my opinion is they would likely consider ceasing mid-term evaluations and determine if the statutes allow them to cease evaluations of elected judges. I would expect substantially less surveying of non-attorneys, because getting that information is expensive.

I assume the Commission would monitor the program to fulfill its statutory obligation under K.S.A. 20-3206 to certify to the Judicial Council when "funding is not adequate to support a judicial evaluation program of high quality" or "in the opinion of the Commission, the program is no longer of appropriate value." The statute gives the Judicial Council the authority to reduce in scope or discontinue the program.

Currently the Commission provides both regular and mid-term (interim) reports to all 117 elected judges, 129 retention election trial judges and 20 retention election appellate judges and justices. The elimination of mid-term reports would not result in large savings because those reports are based on the same information gathered for the regular reports.

Elimination of reports on elected judges would reduce costs of surveying. Because 44% of the judges run in partisan elections (117 elected and 149 retention election) and there are some fixed costs associated with surveying, I estimate surveying costs would be reduced about 35% to 40%.

There are some fixed costs associated with preparing judicial performance evaluations that will not change, or will not change much even if evaluations are limited to only retention election judges and justices. These costs are:

- board meetings and travel
- fee for Justice Systems Inc. to extract information from each courts FullCourt database (we currently pay the minimum $5,000 per quarter fee)
- costs of dissemination of information (this includes website and expenses of dissemination of results, which is currently only done for retention election judges).

Some costs associated with preparing judicial performance evaluation reports would change. They are:

- Salaries and wages
- Communication costs (postage, telephone, DISC services)
- Printing costs (reports)
- Surveying costs
- Office supplies

In summary, I would expect less professional and lower quality reports to be done for retention election judges. There might be objections from those judges because, when the Commission was established, the ability to produce high quality reports was an issue with the judges.

5. What would be the costs of getting the reports out in the second half of 2010?

In answering this question I have made the following assumptions:

- No surveying or data extraction would occur in the 3rd and 4th quarters of 2010.

- CJP staff would be terminated at end of 4th quarter. If a staff member resigned earlier their position will not be filled.

- There are no costs associated with terminating or suspending contracts with vendors.

- Scheduled process of distribution of regular and mid-term reports, interviews with judges, and revision of reports will be performed as scheduled.

- Statutorily required "dissemination of results from the judicial performance evaluation process" [K.S.A. 20-3208(b)] will occur as planned.

- Commission will meet regularly to complete the process. In December the Commission will meet to analyze the evaluations, and direct staff to perform all functions necessary to end or temporarily suspend contracts with vendors and perform all functions necessary to "mothball" the program.

I estimate the costs would be:

Salaries and Wages	$105,000
Commission Meetings	$12,000
Communications (telephone, postage, etc.)	$2,000
Print and Distribute Reports	$8,000
DISC Services	$3,000
Copier Rent	$3,000
Office Expenses	$600
Dissemination (radio, newspapers, internet)	$70,000
TOTAL	$203,600

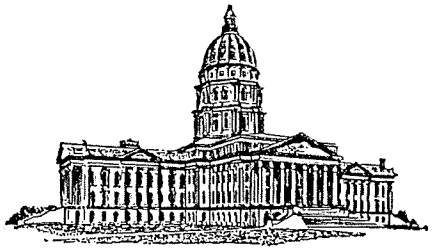
If the surveying were suspended it would likely take some time to accumulate assets, reinstate or rebid contracts, hire personnel and begin surveying again.

Please contact me if you would like additional information.

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

MEMORANDUM

To: Chairman Kinzer and members of the House Committee on Judiciary
From: Matt Sterling, Assistant Revisor of Statutes
Date: February 10, 2010
Subject: House Bill No. 2612

HB 2612 would give the division of vehicles of the department of revenue the authority to restrict the driving privileges of an individual who has been ordered to pay a judgment of restitution if that judgment has been properly filed, the individual is more than six months delinquent in paying the judgment and the individual has not agreed to a court approved payment plan. The restrictions on the individual's driving privileges would limit the individual to driving: To and from work or school, during the course of the individual's employment, during a medical emergency, to or from probation or parole meetings, to or from drug or alcohol counseling, during specific times during the day specified by the order and specific places specified by the order.

300 SW TENTH AVE - STE 010-E, Statehouse—TOPEKA, KANSAS 6(
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STATE OF KANSAS

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TOPEKA
HOUSE OF REPRESENTATIVES

COMMITTEE ASSIGNMENTS:
Chairman
Governmental Efficiency and Fiscal Oversight
Member
Health and Human Services
Member
Joint Committee on Information Technology
Member
Health Care Stabilization Committee

Testimony on HB 2612

Good afternoon, Mr. Chairman and members of the Judiciary Committee. Thank you for allowing me to testify ***in support*** of HB 2612. This bill was requested by both my local sheriff and District Judge last summer. The addition to current law is on page 1, lines 36 to 43, and Page 2, lines 1 to 8.

It was brought to my attention that there is a growing problem especially with younger persons simply "trashing" a property just "for the fun of it." When ordered to make restitution, it is sometimes nearly impossible to receive the money due to lack of an option that can get their attention.

It was suggested that, in such cases, their driver's license be restricted until they make restitution. I requested this as a Judiciary Committee bill to enact what you see in the italicized lines mentioned above.

The change is straight-forward, so I will stand for questions. Thank you for your attention.

Rep. Jim Morrison

House Judiciary
Date 2-10-10
Attachment # 3

Written Testimony Before the House Judiciary Committee
For House Bill 2612
by
Karen Arnold-Burger, Presiding Judge, Overland Park Municipal Court
Maurice Ryan, Presiding Judge, Unified Government Wyandotte County
Randy McGrath, Presiding Judge, Lawrence Municipal Court
Steve Ebberts, Presiding Judge, Topeka Municipal Court
Brenda Stoss, Presiding Judge, Salina Municipal Court
Jennifer Jones, Presiding Judge, Wichita Municipal Court

February 10, 2010

We are submitting this testimony in opposition, in part, to HB 2612 as it is currently drafted. We currently preside over municipal courts in localities across the state of Kansas.

Thank you for the opportunity to address you on this topic. HB 2612 allows the local municipal or district court to issue a restricted license to anyone who has failed to pay a judgment of restitution. The pertinent part of the legislation is as follows:

> K.S.A. 2009 Supp. 8-255 is hereby amended to read as follows: 8-255. (a) The division is authorized to restrict, suspend or revoke a person's driving privileges upon a showing by its records or other sufficient evidence the person:
>
> (6) *has been ordered to pay a judgment of restitution, such judgment has been filed pursuant to K.S.A. 60-4301 through 60-4305, and amendments thereto, is delinquent by more than six months in satisfying such judgment of restitution and has not agreed to a court approved payment plan. Except as otherwise provided by law, whenever a restriction is placed on a person's driving privileges pursuant to this subsection, a district or municipal court may enter an order restricting the person's driving privileges to driving only under the following circumstances:*

Although we do not object to the purpose of the legislation, municipal courts would have no way of tracking any restitution orders from a district court. This legislation would seem to allow a municipal court to enter a restriction whenever a driver failed to comply with a district court judgment for restitution. The statute under which such judgments are filed does not directly relate to a municipal court order for restitution therefore said courts have no involvement in such judgments. Municipal courts do not enter the orders, nor track compliance with said judgments.

We respectfully ask that the Committee take these issues into consideration when acting on HB 2612 and either put all authority for entering restrictions in these situations on the Department of Revenue, Division of Vehicles and leave the courts out of it all together (except in so far as the district court may notify the Division of non-compliance) or, at a minimum, remove any reference to municipal courts in the legislation.

KANSAS
DEPARTMENT OF REVENUE

Mark Parkinson, Governor
Joan Wagnon, Secretary

www.ksrevenue.org

TO: Chairman Lance Kinzer
Members of the House Judiciary Committee

FROM: Marcy Ralston,
Chief, Driver Control Bureau
Division of Vehicles

DATE: February 10, 2010

RE: House Bill 2612

Thank you Mr. Chairman and Members of the Committee. I am Marcy Ralston, Chief of the Driver Control Bureau, Division of Motor Vehicles.

House Bill 2612 creates a new type of license sanction against the driving privileges based upon a delinquent judgment of restitution by more than six months. The Division of Vehicles stands neutral on the bill because we can administer the functionality of the new suspension and/or restriction action. However, the consequences of the additional workload cause concern. We understand the volume of delinquent judgments could be extremely high and if so, would be beyond the capabilities of our current staffing level. I need to bring to your attention that we've estimated this bill would require two new FTE positions in our fiscal note (approximately $114, 800) and that may be a conservative estimate at the least, considering the paperwork, processing and customer inquiries that will result if the bill is passed.

Thank you and I am glad to stand for any questions.

DIVISION OF VEHICLES
DOCKING STATE OFFICE BUILDING, 915 SW HARRISON ST., TOPEK
Voice 785-296-3601 Fax 785-291-3755 http://www.ksre

House Judiciary
Date 2-10-10
Attachment # 5

Office of the Revisor of Statutes
300 S.W. 10th Avenue
Suite 24-E, Statehouse
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MEMORANDUM

To: Chairman Kinzer and members of the House Committee on Judiciary
From: Jill Ann Wolters, Senior Assistant Revisor
Date: 2 February, 2010
Subject: HB 2525

Under current law, K.S.A. 75-4319 requires all meetings conduct by a public body or agency to be open, except under specific circumstances established by law.

HB 2525 would amend K.S.A. 75-4319 to do the following:

1. A member of a public body or agency may object to participating in a closed or executive session if the member believes the action violates or subverts the intent of the open meetings act. Upon such objection, the closed session may commence or continue only if such meeting or session is recorded. Such recording will be kept by the public body for a period of time not less than one year after the date of the closed session.
2. The recording of a closed session shall be sealed and not be a public record subject to public inspection under the open records act. In any action to enforce the open meetings act, upon order of the court, the recording of the closed session shall be unsealed and examined by the court in camera. If the court determines it is likely that a violation of the act has occurred, the court shall determine what portion of the recording of the closed session, if any, should be disclosed for use in the enforcement proceeding to the party seeking enforcement of the open meetings act.
3. In determining whether any portion of the recording of the closed session should be disclosed, the court shall weigh the prejudicial effects to the public interest resulting from the disclosure of any portion of the recording of the closed session against the probative value of such portion needed to enforce the provisions of this act. After making its determination, the court may permit the party seeking enforcement of this act to inspect or use the recording of the closed session, or any portion thereof, under such conditions as the court may direct.
4. The presence of a recording device, as required by this act, shall not constitute or be construed as a violation of the attorney-client privilege.
5. For the purposes of this subsection:"Recording" means the duplicating, or causing to be duplicated, of sound by electronic means or otherwise, on a phonograph record, disc, wire, tape, film or other article on which sounds are duplicated; and "recorded" means the duplication of, or causing the duplication of, sound by a recording device.

STATE OF KANSAS

HOUSE OF REPRESENTATIVES

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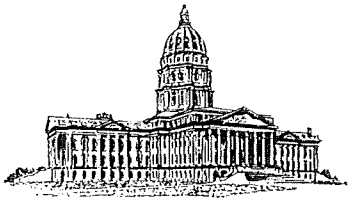

BILL OTTO

I want the thank the committee on hearing HB 2525.

You are going to hear people who will tell you there is no problem. There are no convictions, and I am so glad to have this bill before a committee of lawyers. The reason there are no convictions is the law is so bad that conviction is next to impossible.

My idea was a very simple one and would have saved the Coffey County Fire District #1 at least $50,000 had HB 2525 been on the books. Rather than the word of one honest person against several others, it allows that person to stand up and take action that gives his word greater value.

With that I will stand for questions.

House Judiciary
Date 2-10-10
Attachment # 7

KOMA Notice HB 2525

fry8413 [fry8413@sbcglobal.net]

Sent: Monday, February 08, 2010 12:21 AM

To: Lance Kinzer; Lance@LanceKinzer.com

November Patriots

TO: House Committee on Local Government /Rep. Lance Kinzer
Government body / agency
Matter: HB2525

Request for Notice of Future Action and Agenda

A formal request is herby being made under the Kansas Open Meetings Act (KOMA) for prior notice of any future regular or special meeting of the public body being put on notice hereby as to the matters specified herein. (K.S.A. 75-4317 et seq.)

Request for Agenda

Request is hereby being made for an agenda, relating to any business to be transacted at any future meeting, to be provide in advance of any such meeting to the requestor hereof, as noted below.

Duty to Provide Notice

It is the duty of the presiding officer or other person calling such meeting to provide the aforementioned notice.

Penalties for Violation of KOMA

Any member of any body or agency subject to [KOMA] ...who knowingly violates any of the provision of [KOMA] or who intentionally fails to furnish information as required by [KOMA] ....**shall be liable for the payment of a civil penalty** ...**any binding action** which is taken at such a meeting not in substantial compliance with[KOMA] ...**shall be voidable....**

Designation of Recipient of Notice and Information

Notice of any future meeting and of related information should be sent to:

Recipient: Richard D. Fry
Tele: 816 853 8718
E-Mail: RichardFry@novemberpatriots.info
Other:

House Judiciary
Date 2-10-10
Attachment # 8

Benjamin Hodge
Overland Park, KS
Kansas Representative, 2006-2008
Johnson County Community College Trustee, 2005-2009

Proponent, HB 2525

Testimony to Judiciary Committee
February 10, 2010

Chairman Kinzer, members of the committee, thank you for the opportunity to address you today. I am here today for a few reasons. For one, I want government to be as open as possible. In particular, I want the discussion of budgets – spending the taxpayers' money – to be done in a manner that puts the taxpayers first, and does not put the protection of government first. I have served in local government, and I have seen first-hand the good and the bad in local government. I don't think some of you realize just how much fraud and corruption there is in local government and in Kansas schools, and I'm here to challenge the conventional wisdom.

I'm also here today because my testimony relates directly to three other, very important issues that you are dealing with during the 2010 session. These three issues are education, the overall state budget (and whether tax increases are necessary), and the judicial branch of government (and whether judges are accountable and qualified).

If there are only two things you take away from my testimony, they're these:

- One: In Johnson County, there effectively is no open meetings law because the district attorney refuses to enforce the law. In Johnson County – a county with a fifth of the state's population, and where local governments spend billions of dollars – local politicians are free to discuss budgets during executive sessions, and also through serial meetings.
- Two: While the current open meetings law is good, I do believe that you need to improve the law. Most importantly, it needs to be easier to enforce – namely, I ask you to give local officials the funding and the tools to take KOMA violations directly to court. Right now, the district attorney is the only person who can enforce the law. Otherwise, it's up to local politicians to spend their own money to hire a lawyer and take KOMA violations directly to court.

First, a brief background about me and about JCCC. The background on JCCC is necessary so that you can better understand the ongoing culture of corruption. As some of you know, I served in the Kansas House from 2006 to 2008. I was a part of this judiciary committee. I've also served in local office, at Johnson County Community College. With 50,000 students a year, JCCC is the largest college in the state; larger than KU or K-State. The budget is about $160 million a year. There are seven at-large trustees at JCCC. They're elected to four-year terms, and the elections are alternated so that four trustees are elected at one election, and three at another election. The spring of 2005, at age 25, I received first place out of four, in an election where the top three vote-getters won election. I beat incumbent Trustee Nelson Mann, a prominent Kansas City attorney.

I was later told by Trustee Lynn Mitchelson that if I had not replaced Nelson Mann and if Nelson Mann were still there, that it was likely that former college President Charles Carlsen would not have voluntarily resigned. In 2006, it became known that one woman accused President Carlsen of sexual harassment. Carlsen denied it, and we believed him, at first. But soon, it became four women that were accusing Carlsen of sexual harassment. The only reason we know any of this is because of a student -- the editor of the student newspaper – who did his own investigations. Right after it was known that it was not one woman but instead four women who were accusing Carlsen of sexual harassment, Carlsen immediately resigned.

Later, the board found out that one of the final acts of the Carlsen admi
cover-up. I mentioned the student editor – he also worked part-time in the libr

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resigned, trustees learned that two people -- Carlsen's top vice president and college attorney Mark Ferguson – approached the student editor while he was working in the library, and pulled him aside to "talk" to him about the investigation the sexual harassment accusations. This was clearly an attempt to intimidate the student, it was clearly unprofessional, and, again, the only reason we know this is because the student editor had the courage to file an ethics complaint against attorney Mark Ferguson and told us about this during an executive session.

If you're not familiar with Mark Ferguson – he is a law partner of Larry Gates, the Democratic Party Chairman, and college trustees refuse to perform a competitive bid for legal services. Ferguson replaced Dan Biles – now Supreme Court Justice Dan Biles. For the sake of Kansas, I sincerely hope that Dan Biles is a better lawyer than Mark Ferguson. In 40 years, the college has never performed a competitive bid for legal services, and somehow, the contract has ended up in the hands of Larry Gates. Ferguson also has the legal contract for the K-12 state school board.

Ferguson is both unethical and also not all that good of a lawyer. He played a role in at least two attempts to cover up those sexual harassment allegations, he's lied to the public, he has actively encouraged trustees to violate their own code of conduct, he has encouraged current college president Terry Calaway to violate internal college policies for ethics complaints, he's encouraged Calaway to abuse the intra-college communication systems in order to mislead employees, he's violated the Kansas Open Records Act, and he tried, unsuccessfully, to cover up the violation of KOMA, the open meetings act. My favorite Mark Ferguson story is this, from another former student reporter: Ferguson once told him, *I'm not going to grant your open records request, because I know you're going to write about the information.* Again, Ferguson told the student that because the student was going to report the information, that Ferguson would not grant the KORA request.

Now, to my experiences with KOMA violations at JCCC: In late 2008, I wrote a letter to the editor at *The Kansas City Star*, about the possibility of tax increases at JCCC. That frustrated four other trustees, who then agreed to the contents of their own letter to editor, regarding both my letter and also their "take" on the likelihood of tax increases. That was four out of seven trustees, a majority – and I asked our college attorney whether that violated the serial meetings clause in KOMA. After repeated back and forths, whereby Ferguson tried to delay, he finally did answer through Email: yes, it violated the letter of the law, but not the spirit of the law. He later told me in person, *I avoided answering your question by Email because I didn't want to put it in writing.* I decided not to make an issue of it. But, remember, our own attorney had said in late 2008 that, yes, there had been a violation of KOMA, according to the letter of the law.

In early 2009, trustees performed a semi-annual job performance evaluation of President Terry Calaway. We went legally into executive session. Near the end of the executive session, Calaway handed out a 64-item typed list of possible budget cuts. Calaway then <u>verbally instructed</u> trustees not to share the list. These 64 items were not part of a larger document; it was one document that was just a few pages long, and that existed all by itself. Only four items identified actual employees who faced possible job losses – two by name, and two by title. But 60 of the items did not directly reference any one person. I'll take a moment to now to encourage you to clarify this in KOMA – that when an identifiable government employee faces a job loss due to budget cuts, and not because of job performance, that the budget item should made public.

So, again, that 64-item budget list was shared during a closed meeting. And I didn't think anything of it, at the time. But a week later, after being asked by Star reporter Jim Sullinger for general budget information, I volunteered to him, *Well, I have some budget information, but it was shared during a closed meeting.* I basically was challenging him, *I know I could give it to you, but you need to talk me into it.* He immediately replied, *Now, wait a minute, budget information isn't supposed to be shared during an executive session.* I then realized, *Oh, you know what, you're right,* and I shared the list with Sullinger.

Sullinger reported it online – online only. It would have ended there, in a normal world. But this is not a normal world; this is Johnson County. College leaders were infuriated that I did not ask for their permission to share the budget information with the public. These people genuinely come from the point of view that tax dollars are their money – that government comes first, and taxpayers come second. They hold the un-American view that citizens are a threat to government! President Calaway, Board Chair Shirley

Brown-VanArsdale, and Board Vice-Chair Lynn Mitchelson were angry at me, and so they began to criticize me for sharing the list. Once they realized that I had a legitimate reason for sharing the list – you know, that they broke the law – they then moved to denial and cover-up. They lied and said that I had specifically requested the list; not only was this false, but it's legally irrelevant – even if I had asked for it, it still would have violated KOMA.

With attorney Mark Ferguson's help, college leaders spent thousands of dollars and violated many college policies trying to both cover-up this KOMA violation and damage my reputation. And all of this because of a relatively minor – and common across the state – legal violation.

I chose to fight back, and I was able to win the political battle with the help of several legislators and press leaders in Topeka and Kansas City. Something that stuck with me was a comment to me by an employee at the Kansas Press Association – in terms of open government, I was told that the KPA typically does not have common problems with either conservative Republicans or Democrats, but instead with elected officials who are self-described "Johnson County Republican moderates."

So, again, we won the political battle, but, at least for now, the citizens of Johnson County lost the legal battle. Johnson County District Attorney Steve Howe made the following conclusions:

1. First, that serial meetings involving a majority of elected officials are acceptable, provided that they do not clearly state something similar to, "OK, and this is how we're later going to take binding action." I find it difficult to believe that this interpretation was the original intent of the law – that any discussion can take place, as long as "binding action" is discussed only later.

   From the Legislature's Web site, KSA 75-4318 (f), concerning serial meetings, emphasis mine:

   "(f) Except as provided by section 22 of article 2 of the constitution of the state of Kansas, meetings in a series shall be open if they collectively involve a majority of the membership of the body or agency, share a common topic of discussion concerning the business or affairs of the body or agency, and **are intended by any or all of the participants to reach agreement on a matter that would require binding action to be taken** by the body or agency."
2. But most disturbing was Howe's decision, here: that because the budget information was handed out during a job performance evaluation, and that because JCCC trustees evaluated President Calaway on something similar to "fiscal management," that large, detailed budget lists could then be distributed during closed meetings.

Again – virtually everybody of consequence in Kansas City disagreed with DA Steve Howe's decision – Howe's decision was so bad that *The Kansas City Star*, KMBC/ABC channel 9, the Kansas Press Association, and the Kansas Association of Broadcasters all editorialized against the decision, and in favor my efforts.

Also, one other thing Calaway tried to say, while trying to justify his behavior – and this was public, typed on the JCCC Web site – was that there was no "discussion" of the information: that the budget information was "merely" distributed, along with instructions not to later share (e.g., discuss) the information with the public, and that all of this was appropriate because there was not verbal discussion about the information among the trustees and during that one executive session. I encourage you to consider whether the Legislature should clarify this, for other administrators who are as openly unethical as JCCC's Terry Calaway.

Again, I appreciate the time to address your committee. Thank you for your time. I will be happy to stand for questions.

Kansas Press Association, Inc.

Dedicated to serving and advancing the interests of Kansas newspapers

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Feb. 10, 2010

To: Rep. Lance Kinzer, chairman of the House Judiciary Committee, and committee members

From: Doug Anstaett, executive director, Kansas Press Association

Re: HB 2525

Thank you for the opportunity to address the merits of HB 2525, a bill to require tape recording of executive sessions of public bodies in Kansas under certain circumstances.

The Kansas Open Meetings Act, approved by the Kansas Legislature in the mid-1980s, states in its first sentence that open meetings are the declared policy of Kansas.

Here's what KOMA then says: *In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the policy of this state that meetings for the conduct of governmental affairs and the transaction of governmental business be open to the public. It is declared hereby to be against the public policy of this state for any such meeting to be adjourned to another time or place in order to subvert the policy of open public meetings ...*

That second sentence is a strong admonition to public bodies: Don't go behind closed doors with the intention of subverting KOMA. If you do, you are going against the public policy of the state of Kansas.

So, why do we have KOMA? It's certainly not designed to make life easier for elected officials. Not at all. It's to make sure they realize they operate in the sunshine, even when they wish they could close the door, shut out the public and "speak frankly" with each other.

I was a newspaper reporter, editor and publisher for 30 years before coming to the Kansas Press Association. I heard the arguments through the years for private discussions of public business. "Oh," some of my own friends would argue, "we could do a much better job if it weren't for you pesky reporters and the public listening in on our discussions." They actually believed what they were saying.

Representative government was not designed to be a well-oiled machine. Frankly, our Founding Fathers designed it more like a parking lot with a series of speed bumps along the way to keep us moving forward, yet slowly and methodically. They called those speed bumps checks and balances.

What we're asking for under this bill is a check on the right of our elected officials to meet behind closed doors. We're not asking for a single change in the exceptions in KOMA. If a public body sticks to those subjects — and avoids all others not covered by the motion or allowed by Kansas state law — it has nothing to worry about. Under HB 2525, in the rare instance when a judge is asked to listen to a tape, he or she will be guided by a clear, unambiguous Kansas Open Meetings Act.

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What we're asking you to do is give the public and the press a realistic opportunity to make sure nothing else, nothing illegal, is being discussed when our elected officials go behind closed doors.

After all, how can the public know what is going on if the means for ascertaining the facts don't exist?

Former President Ronald Reagan had a favorite saying that is fitting for this issue: Trust, but verify.

That is what we are asking for with this legislation: Trust, but verify. The tape recording of a closed meeting or executive session will provide the verification — if it ever becomes an issue — that the public body followed the law when it went behind closed doors. And, even then, only that portion of the meeting that was conducted illegally will come under scrutiny. Boards, commissions, councils and other public bodies will be able to freely and frankly discuss personnel issues, legal problems and other lawfully allowed topics without fear of disclosure. There will be no chilling effect, unless they veer outside of Kansas public policy as stated in KOMA. If they do violate public policy, they should definitely feel a chill.

We urge you to support HB 2525.

Thank you.

KANSAS ASSOCIATION OF COUNTIES

TESTIMONY TO THE HOUSE JUDICIARY COMMITTEE
ON HB 2525
FEBRUARY 10, 2010

Chairman Kinzer and Members of the Committee:

Thank you for the opportunity to offer testimony in opposition to HB 2525.

HB 2525 requires recording of a governing body's executive session if a member of the governing body objects to the executive session. This means that one county commissioner could object to a Board of County Commissioners going into an executive session and then the executive session would be recorded. The bill requires that the public body keep the recording at least a year.

The Kansas Open Meetings Acts (KOMA) contains a provision allowing executive sessions in recognition that certain topics should not be discussed in the open. This section of KOMA outlines several reasons why an executive session may be held. The reasons most often used for executive sessions among county commissioners are discussion on personnel matters and attorney/client privileged communications. The ability to recess to executive session ensures candid and full conversations on delicate matters such as these. We believe adding a tape recorder to the discussion will chill this honest discourse.

We also raise concerns about county attorneys offering privileged information in an executive session. Many of our county attorneys are concerned about possible disclosure of their advice. We also believe county clients will be inhibited from openly discussing legal issues, thus complicating the attorney's ability to fully represent the county.

We worry about keeping the recording sealed. Although the bill states that the recording will be sealed and does not constitute a public record, surely some county personnel will have access to the record. And if the record contains sensitive conversations about personnel issues, there is a risk that information will be leaked, leading to liability for violating an employee's privacy rights.

Lastly, we point out that any member of the governing board who opposes the executive session can report the violation to his county attorney or the Attorney General. The official can offer testimony as to what violations, if any, occurred during the meeting. This testimony alone should afford enough evidence for a prosecutor to prove a violation of KOMA.

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We ask that you not pass HB 2525. I would be happy to stand for questions.

Respectfully Submitted,

Melissa A. Wangemann
General Counsel/Director of Legislative Services

LKM
League of Kansas Municipalities

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TO: House Judiciary Committee

FROM: Don Moler, Executive Director

DATE: February 10, 2010

RE: Opposition to HB 2525

First, I would like to thank the Committee for allowing the League of Kansas Municipalities to testify today in opposition to HB 2525. This bill would radically alter the delicate balance that the Kansas Open Meetings Act (KOMA) currently strikes between the need for certain privacy, and the right of the public to have access to information. In addition, there are protections in the KOMA making this bill unnecessary.

HB 2525 would allow a member of a public body or agency to object to participation in an executive session if that member "believes the action violates or subverts the intent" of the KOMA. At that point, the executive session could only proceed if recorded, and the recording preserved for at least a year. Then, the recording is subject to review and possible release by a court. First, K.S.A. 75-4320b provides adequate enforcement options for addressing any perceived violation. That statute gives the county or district attorney, and the attorney general, the ability to subpoena witnesses and documents, take testimony under oath, and review any other material pertinent to an investigation. Thus, if a member of the public body was concerned about a violation of the KOMA, he or she could testify as to the violation without the need for a recording. In addition, there is nothing preventing any person from declining to go into executive session because that person feels the KOMA may be violated by the action and then that person later making a complaint to the county or district attorney or the attorney general. Furthermore, there are logistical issues that arise with this legislation. A simple objection, whether or not it is made in good faith, triggers the recording of the executive session. If a disgruntled official objected to every executive session, this would result in the recording of every executive session held by a city. This proposed legislation is just another example of a solution in search of a problem. The current law is quite adequate to address the issue that this legislation is attempting to regulate.

There are further problems concerning the administration of this proposed change to the KOMA. Quite simply, who would be the custodian of these secret, and only open subject to court order, recordings? Typically records of this type would be maintained by the city clerk, but if the executive session happened to be about the city clerk, or any other city official designated as the recording custodian, that would be unworkable. Where would the recordings be stored, and who would have access to them? Despite the attempt in this bill to protect attorney-client privilege, it is doubtful that the privilege could survive the pitfalls of this legislation. We do not believe any

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attorney would be willing to advise their client with a recording device in the room, and expect that the attorney-client privilege would survive.

Finally, the most disturbing aspect of this legislation is that it presupposes that locally elected officials cannot be trusted to carry out their statutory duties as provided by the KOMA. The League has faith in local government officials, and believes that the current law is working well. We do not believe that there has been any showing that would support such a drastic and problematic change in the KOMA and would urge this Committee to reject HB 2525 as unnecessary and unwarranted. Thank you again for allowing the League to testify in opposition to HB 2525.

KANSAS ASSOCIATION OF SCHOOL BOARDS

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Testimony before the
House Judiciary Committee
on
HB 2525

by
Tom Krebs, Governmental Relations Specialist
Kansas Association of School Boards

February 10, 2010

Good afternoon Mr. Chair and members of the committee.

Thank you for the opportunity to testify on **HB 2525**.

We stand as an opponent to the bill. That opposition can be easily traced back to a long-standing policy that is supported annually in our Delegate Assembly: KASB opposes any requirement that these [executive] sessions be recorded.

KASB believes the current practices monitoring executive session limitations are sufficient.

First, there's really no way a person can know an executive session "violates or subverts the intent of the Open Meeting Act" until the executive session portion of the meeting is already underway as long as the proper motion with the proper supporting reason is approved with four or more votes. So to demand an executive session be recorded at that point is not pertinent by definition.

Once an executive session starts, the president of the board has an ethical and legal obligation to keep the conversation related to the reason the session was called. If he or she does not do that, it is a perfectly legitimate action for another board member to call that to the president's attention. If the conversation continues to stray from the approved topic, ALL members who feel the intent of the law is being violated simply should leave the session. By doing so, they accomplish two things. If the meeting continues without them, which will be recorded in the

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minutes, they run no risk of being found guilty of an infraction if the meeting is found later to be in violation of the statute. They also visibly demonstrate to their colleagues they are intent on following the law whether others do or not.

The purpose of the law is to prevent violating the explicit limitations, not to allow them to happen, then punishing the offenders. By first reminding the other board members of their obligations to remain true to both the spirit and the letter of the law, and then, if necessary, modeling the appropriate behavior of not engaging in such activity by leaving the meeting, the conscientious board member has done much more to encourage ethical and legal behavior over the long term among his or her peers than any threat of "I'll have this recorded" will ever have.

Thank you for the consideration.

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Testimony Before The
House Judiciary Committee
Regarding House Bill 2525
By Erik Sartorius

February 10, 2010

The City of Overland Park appreciates the opportunity to present testimony in opposition to House Bill 2525, which would require the taping of executive sessions of governmental bodies upon request of a member of that governing body.

The City believes the Kansas Open Meetings Act (KOMA) currently strikes a fair balance to create open and efficient government. Specific topics for which executive sessions are allowed are clearly spelled out, as is the requirement that no binding action be taken in executive session (K.S.A. 75-4319 (c)). The focus of the ability to go into executive session is, for example, to protect the privacy of individuals discussed in such sessions, to allow discussion of litigation strategies and other legal issues with the public entity's attorneys or to allow public entities to negotiate effectively for the purchase of land.

Opening executive sessions to tape recordings, no matter how well intentioned, will compromise the purpose of the closed session. Even though the bill purports to ensure the recording of the executive session neither will become an open public record nor a waiver of the attorney-client privilege, such measures are untested, arguably will not maintain the protection of the attorney-client privilege, and arguably may not protect the recording from inappropriate disclosure under the Kansas Open Public Records Act (KORA). Just as importantly, despite these purported protections, the recording of the executive session, nevertheless, will certainly have a chilling effect on frank discussions in the executive session.

If council members are concerned that privileged conversations with city attorneys will not remain privileged, or that other sensitive information will be exposed, will they ask the necessary questions, no matter how uncomfortable, in order to ensure that the city's interests are protected? Will they address personnel matters head on, or will discussions of possible action be tempered with concerns that the employee will eventually hear deliberations where they are mentioned in an unfavorable light? Human nature suggests that individuals tend to tame their conversations when they believe they are being overheard. At the same time, most would agree frankness is needed at times to address serious issues.

The vast majority of government business is conducted in broad daylight, with public comment and involvement encouraged and expected. At the same time, the Kansas Open Meetings Act has recognized that there are limited, legitimate instances where government entities should be able to consider issues in private. The City of Overland Park asks that you not do away with this current balance, and reject House Bill 2525.

HOUSE BILL No. 2613

By Committee on Judiciary

2-2

AN ACT concerning civil procedure; relating to joinder of persons; amending K.S.A. 60-219 and repealing the existing section.

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

Section 1. K.S.A. 60-219 is hereby amended to read as follows: 60-219. (a) *Persons to be joined if feasible. (1)* Whenever a "contingently necessary" person, as hereafter defined, is subject to service of process, ~~he~~ *the person* shall be joined as a party in the action. If ~~he~~ *the person* has not been so joined, the court shall order that ~~he~~ *the person* be made a party. If ~~he~~ *the person* should join as a plaintiff but refuses to do so, ~~he~~ *the person* may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and ~~his~~ joinder *of the person* would render the venue of the action improper, ~~he~~ *the person* shall be dismissed from the action.

(2) A person is contingently necessary if ~~(1)~~: *(A)* Complete relief cannot be accorded in ~~his~~ *the person's* absence among those ~~already parties,~~; or ~~(2) he~~ *(B) the person* ~~is a party or nominee with whom or~~ *in whose name a contract has been made for the benefit of another,* ~~such person or party~~ claims an interest relating to the property or transaction which is the subject of the action and ~~he~~ *such person* ~~or party~~ is so situated that the disposition of the action in ~~his~~ *the* absence ~~the person or party~~ may (i) as a practical matter substantially impair or impede ~~his~~ *the person* ~~or party's~~ ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of ~~his~~ *the person* ~~or party's~~ claimed interest.

, on the person's own behalf

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(b) *Determination by court whenever joinder not feasible.* If a contingently necessary person cannot be made a party, the court shall determine whether in equity and good conscience the action ought to proceed among the parties before it or ought to be dismissed. The factors to be considered by the court include: First, to what extent a judgment rendered in the absence of the contingently necessary person might be prejudicial to ~~him~~ *the person* or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third,

Amendment to HB 2613
Requested by Rep. Whitha
2/10/10

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Revisor of Statutes
Prepared by M. Sterling

Testimony in Support of Kansas HB 2613
House Judiciary Committee
Testimony on Behalf of Mortgage Electronic Registration Systems, Inc.
Tyson C. Langhofer, Esq.,
Partner, Stinson Morrison Hecker LLP
Wednesday, February 10, 2010

Mr. Chairman, members of the committee, my name is Tyson Langhofer and I am pleased to appear before you in support of HB 2613. I am appearing today on behalf of Mortgage Electronic Registration Systems, Inc. ("MERS"). MERS was created to improve the efficiency of mortgage lending by reducing errors, costs, and delays associated with frequent and multiple assignments of the mortgage lien interest when servicing rights or beneficial ownership interests are sold. MERS Members contract with MERS to hold legal title to the mortgage lien by being the mortgagee of record as "nominee" for all MERS Members who may acquire the beneficial interest in the loan, as such interests and rights are frequently transferred throughout the life of such loans. MERS Members agree to appoint MERS to act as their common agent or nominee, and as the mortgagee of record in that capacity, on all mortgage loans they register on the MERS® System. The MERS® System is a database owned and operated by MERSCORP, Inc. that tracks the changes in servicing rights and beneficial ownership interests in registered mortgage loans. As the mortgagee of record, MERS keeps the chain of title clear and ascertainable, without the worry of unrecorded, incorrect, or intervening assignments. All mortgage loans registered on the MERS® System are recorded in the appropriate recording office.

The bill being proposed is an amendment to K.S.A. § 60-219 which is designated as the contingently necessary party statute. One of the purposes of this statute is to define the class of persons that is required to be named as a party to any civil action that involves an interest in property, which would include a foreclosure action. The proposed amendment is necessary due to a recent Kansas Supreme Court decision, Landmark National Bank v. Boyd A. Kesler, et al., 289 Kan. 528, 216 P.3d 158 (2009), which has created some potential confusion as to whom is to be included in the class of contingently necessary parties.

The rule which has always been followed in Kansas provides an orderly method for adjudication of competing claims to the real estate and prioritization of competing claims. The procedure is activated by joining all known competing interests in and claims to the real estate as parties to the action. To facilitate this process, the Legislature enacted the recording statutes which allow all persons claiming an interest in real property to record their claimed interest. The purpose of the recording statutes is to provide notice to the general public of the various claimed interests in real property. Hayner v. Eberhardt, 37 Kan. 308, 15 P. 168, 171 (1887). This methodology provides a person with the certainty that clear title can be obtained to a parcel of property if all parties which have properly recorded their claimed interests pursuant to the recording statutes are notified of any actions that may affect the real estate.

Historically, the various persons involved in the preparation and filing of foreclosure actions (e.g., attorneys, lenders and title companies) have always understood that all parties claiming an interest in real property, even those claiming an interest on behalf of another party, are

considered contingently necessary parties under K.S.A. § 60-219. In Landmark, however, the Court declined to rule on whether a named mortgagee that held title to the mortgage as nominee for the noteholder is a contingently necessary party under K.S.A. § 60-219. This has created some concern that this decision might be used to call into question whether a person holding a validly recorded interest on behalf of another is a contingently necessary party to an action involving such property. There are many scenarios in which a person might claim an interest on behalf of another, including, as executor, administrator, guardian, conservator, trustee, receiver, nominee, or any party with whom or in whose name a contract has been made for the benefit of another. If these parties are not considered to be contingently necessary parties, then they would not receive notice of a lawsuit which could affect their claimed interest in the property. Under this scenario, they would not be aware of the action and would be unable to carry out their duties to protect their claimed interest. Thus, this amendment is necessary to ensure that any person claiming an interest in property on behalf of another person is considered a contingently necessary party to any action involving such property.

Kansas law imposes certain duties upon mortgagees which include the duty to file a satisfaction of mortgage once the mortgage has been paid in full. K.S.A. § 58-2309a. If the satisfaction is not filed within 20 days from receipt of full payment, then the mortgagee is subject to a fine and civil damages. Since Kansas law imposes duties upon mortgagees which carry the potential for fines and civil damages, it is imperative that Kansas law also recognizes the concomitant rights associated with being a mortgagee. One of the most important rights is the right to notice of a lawsuit which could potentially affect the mortgagee's rights in the mortgage itself. Therefore, all legal titleholders to a mortgage in Kansas must be guaranteed the right to receive notice of any civil action affecting such interest. If they are not guaranteed such right, they could potentially be bound by a judgment that requires the release of the mortgage, but to which they were not a party . If the mortgagee is not aware of such judgment and does not release within the requisite period, the mortgagee could be subject to the imposition of fines and civil damages. This would be entirely inequitable and would not be in line with the due process rights afforded by the United States and Kansas Constitutions.

The amendment to this statute will also clarify K.S.A. § 60-219 to bring it in line with other statutes that also deal with this issue. For example, the real party in interest statute, K.S.A. § 60-217, provides that a person holding an interest on behalf of another "may sue in the party's own name without joining the party for whose benefit the action is brought." This amendment will clarify that not only does a person holding on behalf of another have the right to bring an action in their own name, but guarantees that such a person will be named as a party in any action involving such claimed interest.

I will close with a quote from the Kansas Court of Appeals in Citizens Bank & Trust v. Brothers Constr. & Mfg., Inc., 18 Kan. App. 2d 704, 711, 859 P.2d 394 (1993) which aptly summarizes the law in Kansas on this issue:

> Our holding in this case does nothing more than reiterate that the law in Kansas is as it has been for 97 years. We do not place an unimaginable burden on commercial lending institutions. Our decision requires only that a bank join as parties to a foreclosure action all parties which it knows or should know are

> making some claim to the property in question. . . . If a Bank seeks to foreclose a mortgage, joinder of other parties claiming an interest in the real estate is good law practice and not an overwhelming burden. We think it not outrageous to require that a party be joined before a foreclosure action can be held to foreclose his or her rights to real estate. . . . We believe that such procedure will support the principles of due process and justice on which our legal system was founded.

I urge the Kansas Legislature to enact HB 2613 which will ensure that all parties will be joined before a foreclosure action can be held to foreclose his or her rights to property in Kansas. I support the technical, clarifying amendment which has been proposed to the bill.

Thank you for your time and I'm happy to stand for questions at the appropriate time.

KANSAS LAND TITLE ASSOCIATION
7321 N.W. Rochester Rd., Topeka, Kansas 66617
WWW.KLTA.ORG

To: House Judiciary Committee

From: Chris St. John, KLTA President-Elect and Legislative Chair

Date: February 3, 2010

Subject: HB 2613 – Testimony in Support of House Bill 2613

Chairman Kinzer and members of the Judiciary Committee, thank you for the opportunity to offer written testimony on behalf of the Kansas Land Title Association (KLTA). KLTA represents 156 title companies throughout Kansas.

The Kansas Land Title Association supports House Bill 2613 concerning civil procedure; relating to joinder of persons; amending K.S.A. 60-219. A recent Kansas Supreme Court case has created some question in Kansas as to whether any person or entity, including Mortgage Electronic Registration Systems, Inc (MERS), who holds legal title to an interest in real estate on behalf of another will be classified as a contingently necessary party to a legal action regarding such property pursuant to K.S.A. 60-219. To clarify this potential confusion, we support House Bill 2613.

Respectfully submitted,

Chris St. John
Kansas Land Title Association
President-Elect and Legislative Chair

House Judiciary
Date 2-10-10
Attachment # 17

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February 10, 2009

Hon. Lance Kinzer
Chairman, Kansas House Judiciary Committee
Kansas State Capital Building
10th and Jackson
Topeka, KS 66612

Re: Support for House Bill 2613

Dear Chairman Kinzer:

I am pleased to write this letter in support of House Bill 2613, which would amend K.S.A. 60-219 to eliminate the confusion that has been created by a recent Kansas Supreme Court decision, Landmark National Bank v. Kesler, 289 Kan. 528, 216 P.3d 158 (Kan. 2009). I wanted to be at this hearing in person, but I had an unavoidable conflict.

For many years, particularly during the time I taught Commercial Law at the KU Law School, I worked with the Kansas legislature on matters involving commercial law and consumer protection. Although I have not appeared before this Committee for several years, I appreciate the opportunity to provide some analysis in support of H.B. 2613, which you are considering today. Although my law firm (Stinson Morrison Hecker, LLP) represented MERS in the case to which this bill is responding, I was not involved in the case and am writing this letter more in my capacity as a teacher, writer and long-time student of commercial law principles. In that vein, I have attached a newsletter article I co-authored that discusses the recent Kansas case, as well as another MERS decision from the Minnesota Supreme Court. This article provides more detailed analysis of the issues involved in the Kansas Supreme Court decision.

MERS is a wholly owned subsidiary of MERSCORP, Inc., which owns the MERS System, a data base that tracks the changes in ownership and servicing rights, from initial loan closing through to final loan payoff. MERS holds legal title to mortgage liens as the mortgagee and common agent for the various note-owners. In the Landmark Bank case, decided August 28, 2009, the Kansas Supreme Court held that MERS was not an indispensible party to a Kansas mortgage foreclosure action brought by the first mortgagee. As a result, MERS, as the mortgagee on the second mortgage, lost the opportunity to claim the surplus for the benefit of the noteholder that was left after the foreclosure of the

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Attachment # 18

first mortgage. A default judgment in favor of the first mortgagee wiped out the second mortgage, and the property was sold to a third party.

Under the MERS system, if MERS had received notice of the foreclosure action, it would have immediately notified the current registered servicer of the second mortgage loan, which would then have been in a position to protect its right to any surplus. MERS should have received notice because its name appeared on the recorded second mortgage as "mortgagee" in a nominee capacity for the second mortgage lender and its assigns. MERS' address, which showed up on the title report and could have been used for service purposes, also appeared on the face of the recorded mortgage. But MERS never received the notice that would have allowed it to protect its interest as the second mortgagee and ultimately the interest of the holder of the second mortgage loan.

The Kansas Supreme Court concluded that the trial court did not abuse its discretion in holding that MERS did not qualify as an indispensible party because it functioned "solely as nominee" for the second mortgage lender and its assignees. The court felt that this status was more akin to a "straw man" than a party with a substantive economic stake in the underlying security interest. In my opinion, the court missed the key point that, though MERS does not **itself** have any economic interest in the loan that is secured by the mortgage, its commercial function in the secured lending world is to serve as the mortgagee of record and thus be in a position to notify the servicer or holder of the note of litigation such as the Kansas foreclosure. In serving this vital function, MERS is clearly protecting the economic interest of **third parties** such as the holder of the note which was secured by the second mortgage in the Kansas case. Tracking the ownership of loans secured by mortgages is a huge and important responsibility; in Kansas alone, MERS is designated as mortgagee on over 376,000 recorded mortgages.

The MERS business model relies on well-recognized principles of commercial law, such as (1) the use of a nominee in designating one (or multiple) secured parties on a UCC financing statement, (2) the "indirect holding system" that uses a central depository to track ownership and security interests in various types of securities under Article 8 of the UCC, and (3) the UCC rule that, if a secured party assigns a perfected security interest in collateral, no refiling is required for the assignment transaction.

In my opinion, H.B. 2613 is carefully tailored to respond to the confusion created by the Landmark Bank decision. The amendment to K.S.A. 60-219 would simply make it clear that joinder of a party is necessary if that party, as "nominee", represents another party in a contract that has been made for the benefit of that other party. This amendment reflects the fact that both Kansas common law and the UCC allow a person to appoint a third party to act on their behalf to protect that person's security interest. The Landmark Bank case creates some confusion as to whether

such a third-party nominee is a contingently necessary party to a lawsuit involving a security interest. The confusion caused by the case is not a good thing for secured parties who do business in Kansas, or wish to do so. H.B. 2613 clears up this confusion.

I sincerely hope that this letter, and the recent article that accompanies it, are helpful for the Committee. Please let me know if I can provide any other assistance.

Sincerely,

STINSON MORRISON HECKER LLP

Barkley Clark

BC:brl

Attachments

Kansas Bankers Association

February 10, 2010

To: House Judiciary Committee

From: Kathleen Taylor Olsen, Kansas Bankers Association

Re: HB 2613: Contingently Necessary Parties

Mr. Chairman and Members of the Committee:

Thank you for the opportunity today to present written testimony in support of **HB 2613**, which amends K.S.A. 60-219, regarding contingently necessary parties.

This bill has been brought before you in response to a recent Kansas Supreme Court decision, Landmark National Bank v. Boyd A. Kelser, et al., 289 Kan. 528, 216 P.3d 158 (2009).

We understand that this case raised some issues with regard to who should be named a contingently necessary party in a mortgage foreclosure action. It has long been the rule and practice that any foreclosing entity wants to engage all parties who may claim an interest to the property for which they hold a mortgage. To not do so could mean that their foreclosure action could be set aside.

To the end that this bill resolves the confusion regarding whether any entity, such as Mortgage Electronic Registration Systems, Inc., (MERS), who holds an interest in real property on behalf of another, should be named in a foreclosure action as a contingently necessary party, we support the bill and respectfully request that the Committee act favorably.

Thank you for your time and attention today.

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kbaoffice@ksbankers.com | www.ksbankers.com

House Judiciary
Date 2-10-10
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