

MINUTES

HOUSE RULES AND JOURNAL COMMITTEE

October 19, 2010
Room 142-S—Statehouse

Members Present

Representative Clark Shultz, Chairperson
Representative Janice Pauls, Vice-chairperson
Representative Lance Kinzer
Representative Ed Trimmer

Member Absent

Representative Jeff Witham

Staff Present

Raney Gilliland, Kansas Legislative Research Department
Athena Andaya, Kansas Legislative Research Department
Martha Dorsey, Kansas Legislative Research Department
Lauren Douglass, Kansas Legislative Research Department
Mary Torrence, Revisor of Statutes
Norm Furse, Office of the Revisor of Statutes
Gary Deeter, Committee Secretary

Others Attending

See attached sheet.

The Chairperson called the meeting to order at 10:09 a.m. He reminded members of the Committee's charge to study other states' legislative ethics codes, especially the Iowa code. He also referenced the March 30, 2010, report of the House Select Investigative Committee's recommendation that the Kansas House of Representatives consider adopting a legislative code of ethics (Attachments 1 and 2). He noted that an ethics bill was introduced in the House late in the 2010 Session (HB 2749), but received no hearing or action. He further noted that creating an ethics code through the House Rules and Journal Committee would apply only to House members, whereas, amending the statute to include further ethics directives would apply to all legislators.

The Chairperson invited members to discuss issues related to creating a code of ethics.

Representative Kinzer, noting the complexity of other states' ethics codes, commented that the time allotted to the Committee would make developing a code of ethics very difficult; however, a narrow issue identified during the previous meeting (September 14, 2010) needed clarification: the phrase ". . . as being unconstitutional because of error in the legislative process. . . ." [KSA. 46-233(c)]. He suggested introducing legislation in the 2011 Legislative Session striking that language; he further observed that the proposed bill could include a wider ethics code. If such a code were to be developed, he recommended simple, clear language, avoiding complex syntax and multiple exceptions.

Responding to a question, Norm Furse, Office of the Revisor of Statutes, replied that the phrase "declared on the record" [KSA 46-233(c)] would at least require that the legislator's action be printed in the House Journal.

Representative Trimmer agreed that the language of KSA 46-233(c) was vague, but, regarding the phrase "declared on the record," he noted that any legislator who voted "no" in final action would have his vote appear in the House Journal.

Representative Pauls also agreed to amending KSA 46-233(c), adding that creating an ethics committee would provide a means for establishing a definition of misconduct. Referencing the testimony of Carol Williams, Executive Director, Kansas Governmental Ethics Commission, at the previous Committee meeting, Representative Pauls recommended including in any code a clarification of what constitutes a conflict of interest, a frequent point of concern for citizens who call Ms. Williams' office.

Members discussed the possible ramifications of various proposals. The Chairperson commented that including a code of ethics under House Rules will not address the vagueness of the current statute.

A motion was made by Representative Kinzer and seconded by Representative Trimmer to introduce a bill in the 2011 Kansas Legislature that strikes the phrase ". . . because of error in the legislative process. . . ."

The motion further recommended that:

- *The committee to which the bill is referred consider provisions restructuring current statutes to address issues related to the services of attorney-legislators, particularly disclosure; and*
- *During the 2011 Legislative Session, the House Rules and Journal Committee develop rules related to conflicts of interest.*

Members discussed the motion.

- The proposed legislation, if it becomes law, will take precedence over any House rules; and
- The bill also should include wording related to former legislators becoming lobbyists, or address circumstances where the spouse of a legislator is a lobbyist. Current law prohibits a legislator from serving concurrently as a lobbyist.

The Chairperson invited specific members of the audience to comment. Representative Jerry Henry, who served on the House Select Investigative Committee, commended the Committee for continuing the work of the Select Committee. He recommended that, since legislative leadership positions provide a greater level of power over decision making, the proposed bill should include caveats concerning legislative leaders. He commented that, rather than rely on unwritten rules, the proposed legislation should offer more details to aid members in determining what is considered proper conduct.

Susan Kannarr, Clerk of the Kansas House of Representatives, commented that the creation of an ethics committee might be helpful for the process of evaluating legislators' conduct.

The motion passed unanimously.

The minutes for the September 14, 2010, meeting were approved as corrected.

The meeting was adjourned at 11:30 a.m. No further meetings were scheduled.

Submitted by Gary Deeter
Edited by Athena Andaya

Approved by the Committee on:

November 17, 2010

(Date)

KANSAS LEGISLATIVE RESEARCH DEPARTMENT

68-West-Statehouse, 300 SW 10th Ave.
Topeka, Kansas 66612-1504
(785) 296-3181 • FAX (785) 296-3824

kslegres@klrd.ks.gov

<http://www.kslegislature.org/klrd>

October 19, 2010

To: Chairperson Shultz and Members of the House Rules and Journal Committee
From: Martha Dorsey, Principal Analyst and Lauren Douglass, Research Analyst
Re: Questions from September 14 Meeting

During the previous meeting held on September 14, the Committee had several questions for staff to address, many of which arose during the Committee's discussion of the Iowa legislative codes of ethics. One such question was whether courts were considered "agencies," as legislators' ability to appear and represent others before state agencies is limited. The statutory definitions for "agency" and "state agency" are found in the Iowa Government Ethics and Lobbying Act, Iowa Code § 68B.2. The definitions confine agencies to the executive and legislative branches and do not include the judicial branch or courts. In the same vein, it was asked whether case law exists applying Senate Rule 8 or House Rule 3, which provide that a legislator appearing before an agency must avoid conduct that suggests to the general public he or she is using the position for professional or personal gain. Conversations with Iowa House and Senate staff revealed that there are no relevant advisory opinions stemming from the investigation of ethics complaints.

Further, as Iowa Code § 68B.31 provides that complaints against a legislator are made under penalty of perjury, it was asked whether other states impose the same penalty. Of those states surveyed for the Committee, New Hampshire and Virginia also require a complaint to be sworn with the penalty of perjury for a false statement. N.H. Rev. Stat. Ann. § 14-B:4.1; Va. Code Ann. § 30-114(A).

Next, during the discussion of Iowa's legislative codes of ethics it was asked how direct a financial interest must be to constitute an ethics violation. In Iowa, the House and Senate ethics codes prohibit a member from accepting an economic or investment opportunity when it comes with the intent to influence the member's official conduct. The Senate refers to a "reasonable possibility" that the opportunity comes with the intent to influence; the House version says "when the member knows or should know" the opportunity is offered with the intent to influence. Unfortunately, as above, there are no relevant opinions or decisions to expound on these restrictions.

In contrast, other states provide some additional direction on the issue of financial benefits. Maine's legislative ethics provisions refer to "a direct substantial personal financial interest," that is distinct from an interest available to the general public. Me. Rev. Stat. Ann. 1 § 1014. Arizona's ethics codes prohibit legislators from intentionally soliciting any "personal financial benefit" with the understanding that official action will be influenced. Additionally, in the Senate, members are prohibited from participating in any action if a member has a "substantial interest." While we could find no definition of the term "personal financial benefit," a definition of "substantial interest" appears in Ariz. Rev. Stat. Ann. § 38-502 regarding conflicts of interest:

- "Substantial interest" means any pecuniary or proprietary interest, either direct or indirect, other than a remote interest.

*House Rules & Journal
October 19, 2010
Attachment 1*

- "Remote interest" means:
 - That of a nonsalaried officer of a nonprofit corporation;
 - That of a landlord or tenant of the contracting party;
 - That of an attorney of a contracting party;
 - That of a member of a nonprofit cooperative marketing association;
 - The ownership of less than three percent of the shares of a corporation for profit, provided the total annual income from dividends, including the value of stock dividends, from the corporation does not exceed five percent of the total annual income of such officer or employee and any other payments made to him by the corporation do not exceed five percent of his total annual income;
 - That of a public officer or employee in being reimbursed for his actual and necessary expenses incurred in the performance of official duty;
 - That of a recipient of public services generally provided by the incorporated city or town, political subdivision or state department, commission, agency, body, or board of which he is a public officer or employee, on the same terms and conditions as if he were not an officer or employee;
 - That of a public school board member when the relative involved is not a dependent, as defined in section 43-1001, or a spouse;
 - That of a public officer or employee, or that of a relative of a public officer or employee, unless the contract or decision involved would confer a direct economic benefit or detriment upon the officer, employee, or his relative, of any of the following:
 - Another political subdivision;
 - A public agency of another political subdivision;
 - A public agency except if it is the same governmental entity; or
 - That of a member of a trade, business, occupation, profession, or class of persons consisting of at least ten members, which is no greater than the interest of the other members of that trade, business, occupation, profession, or class of persons.

It should be noted, however, that this definition applies only to the article in Arizona's Title 38 (applicable to all state officers and employees) dealing with conflict of interest.

Finally, as part of the discussion on other states' ethics codes, the Committee asked for an explanation of the types of confidential information legislators are restricted from sharing or using for their own benefit. A search of the statutes did not reveal anything extraordinary. In North Carolina, for example, N.C. Gen. Stat. Ann. § 120-85.1(2) defines confidential information as "information defined as confidential by the law." Similarly, Kentucky classifies information as confidential if, pursuant to the Kentucky Open Records Act, it is not subject to public disclosure. Indiana law says, simply, that "information of a confidential nature" is information that has not been, or will not be, communicated to the general public. Ind. Code Ann. § 2-2.1-3-1(h).

1-2

**House Select Investigative Committee
Final Report
March 30, 2010**

The House Select Investigative Committee has considered the misconduct complaint against Speaker Mike O'Neal filed pursuant to House Rule 4901 with the Clerk of the House of Representatives on March 12, 2010, and printed on pages 1117 and 1118 of the House Journal on March 15, 2010 ("the Complaint").

Section I

The Committee makes the following observations:

1. Pursuant to House Rule 4902, the Committee upon completing its hearings and deliberations may dismiss the Complaint or may make recommendations to the full House of Representatives for reprimand, censure, or expulsion.
2. House Rule 2312(b) establishes the precedence of rules of legislative procedure as follows: "(a) Constitutional provisions; (b) statutory provisions; (c) adopted rules; (d) adopted parliamentary authority; (e) custom usage and precedents."
3. This Committee has received two definitions of "misconduct" from the parties to this complaint. One party cited Black's Law Dictionary, which defines misconduct in part as "A transgression of some established and definite rule of action...." The other party cites the American Heritage Dictionary, which defines misconduct in part as "behavior not conforming to prevailing standards or law."
4. The statutory provisions found in K.S.A. 46-233(c) prohibit a legislator from representing "any person in a court proceeding attacking any legislative action or enactment made during any term such individual served as a legislator as being unconstitutional because of error in the legislative process with respect to such action or enactment unless such legislator voted no upon the enactment of the measure and declared on the record, during such term, that such legislation was unconstitutional."
5. The Speaker voted "no" upon the legislative action and declared his objections "on the record" against the legislative action that is the subject of the filed lawsuit.
6. The Complainant has admitted that the Speaker has not violated K.S.A. 46-233(c), any other statute, any rule of the Kansas House of Representatives, or any of the Kansas Rules of Professional Conduct.
7. Under either definition offered by the parties, performing an action specifically permitted by Kansas law cannot constitute misconduct pursuant to Kansas House Rule 4901.

Therefore, the Committee makes the following statement:

*House Rules & Journal
October 19, 2010
Attachment 2*

The Rules of the Kansas House of Representatives establish that statutory provisions take precedence over adopted rules. A statutory provision of the State of Kansas (K.S.A. 46-233(c)) clearly allows a legislator to represent persons in court proceedings if certain actions are taken by the legislator. The statute does not distinguish between legislators in leadership positions (such as Speaker of the House) and those without such leadership posts. The Complainant admits that the Speaker has: (a) satisfied all of the requirements of K.S.A. 46-233(c); and (b) has not violated any other state law, any rule of the Kansas House of Representatives, or any of the Kansas Rules of Professional Conduct. Thus, because his actions were directly allowed by K.S.A. 46-233(c), the House Select Investigative Committee finds that the Speaker did not commit misconduct under Kansas House Rule 4901.

Section II

The Committee makes the following additional observations:

1. As currently written, K.S.A. 46-233(c) specifically permits attorney-legislators to challenge in their capacity as private attorneys “any legislative action or enactment made during any term such individual served as a legislator as being unconstitutional because of error in the legislative process with respect to such action or enactment....”
2. We find this statute troubling and fear that it has: (a) led to the appearance of impropriety; and (b) cast a shadow of suspicion and public criticism over the Kansas House of Representatives.
3. Furthermore, as the Complainant noted, the Kansas House lacks a Code of Ethics “to govern the behavior of legislators” and for “protecting the integrity of the Legislature.”

Therefore, the Committee makes the following statement:

In the course of its investigation of the Complaint, the House Select Investigative Committee has noted two provisions or omissions in Kansas law and the House Rules that merit further consideration.


First, we find that K.S.A. 46-233(c), as currently written, allows conduct by legislator-attorneys in the Kansas House that creates an appearance of impropriety and negatively impacts the public reputation of the Kansas House. As such, we recommend that the 2010 Kansas Legislature amend K.S.A. 46-233(c) to remove the exception in the subsection that allowed the lawsuit at issue in this Complaint. We believe that the 2010 Kansas Legislature should strike the following words from K.S.A. 46-233(c) “unless such legislator voted no upon the enactment of the measure and declared on the record, during such term, that such legislation was unconstitutional.”

Second, we strongly urge that the 2011 Kansas Legislature (or an interim committee of the 2010 Kansas Legislature) consider the adoption of a code of ethics to govern the behavior of legislators. We do not make any specific suggestions regarding the provisions of such a code, but note with particular importance the need for a code addressing conflicts of interest.


Section III

For the reasons stated in Section I, the House Select Investigative Committee does not recommend reprimand, censure, or expulsion in the present matter. For the reasons stated in Section II, however, this conclusion does not condone litigation filed pursuant to K.S.A. 46-233(c) nor do we encourage members of the Kansas House to serve as attorneys in future actions against the State of Kansas pursuant to this statute. In that vein, we implore the Kansas Legislature to proceed with the two recommendations presented in Section II of this report.

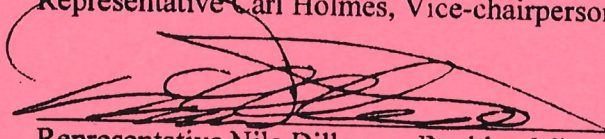
Pursuant to Rule 4902(b) of the Kansas House of Representatives, the House Select Investigative Committee hereby dismisses the Complaint filed on March 12, 2010 against the Speaker of the Kansas House of Representatives.




Representative Clark Shultz, Chairperson



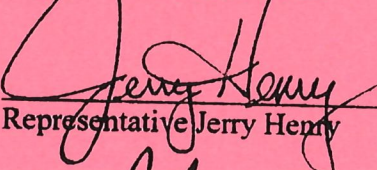
Representative Carl Holmes, Vice-chairperson



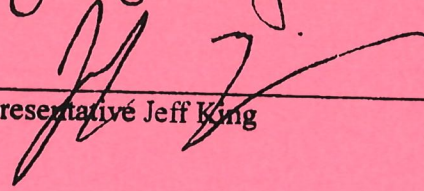
Representative Nile Dillmore, Ranking Minority Member



Representative Bob Grant



Representative Jerry Henry



Representative Jeff King