KANSAS ASSOCIATION FOR JUSTICE

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To: Senator Mary Pilcher-Cook, Chairperson
Members of the Senate Public Health & Welfare Committee

From: Callie Jill Denton JD
Director of Public Policy

Date: March 13, 2013

RE: SB 210 Concerning health information technology (OPPOSED to Sec. 12 (b); NEUTRAL ON THE REMAINDER OF THE BILL)

The Kansas Association for Justice (KsAJ) is a professional association of attorneys with members across the state. **KsAJ is neutral on SB 210, with the exception of Sec. 12 (b).**

KsAJ respectfully requests that SB 210 be amended by deleting Sec. 12 (b) (page 8 lines 30-36).

In legal disputes involving evidence contained in medical records, Sec. 12(b) will complicate the process of obtaining such records and authenticating them for purposes of admission into evidence. Under Sec. 12(b), not even a court may order an "approved health information organization" to produce evidence that is "protected health information."

Evidence needed in "protected health information" is not limited to medical negligence cases. Any personal injury claim potentially involves medical records, including automobile accidents, defective products, premises liability or any other claim in which physical injury results or is part of the claim.

Sec. 12(b) will be detrimental to the expeditious and fair resolution to all parties of a legal claim. Medical records are necessary to an injured person who must prove their case. However, medical records are also relevant and necessary to anyone that is defending themselves in litigation.

Under Sec. 12(b) , once protected health information is released by a health care provider and is in the possession of an "approved health information organization", such information is

> **not subject to discovery, subpoena, or other means of legal compulsion…to any person or entity. An approved health information organization shall not be compelled by a request for production, subpoena, court order or otherwise, to disclose protected health information relating to an individual.** (page 8, lines 32-36)

Sec. 12(b) prevents a court from compelling an approved health information organization to produce protected health information, including providing a patient access to *all* his or her protected health information, or authenticating evidence. Without the ability to authenticate evidence, patients will not be able to introduce it and substantiate their cases.

Sec. 12(b) applies to all parties of a dispute that may need evidence contained in medical records. Without being able to produce and authenticate evidence contained in the personal health information in the possession of an approved health information organization, defendants will find it much more difficult to defend themselves and resolve claims quickly. Under Sec. 12(b), a court cannot order an approved health information organization to produce or disclose protected health information, for any purpose.

The Health Insurance Portability and Accountability Act (HIPAA) and state law give patients the ability to provide written authorization for the disclosure of protected health information. However, Sec. 12(b) appears to be impermeable. Not even a patient has the legal authority to authorize the court to act once an approved health information organization is in possession of the patient's protected health information.

Section 12(b) also appears to violate HIPAA. 45 C.F.R. § 164.524 of HIPAA gives patients the right to access their protected health information from a covered entity, which includes health care providers that transmit information, health plans, or health care clearinghouses. The effect of Sec. 12(b) is to deny patients access to protected health information in the possession of an approved health information organization, when such information is ordered to be produced by the court. Denying a patient access to his or her health information violates HIPAA.

Section 12(b) creates conflict in the Legislature's direction to KDHE regarding rulemaking related to the release of protected health information. Under current state and federal law, patients (and their representative, with appropriate written authorization) have a legal right to access their health information. Section 12(a) provides that no disclosure of protected health information by a health information organization shall be made except pursuant to rules and regulations adopted by the department, consistent with the act. Section 12(b) conflicts with current state and federal law because it does not permit a patient to authorize or access records, through legal compulsion, personal health information from an approved health information organization. Will KDHE's rules reflect the state and federal right of patients to access their protected health information? Or will the rules limit patients' rights of access pursuant to proposed Sec. 12(b), and if so, how?

KsAJ requests that the Committee consider the broad negative impact of Sec. 12(b) upon Kansas citizens. The need for access to medical records goes far beyond the litigation arena. Citizens need unencumbered access to their medical records for a wide variety of purely medical reasons, unrelated to legal disputes. In order to provide optimal care and provide safe care, doctors need unencumbered access to their patients' (new and old) medical records. Additionally, ready access may be necessary when applying for life and disability insurance, and in many instances, health insurance. Section 12 (b) simply overreaches.

It appears the only purpose for Sec. 12(b) is to deny Kansans on either side of a claim the ability to produce, in court, valid, authentic evidence that could prove, disprove, or settle a case. There is no public policy basis for denying either party to a dispute the opportunity to produce valid, authentic evidence in a court of law.

For all of these reasons, the Kansas Association for Justice respectfully requests that the Senate Public Health &Welfare Committee amend SB 210 by deleting Sec. 12 (b) (page 8 lines 30-36).