Report of the Special Committee on Judiciary to the 2015 Kansas Legislature

CHAIRPERSON: Senator Jeff King

VICE-CHAIRPERSON: Representative Lance Kinzer

OTHER MEMBERS: Senators David Haley (replaced by Pat Pettey for November meeting), Forrest Knox, and Greg Smith; and Representatives Erin Davis, Annie Kuether, Janice Pauls, and John Rubin

CHARGE

- Foster Parents' Bill of Rights Act (2014 SB 394), Juvenile Justice, Responses to Kansas Supreme Court Decisions
  - Consider 2014 SB 394, the Foster Parents' Bill of Rights Act, and related reforms;
  - Consider juvenile justice in Kansas;
  - Consider possible responses to Kansas Supreme Court decisions from the end of the regular Session; and
  - Should any time remain during the authorized days, the Committee would discuss legislation and policies under consideration for the 2015 Session.

- Patent Infringement (2014 HB 2663)
  - Study enactments in other states regarding patent infringements;
  - Study and review 2014 HB 2663; and
  - Make recommendations for the Kansas Legislature to consider regarding patent infringements.

Special Committee on Judiciary

Foster Parents' Bill of Rights Act (2014 SB 394)

Conclusions and Recommendations

The Committee recommends a Senate bill containing the Judicial Council proposed legislation based upon 2014 Sub. for SB 394 be introduced for the 2015 Session. The Committee also recommends, as the issue is further considered by the Legislature, additional consideration be given to the question of whether the grievance process should be adopted in statute or rule and regulation or implemented by agency policy.

Proposed Legislation: One bill.

Background

The charge to the Special Committee on Judiciary was to consider and make recommendations on three assigned topics: the Foster Parents' Bill of Rights Act (2014 SB 394); possible responses to Kansas Supreme Court decisions from the end of the 2014 Session; and patent infringement (2014 HB 2663). (Note: the charge to the Special Committee also directed it to consider juvenile justice in Kansas, but the Special Committee deferred to the work of the Joint Committee on Corrections and Juvenile Justice Oversight on this topic.)

On the subject of the Foster Parents' Bill of Rights Act (2014 SB 394), the Committee was directed to consider that proposed bill and related reforms.

The topic was requested by Senator Jeff King as Chairperson of the Senate Judiciary Committee and was assigned by the Legislative Coordinating Council for study and review.

2014 SB 394. SB 394 would have enacted the Kansas Foster Parents' Bill of Rights Act within the Kansas Code for Care of Children (Code). In the 2014 Senate Committee on Judiciary, representatives of Kansas Foster and Adoptive Children Inc. and the Midwest Foster Care and Adoption Association, as well as a social worker and several foster parents, testified in support of the bill. A representative of EmberHope submitted written testimony supporting the bill.

A representative of DCF testified as a neutral conferee, and a representative of KDHE submitted written neutral testimony.

The Senate Committee adopted a substitute bill suggested by the proponents and neutral conferees modifying the language in the Bill of Rights, removing a section to create a State Foster Care and Adoption Board, and removing some changes to existing statutes proposed in the original bill.

The Senate Committee of the Whole amended the substitute bill to remove a provision to allow foster parents to request all available information, when possible, before deciding whether to accept a child for placement.

The bill passed the Senate on final action by a vote of 34-3. It received a hearing in the House Judiciary Committee, where the same conferees provided testimony as in the Senate Committee, but no further action was taken on the bill and it died in House Committee. Representative Lance Kinzer, Chairperson of the 2014 House Judiciary Committee, subsequently requested the Kansas Judicial Council conduct a study on the topic of the legal rights of foster parents, asking the

Council to review the current legal rights of foster parents and consider areas where those rights could be responsibly expanded, using Sub. for SB 394 as a base, while keeping in mind possible unintended consequences.

Sub. for SB 394, as amended, would have done the following:

- Recognized foster parents' integral role in the effort to care for displaced dependent children, and declared that foster parents have the right to be treated by DCF, KDHE, and other partners in the care of abused and neglected children with dignity, respect, and trust. The bill would have stated foster parents shall treat all children in their care, each child's birth family, and all members of the child professional team with dignity and respect;

- Required KDHE to provide foster parents with written notification of their rights under the Act at the time of initial licensure and license renewal;

- Required DCF to publish the Prevention and Protection Services Policy Procedure Manual on the DCF public website and require access for foster parents to DCF policies posted on the DCF website. Foster parents would have had access to rules and regulations regarding their licensure which are posted on the KDHE website, and would have been required to comply with the licensure requirements and policies of their licensing agency and child placing agency;

- Required DCF to provide foster parents with pre-service training and required DCF, KDHE, or the child placement agency to provide training at appropriate intervals to meet mutually assessed needs of the child and to improve foster parent skills;

- Required DCF to provide to foster parents, prior to and during placement, pertinent information regarding the care and needs of the child, and to protect the foster family to the extent allowed under state and federal law;

- Required DCF to provide information to foster parents regarding the number of times a child has been removed and the reasons for removal, to the extent permitted by law, and allowed DCF to provide names and phone numbers of previous foster parents if authorized by the previous foster parents;

- Required DCF to arrange for pre-placement visits between foster children and family foster home parents, when appropriate and feasible;

- Allowed foster parents to ask questions about the child's case plan or to encourage or refuse a placement. Such refusal could not serve as the sole determining factor in subsequent placements if such placement is in the best interests of the child. After placement of a child with foster parents, DCF would have been required to update the foster parents as new relevant information about the child and the child's parents and other relatives is gathered;

- Required DCF to provide timely notification to foster parents of all case plan meetings concerning children placed in their homes. Foster parents would have been encouraged to participate in such meetings and provide input, and would have been informed by KDHE regarding their family foster home licensure;

- Required DCF to, when appropriate and feasible, establish reasonably accessible respite care for children in short-term foster care, in consultation with the foster parents. Foster parents would have been required to follow DCF policies and procedures in requesting and using respite care;

- Required foster parents to treat information received from DCF about the child and child's family as confidential,

except necessary information provided to practitioners for the medical or psychiatric care of the child or to school personnel in securing a safe and appropriate education. Foster parents would have been required to share information they learn about the child and child's family, or concerns arising in the care of the child, with the caseworker and other members of the child professional team;

- Allowed foster parents to continue the practice of their own family values and routines while respecting the child's cultural heritage and cultural identity and needs. DCF would have been required to provide foster parents with relevant information on specific religious or cultural practices of the child;

- Required all discipline and discipline methods to be consistent with state law and rules and regulations, including those adopted by DCF and KDHE.

- Stated visitations with the child's siblings or biological family should be scheduled at a time meeting the needs of all parties, whenever possible;

- Required foster parents to be flexible and cooperate with family visits and provide supervision and transportation for the child for such visits;

- Required DCF to provide, upon a former foster parent's request, general information, if available, on the child's progress if the child was in the custody of the Secretary for Children and Families and the child and child's placement agreed;

- Required 30-days' advance notice to foster parents, in accordance with the statute governing change of placement;

- Set forth the right of foster parents to be considered, when appropriate, as a placement option when a child formerly placed with such foster parents re-enters the child welfare system;

- Required foster parents to inform the caseworker in a timely manner if the foster parents desire to adopt a foster child who becomes free for adoption. If the foster parents did not choose to pursue adoption, they would have been required to support and encourage the child's permanent placement, including providing certain information and accommodating transitional visitation;

- Required advance notification to foster parents of all court hearings and reviews pertaining to a child in their care and of their right to attend and participate under applicable state and federal law;

- Set forth the right of foster parents to complete and submit to the court the foster parent court report form;

- Set forth foster parents' access to the appeals and grievance processes pursuant to state law and regulations and policies of DCF and KDHE; and

- Set forth the foster parents' right to contact DCF or KDHE regarding concerns or grievances about management decisions or delivery of service issues.

The bill would have defined "foster parent" and "family foster home."

The bill would have amended the Code with regard to access to information contained in law enforcement records to remove licensed or registered child care providers from the list of individuals or agencies entitled to access such information.

The bill would have amended the statute within the Code governing change of placement to require 30 days' written notice of a planned change in placement to various parties when a child has been in the same foster home or shelter facility for three months or longer. Under current law, such written notice is required if a child has

been in the same placement for six months or longer.

Finally, the bill would have updated agency references to reflect agency reorganization.

Committee Activities

In November, the Special Committee received the written *Report of Judicial Council Juvenile Offender/Child in Need of Care Advisory Committee on Foster Parents' Rights – 2014 SB 394* ("Judicial Council Report"). At its November meeting, the Committee heard an overview of the Judicial Council Report from Judicial Council representatives and testimony on the issue from various stakeholders.

Overview of Judicial Council Report

A representative of the Kansas Judicial Council presented the Committee with an overview of the Judicial Council study and report. He reviewed the charge to the Judicial Council per Representative Kinzer's request (described above) and noted the Judicial Council Advisory Committee added six temporary members to ensure foster parents and other relevant stakeholders were part of its discussion and held three all-day meetings to study the issue. It approved its final report in early November *via* teleconference.

Among those foster parent concerns highlighted by the representative were these: status of foster parent as part of a team; improved information sharing; notice and participatory rights for key decisions; consideration for relationship in adoption, re-fostering, and updates on well-being; protection from retaliation and complaint process; a need for Foster Parent Allies and State Foster Care and Adoption Board; and the desire for a comprehensive statutory statement of rights and responsibilities.

The Judicial Council representative noted the concerns of state agencies involved in the foster care system, including issues that currently are addressed elsewhere in detail by statute or regulation; the potential for conflict and confusion if there are multiple provisions addressing the same subject; and whether some proposals are consistent with best practices. The Advisory Committee also recognized that the rights of foster parents must respect the rights and needs of other parties involved in the system, including the foster child or youth, the parents, and other relatives or adults with close emotional ties to the child or youth.

He then outlined the conclusions and recommendations the Advisory Committee reached with the above considerations in mind. The Advisory Committee concluded statutory protections could provide security but must be consistent with other law. While foster parents play an essential role in the system, they are not equivalent to agency personnel, and changes should be avoided that would make them agents of the state. While information sharing with foster parents is adequately addressed under current law, notice could be strengthened for moving a child (but is not feasible to provide for every meeting). Consideration for the relationship of a foster parent with a foster child or youth could be improved, but not at the expense of other rights. Access to an internal grievance process would help protect foster parents, but use of Foster Parent Allies or creation of a state board would not be desirable at this point. The Judicial Council representative noted the proposed legislation, modified from Sub. for SB 394, reflected the conclusions outlined above, as well as made some additional changes addressing specific issues.

In response to questions from the Committee, the Judicial Council representative noted the foremost consideration for the Advisory Committee was how to structure the system to produce the best results for the most children. He emphasized the importance of the proposed changes relating to strengthening notice for child moves and the grievance procedure. He stated that, moving forward, there would be value in considering the rights of the foster child and focusing on what foster children or foster youth might like to see as they move through the system. He also provided the Committee with a document comparing SB 394 with existing statutes and regulations.

Judicial Council Proposed Legislation

[Note: because the Judicial Council's proposed legislation is based on Sub. for SB 394, the following describes only the differences between the proposed legislation and the summary of Sub. for SB 394 provided earlier in this report.]

The Judicial Council proposed legislation modifies Sub. for SB 394 by:

- Adding language recognizing training provided by foster parent support groups;
- Adding language ensuring foster parents may ask questions about a case plan without it serving as the determining factor for a subsequent placement;
- Adding language encouraging foster parents to participate in other placement meetings when appropriate and feasible;
- Removing language regarding confidentiality of information that is not consistent with existing regulations;
- Restoring and clarifying language related to foster parents' responsibility to seek information related to a placement;
- Removing the provisions related to cultural heritage and identity, discipline, and visitation scheduling, which are covered in detail in current regulations;
- Rewording the provision allowing DCF to provide information on the well-being of a child to a former foster parent;
- Removing the language specifically giving foster parents the right to be considered as a placement option, adding language specifying that a person with whom a child has "close emotional ties" may include a foster parent for purposes of preferences in granting custody for adoption, and adding a reference to this preference language in the disposition statute;
- Clarifying language related to foster parents' responsibility to support and encourage permanent placement;
- Removing definitions for "foster parent" and "family foster home" that are unnecessary or inconsistent with definitions found elsewhere;
- Restoring the six-month qualifying period to trigger the notice requirements for a change in placement and requiring the hearing to be held within seven days; and
- Adding language requiring 72 hours' written notice to a foster parent of any plan to change placement of a child who has been in the foster home for more than 30 days but less than 6 months, and requiring private child placing agencies to develop and implement an internal grievance process through which a foster parent can object to such placement change.

Stakeholder Testimony

The Assistant Director for Legal Services, Prevention and Protection Services at DCF presented testimony to the Committee supporting the concept of a Foster Parents' Bill of Rights. She noted her participation in the Judicial Council Advisory Committee study and reported that DCF prepared a foster parents' rights document during the summer of 2014 and posted it to the DCF website. DCF also appointed a Foster Parent and Youth Ombudsman in June 2014 to specifically address concerns of foster parents and youth. Information regarding these initiatives was sent to every licensed Kansas foster home, and a copy of this information was provided to the Committee.

The Assistant Director noted a few suggested revisions by DCF to the Judicial Council proposed legislation and the ongoing efforts of a workgroup made up of many stakeholders, agency representatives, and other entities involved in the Kansas child welfare system to address concerns and issues relating to foster parents' rights. This workgoup prefers that foster parents rights provisions be incorporated in policy rather than in

statute, and plans to utilize the current DCF foster parents' rights document in considering and proposing further revisions or additions.

In response to Committee questions, the Assistant Director stated the contractual providers already have internal grievance procedures. The Committee asked the Assistant Director to provide more information regarding these procedures for the January meeting.

When asked if the primary goal is reintegration or permanency, the Assistant Director responded that it depends on the facts and circumstances in each case. The ultimate goal is to prevent removal in the first place, then to achieve reintegration with the original family. If it is not feasible for the child to remain in or return to the home, then the goal is to move toward reintegration as soon as possible.

The President and CEO of the Midwest Foster Care and Adoption Association (MFCAA), and original drafter of the Foster Parent Bill of Rights as introduced in SB 394, reviewed some of the foster parent concerns and issues that led to the introduction of a Foster Parent Bill of Rights, including fear of retaliation and feeling unheard, unsupported, and unable to voice opinions and concerns. Retention of foster parents is critical to the child welfare system. She also reviewed the steps taken by DCF during the summer (as outlined by the Assistant Director) and the efforts of the Judicial Council Advisory Committee and the workgroup (identified as the Kansas Bill of Rights Group [KBORG]). She participated in both the Advisory Committee study and in KBORG.

The MFCAA president stated her belief that it is critically important for foster parents to have easy access to a bill of rights set forth in law, which can be accomplished by enacting the Judicial Council proposed legislation. She asked the Committee to support the proposed legislation.

The Executive Director of the Kansas Foster and Adoptive Parent Association (KFAPA) reported her association initiated KBORG to work on a foster parent bill of rights, and a majority of the group wants to pursue a bill of rights via DCF policy. KBORG plans to continue working toward that end, identifying gaps that may need to be addressed in the Judicial Council proposed legislation. KBORG also plans to focus on identifying and developing specific trainings for foster parents, foster children, and child welfare workers.

The Committee asked the KFAPA Executive Director to try to provide feedback from KFAPA members regarding the Judicial Council report for the January meeting.

Committee Discussion

During discussion, Committee members raised the following points:

- While the grievance process should not be micromanaged by the Legislature, it is important to provide enough structure so that foster parents think the review is meaningful;

- When addressing foster parents' rights, it is necessary to balance the constitutional rights of the natural parents with the rights provided to foster parents, which may look different depending on whether parental rights have been terminated;

- While the proposed legislation is a good start, there will be further efforts made during the 2015 Session to expand the scope of the examination of and reforms related to the foster care system, including the roles that various state agencies play in the system. Also needing to be examined are cases that drag on in the courts, delaying permanency;

- The scheme of definitions provided for elements of the foster care system, mainly in regulation, needs to be examined to ensure consistency and to determine whether definitions should be added to statute; and

- The causes leading children and youth to enter the foster care system should be examined, as well as why children and youth cannot be reintegrated with their families.

Further Information and Discussion

In January, the Assistant Director for Legal Services, Prevention and Protection Services at DCF provided the Committee with further information about the grievance process for foster parents when a change in placement is to be made for a child who has been in the foster home more than 30 days but less than 6 months. At least 72-hours' written notice is required, and the foster parent shall have a reasonable opportunity to express concerns to an agency representative other than the case manager or supervisor managing the case. An impartial internal committee of experienced child welfare practitioners shall review the grievance and situation to determine whether the change in placement is in the best interests of the child, considering all relevant factors. The review decision shall be documented and a verbal or written response shall be provided to the foster family before any move occurs.

The Assistant Director indicated both contractual providers have agreed to implement this procedure to ensure a consistent grievance process in these situations.

The KFAPA Executive Director submitted responses from a survey of KFAPA members regarding the Judicial Council proposed legislation. A Committee member noted that nearly 90 percent of the respondents preferred a bill of rights be placed in law rather than in policy, and that a substantial percentage wanted to see more changes made beyond those in the proposed legislation.

Conclusions and Recommendations

The Committee recommends a Senate bill containing the Judicial Council proposed legislation be introduced for the 2015 Session. The Committee also recommends, as the issue is further considered by the Legislature, additional consideration be given to the question of whether the grievance process should be adopted in statute or rule and regulation or implemented by agency policy.

Special Committee on Judiciary

Responses to Kansas Supreme Court Decisions

Conclusions and Recommendations

To address the out-of-state criminal history issue raised in *State v. Murdock*, 299 Kan. 312 (2014), the Committee recommends legislation be introduced in the House of Representatives for the 2015 Session making the amendments to KSA 2014 Supp. 21-6811(e), KSA 2014 Supp. 21-6810(d), and KSA 22-3504 recommended by the Kansas County and District Attorneys Association (KCDAA), and that such legislation be referred to the House Committee on Corrections and Juvenile Justice.

To address the search warrant issue raised in *State v. Powell*, 299 Kan. 690 (2014), the Committee recommends legislation be introduced in the House of Representatives for the 2015 Session making the following amendment to KSA 2014 Supp. 22-2502, based upon the KCDAA recommendation: replace the current specific listing of things for which a magistrate may issue a search warrant with a general statement that a warrant may be issued for the search or seizure of any item that can be seized under the Fourth Amendment to the *United States Constitution*. The Committee recommends this legislation be referred to the House Committee on Corrections and Juvenile Justice.

Proposed Legislation: A House bill based upon KCDAA recommendations to address the *Murdock* issue and a House bill based upon KCDAA recommendations to address the *Powell* issue.

Background

The charge to the Special Committee on Judiciary was to consider and make recommendations on three assigned topics: the Foster Parents' Bill of Rights Act (2014 SB 394); possible responses to Kansas Supreme Court decisions from the end of the 2014 Session; and patent infringement (2014 HB 2663). (Note: the charge to the Special Committee also directed it to consider juvenile justice in Kansas, but the Special Committee deferred to the work of the Joint Committee on Corrections and Juvenile Justice Oversight on this topic.)

On the subject of recent Kansas Supreme Court decisions, the Committee was directed to consider possible responses to Kansas Supreme Court decisions released near the end of or after the 2014 regular legislative session.

The topic was requested by Senator Jeff King as Chairperson of the Senate Judiciary Committee and was assigned by the Legislative Coordinating Council for study and review.

Committee Activities

In September, the Committee reviewed its charges and received an overview of three recent Kansas Supreme Court decisions from the Senior Deputy District Attorney with the Johnson County District Attorneys' Office. The three cases discussed were *State v. Murdock*, 299 Kan. 312 (2014); *State v. Reiss*, 299 Kan. 291 (2014); and *State v. Powell*, 299 Kan. 690 (2014).

State v. Murdock. In *Murdock*, the Kansas Supreme Court held that a defendant's out-of-state convictions occurring before enactment of the

Kansas Sentencing Guidelines Act (KSGA) should be scored as nonperson felonies, instead of as person felonies, for criminal history purposes because Kansas did not have a comparable person crime designation before the KSGA.

The Johnson County Senior Deputy District Attorney noted language in the opinion suggested the holding might apply to *all* pre-KSGA convictions, both in-state and out-of-state, but there was a pending motion by the state for rehearing to clarify the extent of the holding.

He further noted the opinion suggested the Legislature take action if the holding did not comport with the Legislature's intended classification of pre-KSGA convictions, and that the dissent stated the holding "completely overlooks [Kansas'] sentencing structure, purpose, and design."

The Johnson County Senior Deputy District Attorney reviewed the Kansas Sentencing Commission's notice to criminal justice stakeholders advising them to adhere to the *Murdock* holding and treat all crimes committed prior to July 1, 1993, as nonperson crimes for criminal history purposes.

In response to questions from the Committee, he explained the practical effect of the *Murdock* holding would be to entitle some offenders to shorter sentences due to the lower severity of nonperson felonies in calculating criminal history. He reported the Attorney General's office estimated the holding could affect up to 800-900 inmates. He noted proposed legislation could be explored once the pending motion for rehearing was resolved and the extent of the holding clarified.

The Committee asked for more information regarding the possible impact of the *Murdock* decision once the motion for rehearing was resolved.

State v. Reiss. In *Reiss*, the Kansas Supreme Court reversed a conviction for driving under the influence, holding that an incidental traffic stop had evolved into an investigative detention, requiring reasonable suspicion of criminal wrongdoing, and that such reasonable suspicion did not exist under the facts of the case. Because the Supreme Court relied heavily on Fourth Amendment search and seizure protections in reaching its holding, the Johnson County Senior Deputy District Attorney noted it would be difficult to take any legislative action in response to the decision.

State v. Powell. In *Powell*, police obtained a search warrant for the defendant's blood, hair, cheek cells obtained using oral swabs, and fingerprints. The Supreme Court held the district court erred in admitting this evidence because the affidavit used to obtain the warrant was insufficient. Although the defendant also argued the evidence should be suppressed because KSA 2014 Supp. 22-2502 does not authorize a search warrant for blood, hair, fingerprints, or cheek cells, the Supreme Court declined to reach this argument because it had reversed the district court on other grounds. However, the Court noted "the Legislature may wish to consider whether the statute's plain language appropriately addresses legislative intent." The Johnson County Senior Deputy District Attorney noted a number of questions asked by justices at oral argument related to this issue. In response to questions from the Committee, the conferee stated he thought the Legislature could address the issue without causing harm to existing cases under the search warrant statute.

The Committee asked for information regarding how other states have addressed biological material in their warrant statutes. At the November meeting, Committee staff presented information on warrant statutes and rules in Colorado, Louisiana, Maine, Montana, and Rhode Island that include provisions related to biological materials.

Proposed Legislation and Testimony

At the September meeting, the Committee asked the Johnson County Senior Deputy District Attorney to work with the Kansas County and District Attorneys Association (KCDAA) to craft proposed legislation to address the issues raised in *Murdock* and *Powell* and to present this proposed legislation at the next meeting.

In November, the Johnson County Senior Deputy District Attorney presented proposed legislation on behalf of the KCDAA. The KCDAA recommended addressing the *Murdock* decision by amending KSA 2014 Supp. 21-6811(e) by specifying the Kansas Criminal Code as the source for designating comparable offenses and modifying "comparable offense" by adding the phrase "an existing"; amending KSA 2014 Supp. 21-6810(d) to clarify that felony convictions or juvenile adjudications committed before July 1, 1993, shall be scored as person or nonperson using an existing comparable offense under the Kansas Criminal Code; and amending KSA 22-3504 to add time limitations for motions to correct illegal sentences, allowing extensions only to prevent manifest injustice.

The KCDAA recommended addressing the *Powell* decision by amending KSA 2014 Supp. 22-2502 to add subsections specifically allowing search warrants to be issued for the search or seizure of any biological material, including but not limited to DNA (deoxyribonucleic acid), cellular material, bodily tissues, bodily fluids, saliva, urine, blood, hair, fingernail clippings or scrapings, or fingerprints or palmprints; and any item that can be seized under the Fourth Amendment to the *United States Constitution*.

A representative of the Kansas Association of Criminal Defense Lawyers opposed the KCDAA's proposed amendment to KSA 22-3504 (motions to correct illegal sentences) on the grounds the amendment would not solve the perceived problem and could actually prevent the state from filing a motion to correct an illegal sentence in certain situations.

Committee Discussion

In January 2015, the Committee reviewed the material presented on the topic at the September and November meetings in 2014 and made the following recommendations.

Conclusions and Recommendations

To address the *Murdock* issue, the Committee recommends legislation be introduced in the House of Representatives for the 2015 Session making the amendments to KSA 2014 Supp. 21-6811(e), KSA 2014 Supp. 21-6810(d), and KSA 22-3504 recommended by the KCDAA, and that such legislation be referred to the House Committee on Corrections and Juvenile Justice. The Committee has concerns with the proposed changes to KSA 22-3504, but wants to submit them without recommending those changes favorably or unfavorably so that they may be further considered by the Legislature.

To address the *Powell* issue, the Committee recommends legislation be introduced in the House of Representatives for the 2015 Session making the following amendment to KSA 2014 Supp. 22-2502, based upon the KCDAA recommendation: replace the current specific listing of things for which a magistrate may issue a search warrant with a general statement that a warrant may be issued for the search or seizure of any item that can be seized under the Fourth Amendment to the *United States Constitution*. The Committee recommends this legislation be referred to the House Committee on Corrections and Juvenile Justice.

Special Committee on Judiciary

Patent Infringement (2014 HB 2663)

Conclusions and Recommendations

The Committee recommends a Senate bill addressing patent infringement claim abuse be introduced in the 2015 Session using the language presented by the Kansas Bankers Association at the January meeting, but incorporating only the second of the two suggested exemptions (the pharmaceutical exemption referencing federal statutes).

Regarding anti-SLAPP (strategic lawsuit against public participation) legislation, the Committee recommends the language of 2014 HB 2711 be introduced as a House bill in the 2015 Session.

Proposed Legislation: Two bills.

Background

The charge to the Special Committee on Judiciary was to consider and make recommendations on three assigned topics: the Foster Parents' Bill of Rights Act (2014 SB 394); possible responses to Kansas Supreme Court decisions from the end of the 2014 Session; and patent infringement (2014 HB 2663). (Note: the charge to the Special Committee also directed it to consider juvenile justice in Kansas, but the Special Committee deferred to the work of the Joint Committee on Corrections and Juvenile Justice Oversight on this topic.)

On the subject of patent infringement (2014 HB 2663), the Committee was directed to study enactments in other states regarding patent infringements, study and review 2014 HB 2663, and make recommendations for the Kansas Legislature to consider regarding patent infringements.

The topic was requested by Representative Lance Kinzer as Chairperson of the House Judiciary Committee and was assigned by the Legislative Coordinating Council for study and review.

Committee Activities

In September, the Committee received an overview of 2014 HB 2663 and other states' legislation and heard testimony from proponents and opponents of HB 2663.

Bad Faith Assertions of Patent Infringement

Topic Overview: 2014 HB 2663. Committee staff explained HB 2663 arose in response to bad faith assertions of patent infringement (often called "patent trolling"), in which firms purchase or license patents from inventors for the purpose of sending demand letters to companies that use equipment incorporating technology allegedly covered by the patents. These demand letters threaten lawsuits unless "settlement" or "licensing" fees are paid. The legitimacy of the patents upon which such claims are made may be suspect, but it is often more economical for a company being threatened to just pay the "settlement" or "licensing" amount offered than to contest the patent claim.

Committee staff provided a review of HB 2663, explaining the bill would have prohibited bad faith assertions of patent infringement, establishing definitions and factors to be

considered as evidence of such bad faith assertions. The bill also would have established factors to be considered as evidence that an assertion of patent infringement was not made in bad faith. The bill would have allowed any target of the prohibited conduct to bring a civil action for equitable relief, damages, costs and fees, and exemplary damages in the amount of $50,000 or three times the total of damages, costs, and fees, whichever is greater. Upon motion by the target and a showing of a reasonable likelihood of a bad faith assertion, the defendant would have been required to post a bond of up to $250,000. The Attorney General also would have received enforcement authority.

The bill was patterned after legislation enacted in Vermont. HB 2663 did not receive a hearing during the 2014 session and died in the House Judiciary Committee.

Other states' legislation. Committee staff reviewed legislation enacted in other states since 2013 intended to address bad faith assertions of patent infringement. Most of the bills (including HB 2663) have been patterned after the Vermont legislation, which was the first to pass, although many states have made modifications to the Vermont model to add exemptions for certain types of notifications or patent holders or to limit enforcement to the state Attorney General. As of the September 2014 meeting, 18 total states had adopted patent trolling legislation. Legislation was pending in four additional states, while legislation was introduced but died in seven states (including Kansas with HB 2663).

Testimony. A representative of the Kansas Bankers Association (KBA) asked the Committee to recommend passage of the language of HB 2663 to the 2015 Legislature. She stated the bill was drafted narrowly to help Kansas companies respond promptly and efficiently to patent infringement assertions against them, lessening the burden of potential litigation on such companies and reducing the harm caused by bad faith infringement claims, while not interfering with the enforcement of good faith assertions of patent infringement. The KBA representative said that association is willing to work with industries with concerns regarding the legislation.

A representative of the American Bankers Association also appeared in support of the language of HB 2663. He presented an overview of state legislation intended to address bad faith patent infringement claims, the relationship of such legislation to federal patent law, First Amendment concerns with such legislation, other opposition to such legislation and how it can be addressed, and the case law that is beginning to develop around such legislation.

The Committee received written testimony from representatives of the Kansas Attorney General, Kansas Association of Realtors, and Kansas Credit Union Association, as well as from a Kansas certified public accountant, encouraging the Committee and the Legislature to take action to address bad faith patent infringement claims.

A representative of the Pharmaceutical Research and Manufacturers of America (PhRMA) presented testimony in opposition to the language of HB 2663, stating concerns that the law could conflict with federal regulation of patent law and run afoul of the Supremacy Clause, as well as encroach on First Amendment rights. He stated PhRMA supports reasonable efforts to stop patent enforcement abuses. PhRMA is working with the KBA to develop amendments that would address its objections to the legislation and plans to continue working with the KBA to resolve concerns.

The Committee received written testimony from a representative of The Innovation Alliance opposing the language of HB 2663 and encouraging the Legislature to develop legislation that would address the abuses of mass mailing of bad faith demand letters while protecting legitimate communications.

Committee discussion. The Committee encouraged the parties to continue working toward compromise legislation. The Committee also requested more information addressing whether the current Kansas Consumer Protection Act could be used to curb patent trolling and how other states might be using existing consumer protection laws in this way. Committee members asked if bad faith litigation was limited to the patent context and requested more information regarding an anti-SLAPP (strategic lawsuit against public

participation) bill that was introduced in 2014 (HB 2711).

Further information. In November, the Committee received further information responding to the questions raised in September.

An assistant Kansas Attorney General appeared before the Committee to explain that the Kansas Consumer Protection Act could not be used in most patent trolling cases because it covers only conduct in connection with "consumers" and "consumer transactions." Bad faith assertions of patent infringement are more likely to arise in business-to-business transactions.

Committee staff presented information on efforts in Minnesota, Nebraska, New York, and Vermont to combat patent trolling using existing consumer protection laws. Staff also provided examples of exemptions contained in some state patent infringement abuse legislation and information regarding the definition of the term "meritless" as it is used in the Vermont law and in HB 2663.

Anti-SLAPP Legislation

Topic overview: 2014 HB 2711. Also in November, Committee staff presented an overview of 2014 HB 2711, the anti-SLAPP "Public Speech Protection Act." The bill would have required a party bringing a claim against a person arising from that person's "public participation and petition," as defined in the act, to verify the claim is made in good faith and not to suppress free speech. The bill would have allowed unverified claims to be stricken and sanctions for verified claims that violated the law. Additionally, the bill would have allowed a party to move to strike a claim based upon an action of public participation and petition, with an automatic stay taking effect upon the filing of such a motion. A defending party would be entitled to costs and attorney fees if it was determined a claim was unverified or if a motion to strike was successful, and punitive damages could be awarded to deter repetition of the conduct. Similarly, costs and attorney fees would have been awarded to a responding party if a motion to strike was frivolous or intended to delay. If a government contractor was found to have violated the act, the court would have been required to send the ruling to the head of the relevant government agency doing business with the contractor.

Representative Jan Pauls, who requested the introduction of HB 2711 in 2014, told the Committee the bill was intended to provide a timely remedy when frivolous lawsuits are filed to intimidate and silence people with limited resources who exercise their First Amendment right to free speech. Such lawsuits and the prospect of expensive litigation can have a chilling effect on free speech. Representative Pauls reported similar acts have been passed in 28 states, the District of Columbia, and Guam, usually with widespread bipartisan support.

Updates and Discussion

In January 2015, Committee staff reviewed the information the Committee had received on the topic at the September and November meetings.

A representative of the KBA presented the Committee with a clean draft of proposed legislation based upon 2014 HB 2663. She explained the KBA had worked with PhRMA, Pfizer, and Caterpillar to develop the new draft, which incorporated technical clarifications as well as two exemptions intended to address the concerns of various parties.

According to the KBA representative, the first exemption was drawn from the Illinois version of the legislation and clarified the bill was not to be construed to deem it an unlawful practice to take certain steps in attempting to license or enforce a patent in good faith.

She stated the second exemption was requested by Pfizer and exempted demand letters or patent infringement assertions arising under federal statutes dealing with pharmaceutical regulation.

A representative of PhRMA stated he had not heard from Pfizer regarding the exemptions, and that he had forwarded the new version of legislation to the companies involved in PhRMA but had not yet heard back from them. He told the Committee that the interested companies would be

able to address any further concerns once the legislation was introduced.

Regarding the anti-SLAPP legislation, Representative Pauls reported the Kansas Supreme Court currently has a committee studying possible filing restrictions for litigants who repeatedly file frivolous, malicious, or repetitive pleadings. She asked the Special Committee to consider recommending introduction of the language of 2014 HB 2711 as a committee bill.

Conclusions and Recommendations

The Committee recommends a Senate bill addressing patent infringement claim abuse be introduced in the 2015 Session using the language presented by the KBA at the January meeting, but incorporating only the second of the two exemptions (the pharmaceutical exemption referencing federal statutes). Committee members expressed support for the concept behind the first exemption (clarifying the bill was not to apply to certain patent enforcement actions taken in good faith), but noted some concern with the wording of the exemption as presented and whether it would render the rest of the bill meaningless.

Regarding anti-SLAPP legislation, the Committee recommends the language of 2014 HB 2711 be introduced as a House bill in the 2015 Session. Some Committee members noted their support of the concept of the bill despite concerns with some of the specific language, including the language related to punitive damages, damages for failure to verify, and liberal construction of the statute.