

Approved: May 11, 2012

(Date)

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairperson Kinzer at 3:30 PM on Monday, January 30, 2012 in 346-S of the Capitol.

All members were present.

Committee staff present:

Katherine McBride, Office of Revisor of Statutes
Jason Thompson, Office of Revisor of Statutes
Lauren Douglass, Kansas Legislative Research Department
Robert Allison-Gallimore, Kansas Legislative Research Department
Nancy Lister, Committee Assistant

Conferees appearing before the Committee:

Amy Hanley, Assistant Attorney General
Kyle Smith, Deputy Director, Kansas Bureau of Investigation
Keith Henderson, Assistant District Attorney, Johnson County District Attorney's Office
Todd Hiatt, Assistant District Attorney, Shawnee County District Attorney's Office
Christopher Joseph, Attorney, Joseph & Hollander LLC
Representative Melanie Meier
Charles Yunker, Adjutant, The American Legion Department of Kansas
Doug Wareham, Kansas Bankers Association
Professor James Concannon, Washburn Law Center

Others in attendance:

See attached.

Chairman opened the meeting and asked for bill introductions.

Representative Ryckman introduced a bill concerning estate recovery and saving the state some money. The request was seconded by Representative Brookens and the bill was accepted without objection.

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Representative Suellentrop introduced a bill concerning product liability and the sale of used equipment. The request was seconded by Representative Bruchman and the bill was accepted without objection.

Chairman opened the hearing on **HB 2464—Amending criminal discovery statute to prohibit release of child pornography evidence to the defense.** Katherine McBride provided an overview of the bill content and handed out a copy of K.S.A. 21-5510, defining sexual exploitation of a child, and specifically read the explanation of “visual depiction” of a child. (Attachment 1)

Amy Hanley testified in support of **HB 2464**, on behalf of the Office of the Attorney General, and advised she currently prosecutes high-level crimes throughout the State of Kansas, including capital murder, sexual abuse of children, and possession and distribution of child pornography. Federal law 18 USC 3509 (m) prohibits the transfer, reproduction, or distribution of sexually explicit images of children to the defendants and their counsel and requires these images to be in the care, custody and control of either the government or the court. Child pornography is contraband, and Ms. Hanley made the analogy of cocaine- that just as it is unreasonable to allow a baggie of cocaine to be turned over to a defendant, child pornography should not be transferred to a defendant’s control. Ms. Hanley advised **HB 2464** is consistent with discovery provisions already in effect. Under K.S.A. 22-3212(e), courts have discretion to order discovery or inspection denied, restricted, or deferred. K.S.A. 22-3212 (b) (1) provides that prosecuting attorneys shall permit the defendant to inspect and copy items related to the case in their custody that “will not place an unreasonable burden upon the prosecution.” Requiring law enforcement prosecutors to violate federal law by producing copies of the child pornography images is unreasonable. Ms. Hanley offered it has been her experience that rarely a defense counsel wants to use a special out-of-state expert to help make their case. If it happens, it generally has to do with data recovery from a computer. Kansas law prohibits visual depictions that are sexually explicit of minors, and using the defense the images are computer generated, and therefore not real, is not a viable defense in Kansas. (Attachment 2)

Kyle Smith testified in support of **HB 2464** on behalf of the Kansas Bureau of Investigation, stating the bill will help control the spread of contraband, protect child victims from being re-victimized, and reconcile a serious problem in criminal discovery. The Kansas Bureau of Investigation has a Cyber Crime Unit, which does a lot of examinations of computers and other equipment that is seized in conjunction with sexual crimes throughout the state. This is contraband and it is a federal offense to make copies of any evidence to give to defense counsel. It is not a problem to make evidence available to defense counsel, as they are entitled to discovery, but they are not entitled to re-victimize the child. (Attachment 3)

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Keith Henderson testified in support of **HB 2464**, on behalf of the Kansas County and District Attorneys Association. As the Assistant District Attorney and member of the Sex Crimes and Child Abuse Unit in the Johnson County District Attorney's Office, he prosecutes sex crime cases on a regular day-to-day basis. Mr. Henderson stated the images are contraband and **HB 2464** would require images of child pornography to remain in the custody and control of law enforcement, prosecution, or the courts. In one case he was familiar with, a Johnson County case, defense counsel filed a motion requesting the State provide a copy of its evidentiary hard drive containing illicit images and videos. The defendant specifically requested the copy be sent to California for a review by the defendant's expert. The presiding judge agreed with the defense and ordered a copy of the hard drive be sent to California, which was then copied and delivered via Fed Ex to the expert in California. The package was contraband, handed over to a Fed Ex employee, who was a stranger, and he was entrusted with getting it delivered to the correct destination. In this specific example, the material was delivered appropriately, but with the passage of **HB 2464**, this type of situation would be prevented from occurring again. (Attachment 4)

Todd Hiatt testified in support of **HB 2464** on behalf of the Shawnee County District Attorney's Office, stating he handles all the sex crimes in the county. In the cases he has handled, there are pictures on the internet, cell phones, flash drives, hard drives, and tablets. There are also various kinds of crimes where child pornography is being found, including robbery cases and a recent murder case. This bill would create presumption the images should not be shared or disseminated, but if they do need to be disseminated, there would be a discreet and careful way for copies to be examined. (Attachment 5)

Mr. Hiatt shared he worked on a case recently involving the rape of a five-year old child, which wasn't charged for several years. When it was charged, it was a rape case with child pornography elements. The child porn allegedly was used to facilitate the rape, which made the two charges appropriate to put together in one complaint. The issue of whether the defense attorney's out-of-state expert could get copies of the images was litigated for nearly a year. Washington became involved, representatives from the FBI came down to testify, and at the end of the day, the judge determined, as the prosecutor had never taken possession of the pornography, Mr. Hiatt could not be ordered to supply it. The FBI no longer had the images, so they could not be ordered to supply it. The Topeka Police Department was still in possession of the images, so the judge had a detective make a copy of all the child pornography and turn it over to the court. The court then gave the images to the defense attorney, and it was assumed the materials were given to the expert or kept in a secured facility. The materials disappeared for a while but then were returned to the judge. The judge didn't want the images and tried to get the prosecutor to take the child pornography, but the prosecution did not want to take possession of the images. Eventually, the Topeka Police Department retrieved the images, which are being

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stored in the evidence room and will be destroyed according to protocol. The passing of **HB 2464** will give clear guidelines and put a system in place to prevent the copying and distributing of child pornography.

Mr. Hiatt advised there is a tension between the federal criminal law and federal criminal discovery law, as is found in the Adam Walsh Act. There is a tension between federal criminal law, which says possession of child pornography is illegal without exception, and due process tries to defend it. The more tension that can be eased by putting in place this type of uniform act, the easier and more efficient this kind of litigation will be. Mr. Hiatt asked for **HB 2464** to be passed.

Chairman Kinzer directed the Committee to consider the written testimony in support of **HB 2464** from Ed Klumpp, on behalf of the Kansas Association of Chiefs of Police, the Kansas Sheriffs Association, and the Kansas Peace Officers Association. (Attachment 6)

Chris Joseph testified in opposition of **HB 2464** and on behalf of the Kansas Association of Criminal Defense Lawyers. As a practicing criminal defense attorney in Topeka and also statewide, Mr. Joseph stated there are a fair number of computer crime cases where no one needs to look at the pornography, as the people charged have confessed to the crime. There are other cases though where client states he didn't put anything on the hard drive of the computer, and doesn't know how it got there. It still does no good to look at the pornography images, but it is necessary to look at the computer's metadata. A computer forensics expert is often needed to look at how the information got to the hard drive, where it was and when it got there. In Kansas, one has to prove possession of the pornographic images. The experts are usually former law enforcement officers who retired and now work as expert witnesses. If the lab in Kansas ships to a lab expert in Oregon, Fed Ex is used. The point is clients are entitled to due process, and it is more expensive to bring experts to Kansas, which can cost an additional \$10,000 dollars in expert costs, and it is also not an easy process to review, which causes problems. (Attachment 7)

Mr. Joseph testified there are two software programs used in looking at the metadata of a computer hard drive, Forensic Tool Kit and End Case. The process starts with a mirror image of the hard drive. The hard drive is mounted onto the software, and a process of indexing the information begins. Indexing can take from two days to a week. The process is continuous and runs overnight in a secure facility. To expect an expert to come to a law enforcement lab and sit there and wait while the indexing occurs is not practical, at a cost of \$350 to \$450 dollars per hour, and if the lab is not open for use 24 hours a day, there is a problem because the expert cannot stay there all night and supervise the data.

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Mr. Joseph noted in a recent case in Lawrence he was working on, the metadata showed information in a temporary internet file folder. When someone is browsing the internet, there are pop-ups that aren't requested, or there are thumbnails one can review, but are not downloaded onto the computer. This is not considered having possession, if it is in a temporary internet file folder and there are multiple users of the computer.

Mr. Joseph offered **HB 2464** is trying to solve a problem that does not exist. Criminal Defense attorneys now do whatever is necessary to provide due process for their clients. Chairman Kinzer inquired as to what Mr. Joseph's opinion was about the way the bill is currently drafted and whether it provides the "reasonably available" opportunity for experts to go into the law enforcement location and have the necessary access to review the hard drive and metadata. Mr. Joseph expressed many times it is not, as it sometimes takes a lot of equipment to glean the data and it is not practical to move it out of an expert's location and set it up at a law enforcement center. Attorneys now go through hearings to obtain access for experts to review hard drives and metadata. Mr. Joseph advised Judge Wilson ended up using an order from the District of New York for a second circuit federal court protective order under the Adam Walsh Act as the model to provide the very strict limitations about how the expert can use the hard drive information and under what circumstances. Representative Brookens questioned whether this second circuit model would be available for the Committee to review. Mr. Joseph agreed to provide a copy of this information to the Committee. (Attachment 8)

Mr. Joseph offered the Adam Walsh Act has a true safety valve law for what is "reasonably available". There have been challenges, but without **HB 2464** having a true safety valve, it may be found to be in violation of due process. Chairman Kinzer suggested if Mr. Joseph could provide any safety valve language to the Committee from the Adam Walsh Act, it would be helpful to have.

Chairman Kinzer closed the hearing on **HB 2464**.

Chairman Kinzer opened the hearing on **HB 2297-Requiring courts to wait until a deployed soldier returns home before proceeding with foreclosure**. Katherine McBride provided an overview of the content of the bill. Chairman Kinzer requested that Katherine or research staff compare and contrast the provisions under this bill with the statutory protections that are already available under the Servicemembers Civil Relief Act to determine whether it is duplicative. Katherine McBride suggested there is some language in the bill that needs clarification, as it makes references to civil actions and foreclosure actions, and it is very specific to Kansas National Guardsmen and Kansas Reserves servicemembers. It is unclear as to whether this refers to the uniform services, which we define but we never use, and that includes all the branches, including reserves and guards, whether or not they are residents of Kansas.

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Representative Meier testified in support of **HB 2297** noting the Servicemembers' Civil Relief Act (SCRA) was signed in 2003, which updated the original Soldiers' and Sailors' Civil Relief Act of 1940. In 2008, an additional Foreclosure Protection Act was passed to provide returning servicemembers extended protection from foreclosure from 90 days to 9 months. Despite these federal safeguards, there are still cases where the servicemembers return home and find their houses have been foreclosed upon. **HB 2297** focuses on how a lender can determine if a servicemember has been deployed. Representative Meier offered the Revisor's Office provided her with an alternative version of the bill language for the Committee to consider, which is attached as part of her written testimony. The bill language covers the prevention of a foreclosure and adds a deterrent of a \$2,000 civil fine. Representative Meier agreed **HB 2297** should be opened up to all servicemembers, not just the national guard and reserves. Also attached to her written testimony is a letter of support from the Junior Vice Commander of the Kansas Veterans of Foreign Wars (VFW), information on what the VFW is doing to help servicemembers who are in trouble with their mortgage or rent, and an article on a foreclosure. Representative Meier stated she did an internet search and found there were 34 bills considered recently and bills have passed in 12 states that include various expansions of the foreclosure protections, ranging from adding foreclosure violations penalties to just giving an extension of time of more than nine months. (Attachment 9)

Chairman Kinzer asked if the core of the additional protection in **HB 2297** relates to the front-end issue of having a few more hoops for lenders to go through to make a determination of whether or not someone is a member of the military. Representative Meier indicated that was a fair assessment and added in most of the cases she was familiar with, the defense for the foreclosing lender in violation of the SCRA was the lender did not know the servicemember was deployed or out of the country. If lenders would make a good faith effort to find out this information, a lot of these cases wouldn't occur.

Charles Yunker testified in support of **HB 2297** on behalf of the American Legion Department of Kansas, and agreed he would like to see the bill expanded to include all services. He knew of several cases in the last year where individuals in Kansas came in to ask for assistance in stopping a foreclosure. Mr. Yunker offered it would be good if servicemembers and their spouses were given a piece of paper which listed their rights as a servicemember and homeowner or spouse under SCRA. (Attachment 10)

Doug Wareham testified as neutral on **HB 2297** on behalf of the Kansas Bankers Association, and stated the bill requires an affidavit to be filed by the foreclosing party (bank) indicating whether the property owner is a military servicemember or a dependent of a servicemember. What is being proposed as a state law is already federal law and the Kansas Bankers Association is concerned about the duplication of duties on the part of the foreclosing party and of causing

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confusion. Congress enacted the SCRA and there are certain similar provisions relating to foreclosure proceedings when a military member is the property owner. There are also provisions that suspend foreclosure proceedings while the servicemember is in service and for a certain period afterwards. (Attachment 11)

Mr. Wareham shared the Consumer Financial Protection Bureau (CFPB) at the federal level is a new federal regulatory agency which was established by the Dodd Frank Wall Street Reform Act and within the Bureau is the Office of Servicemember Affairs, headed by Holly Petraeus, wife of former CIA Director and retired four-star general, David Petraeus. The CFPB is going to be very proactive and if a servicemember has a complaint and needs assistance, they can call the Consumer Financial Protection Bureau and they will be helped. On Veterans Day, the CFPB announced there were 87 veterans of foreign war working at the Bureau. The CFPB is in the process of looking to see what additional standards and protections should be afforded to military personnel. Mr. Wareham asked the Committee to pause and look at what is established at the federal level and consider whether there is a need to have a duplicate set of laws at this time. As a veteran, with family members in the service, Mr. Wareham stated his appreciation for the cause Representative Meier has taken up in this bill.

Chairman Kinzer closed the hearing on **HB 2297**.

Chairman Kinzer opened the hearing on **HB 2473–Civil procedure; pleadings and discovery** and stated there was no one better to explain this bill than Professor Concannon, who was present to testify, so he would forgo an explanation from the revisor.

Professor James Concannon testified in support of **HB 2473** on behalf of the Kansas Judicial Council as a member of the Civil Council Advisory Committee. Professor Concannon advised he has taught Civil Procedure and Evidence for many years at Washburn Law School. For many years, Kansas Code of Civil Procedure has been nearly identical to the Federal Rules of Civil Procedure, and when there have been amendments to the federal rules, Kansas has usually adopted them unless they conflicted with established state practices. **HB 2473** is based on two federal amendments that became effective December 1, 2010. The important change is in section two of the bill, in two subsections of K.S.A. 60-226, which are on pages four and five of the bill, relating to discovery from expert witnesses. Until 1993, both Kansas and the federal rules required a party's lawyer to answer an interrogatory by identifying any expert witness they planned to call on and to state three things: the subject matter the expert was going to be testifying on, the substance of the facts and opinions the expert was going to testify on, and summary of the grounds of each of those opinions. Federal Rule 26 was extensively revised in 1993 in three ways: to require that the expert personally- and not the party's lawyer- prepare a much more extensive disclosure than that, if the expert was retained or specially employed

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to provide expert testimony or was an employee of a party who regularly gives expert testimony. The second change for the disclosure required of other expert witnesses, such as the emergency room doctor giving expert testimony or the employee of the party who doesn't usually give expert testimony, was cut back to provide their identity only. The third change allowed parties to take a deposition of expert witnesses without court approval, no matter what kind of expert it was. Kansas went along with the last two changes but rejected the first one. Thus, in Kansas, the party's lawyer continues to make disclosures, but after 1993, it was only about retained or specially employed experts. (Attachment 12)

Professor Concannon stated the 2010 Federal Advisory Committee concluded the 1993 restriction on disclosure- just to identify experts who are not retained or specially employed- wasn't working, and restoring the requirement that the party's lawyer disclose the subject matter on what the non-retained or non-specially employed experts would testify on, giving the general facts or opinions they would testify about, would better enable the opposing party to determine whether there was a need to use more expensive and time-consuming discovery procedures, such as taking depositions. **HB 2473** would amend K.S.A. 60-226 (B) (6) to adopt this expanded federal disclosure by the lawyer for the experts who are not retained or specially employed. Professor Concannon stated the bottom line is it will effectively restore the disclosure requirement regarding these experts to what it was back in 1993.

Professor Concannon advised the other change in K.S.A. 60-226, (B) (5), on page four of the bill, would clarify the application of the work product doctrine to expert witnesses. There have been a number of federal courts that have ended up authorizing discovery of communications between counsel and their expert witnesses and also discovery of drafts of the disclosures required under the rule. This had the undesirable effect of raising costs, as attorneys felt the need, in order to avoid having their own sensitive and case-specific, confidential analyses revealed, either employ two sets of experts-one to consult and one to testify- or adopt a really guarded attitude about how they were going to interact with testifying experts, which impeded effective communication. This is an issue on which any kind of uncertainty is unacceptable, and a clear rule is needed. **HB 2473** adopts for all expert witnesses the approach of the 2010 federal amendment and makes clear the work product protection extends to drafts of the lawyer's disclosures regarding expert witnesses and to communications between the lawyer and the expert witness. What the federal amendment does is recognize three categories of communications between counsel and experts who will be exempt from the work-product protection so the other side can find out these things and better prepare to cross examine the expert at a deposition or at trial. These are compensations for the expert's study and testimony- which could be used to show the expert's bias. According to the Advisory Committee comment, it would broadly include such things as any discussions about which would be subject to discovery. Communications about the potential relevance of the facts or data would still be protected for

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future benefits, such as further work in other cases- if the current case turns out successfully. There also would be disclosure of data or facts the attorney provided that the expert considered in forming the expert's opinion. Only the communications identifying those facts would be considered work product. Additionally, assumptions the attorney provided to the expert to rely on in forming an opinion would be discoverable, for example, when the attorney tells the expert to assume the truth of certain testimony or the correctness of another expert's conclusions, but it would not extend to things such as discussion of hypothetical facts. Any other information would be work product, and the standards that have always applied to the discovery of work product would apply to those other matters.

Professor Concannon advised Section 1 of the bill adopts the 2010 amendment to Rule 8, a minor change, which makes clear discharge of bankruptcy is not a defense that is lost by failure to plead it. There is a third federal amendment in 2010 that is not included in **HB 2473**, amending the summary judgment rule, Rule 56, mandating a uniform requirement for all federal courts that parties seeking or opposing summary judgment cite to the record to show there either is or isn't a genuine issue as to material fact for trial. Kansas has had a uniform requirement for district courts along the same lines for many years in Supreme Court Rule 141, which requires greater specificity than the amended federal rule does. Thus, the Civil Code Committee concluded the Kansas rule was working well, and adopting the less demanding federal standard would have a negative impact on the Kansas practice. The Committee concluded the few other changes in the 2010 amendment, which essentially codified existing case law, could be added to Supreme Court Rule 141 without a statutory amendment.

Chairman Kinzer clarified the only difference, with respect to retained or specially employed experts and other experts, would be the need for a summary of the grounds of each opinion and Professor Concannon concurred. Chairman Kinzer questioned what the rationale was for drawing a distinction between presenting a summary for the grounds of the opinion in some cases and not others. Professor Concannon stated the third requirement is what is in the current Kansas law. For retained or specially employed experts, an identical report will need to be given, which one currently has to provide for those experts. What is being added is disclosure of those experts who are not retained or specially employed. The rationale is if they are not retained or specially employed, they might not be quite as forthcoming with the lawyer who has to make this disclosure, whereas a retained or specially employed might be more forthcoming. The lawyer would still have the opportunity to take a deposition if the disclosure is not thought to be adequate.

Chairman Kinzer questioned, under K.S.A. 60-226, (B) (5), regarding protection of drafts of disclosures, in some instances district courts do require a written report from experts. If the attorney is using as the disclosure not a report the attorney put together, but rather a written

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expert report- and given the fact it was drafted by the expert-would it be protected by (5) (B). Chairman Kinzer noted most of the experts he works with have only one draft, a working copy of their report, and will edit it as they go. Professor Concannon advised his opinion, on the face of the issue, was it would not be protected. In the introductory language of work product protection, it would protect drafts of any disclosures required under Subsection (B) (6), which is only the disclosure of the lawyer. It is drafted that way just because it is only the lawyer's report, which the statute requires. Chairman Kinzer offered, on the issue of giving out the draft reports of experts, it is not uncommon to see a written expert report the expert has provided. In state court, it practically meets the interpretation of the rule. Professor Concannon offered this issue is addressed in the federal rule, which extends the draft disclosure protection to the report which is signed by the expert. Chairman Kinzer stated this is helpful information.

Chairman Kinzer closed the hearing on **HB 2743**.

The next hearing is scheduled for Tuesday, January 31, 2012. The meeting was adjourned at 5:04 p.m.