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**Testimony Before the House Committee on Health and Human Services
Regarding Senate Bill No. 430
by Kevin M. Fowler of Frieden, Haynes & Forbes
on Behalf of the
Kansas Health Care Association, Inc.**

March 18, 2004

Chair Morrison and members of the Committee, my name is Kevin Fowler. I am a partner in the Topeka law firm of Frieden, Haynes & Forbes and I have been licensed to practice law in Kansas for nearly 22 years. During the past decade, a significant amount of my professional time and attention has been devoted to legal matters affecting the interests of Kansas adult care homes and their residents. I am appearing before the Committee on behalf of the Kansas Health Care Association, Inc.

The subject matter of Senate Bill No. 430 (which establishes a general prohibition against the admission of survey or inspection reports as evidence in civil actions) has already been fully heard and considered by this Committee in

connection with House Bill No. 2306. The Kansas Health Care Association is pleased to request that the Committee reaffirm its support for House Bill No. 2306 by amending Senate Bill No. 430 in conformity with the substantive provisions of the House Bill as it was previously heard, considered and reported favorably by an overwhelming majority of this Committee and approved by the House of Representatives. In the interest of efficiency and economy, I have also separately submitted the power point presentation we previously furnished the Committee in connection with House Bill. No. 2306.

The Kansas Health Care Association's principal concern regarding Senate Bill No. 430 involves the provision that creates an exception to the inadmissibility of survey or inspection reports. Under House Bill No. 2306, excerpts from such reports may be used as evidence in civil actions where they directly relate and refer to the adult care home resident whose care or treatment is at issue in the lawsuit and they are otherwise admissible under the rules of evidence. This exception specifies the "degree of relatedness" that must be shown before any part of a survey or inspection report may be used as evidence.

On the other hand, Senate Bill No. 430 contains an exception for excerpts from survey or inspection reports that would allow the use and admission of such information as long as it is related to the plaintiff or "related to the allegations asserted by the named plaintiff." This language is problematic because it may have the unintended effect of nullifying the prohibition against using such reports as evidence in civil cases. Unfortunately, the Senate language does not

specify any degree of relatedness between a survey or inspection report and the named plaintiff, the plaintiff's legal cause of action or the plaintiff's factual allegations before excerpts from the report may be used as evidence. Because a survey or inspection report may always be viewed as bearing some amount of nexus or relatedness (however slight or tenuous) to a plaintiff's allegations, the exception contained in the Senate Bill could be construed in a manner that substantially, if not completely, eviscerates the prohibition against admissibility. Although we do not believe the Senate intended to create an exception that swallows the rule of inadmissibility, the language of Senate Bill No. 430 could be misinterpreted as approving current practice or increasing the authority of trial judges to permit the use of such reports as evidence.

The Kansas Health Care Association, therefore, urges the Committee to amend Senate Bill No. 430 so that it conforms to the substantive provisions and limitations contained in House Bill No. 2306.