

## MINUTES

### SPECIAL COMMITTEE ON JUDICIARY

September 18-19, 2007  
Room 123-S—Statehouse

#### Members Present

Senator John Vratil, Chairperson  
Representative Mike O'Neal, Vice-Chairperson  
Senator Greta Goodwin  
Senator Phil Journey  
Senator Julia Lynn (September 19)  
Senator Derek Schmidt  
Representative Sydney Carlin  
Representative Marti Crow (September 18)  
Representative Lance Kinzer (September 18)  
Representative Jan Pauls  
Representative Marc Rhoades

#### Members Excused

Senator Julia Lynn (September 18)  
Representative Marti Crow (September 19)  
Representative Lance Kinzer (September 19)  
Representative Bill Light  
Representative Vern Swanson

#### Staff

Bruce Kinzie, Office of the Revisor of Statutes  
Justin Slinkard, Office of the Revisor of Statutes  
Jason Thompson, Office of the Revisor of Statutes  
Athena Andaya, Kansas Legislative Research Department  
Jerry Donaldson, Kansas Legislative Research Department  
Emalene Correll, Kansas Legislative Research Department  
Carol Benoit, Chief of Staff for Senator Vratil  
Ann McMorris, Committee Secretary

## Conferees

### **Topic No. 6** – Change in Judge in a Civil Action (September 18)

Gary Carnivale, Citizen  
Honorable Thomas Foster, Kansas District Judges' Association

### **Topic No. 5** – Subrogation Clauses in Health Insurance Contracts (September 18)

Senator Phil Journey  
Ryan Woody, Attorney  
Jim Clark, Kansas Bar Association  
Michael Helbert, Member, Kansas Trial Lawyers Association  
Corrie Edwards, Kansas Health Consumer Coalition  
Ernest Kutzley, AARP

### **Topic No. 13** – Indemnification Agreements (September 19)

Bill Miller, American Subcontractors Association  
Tom Whitaker, Executive Director, Kansas Motor Carrier Association  
SueAnn Schultz, Kansas Association of Insurance Agents  
Ken Keller, Eastern Extralite  
Gus Meyer, Rau Construction, Builders Association, and Kansas City Chapter of Associate General Contractors  
Marvin Kleebe, Allied Staffing, Mid-America Association of Personnel and Staffing Services, and Kansas State Council of the NFIB  
Pat Barnes, Kansas Auto Dealers Association  
Edward Cross, Kansas Independent Oil and Gas Association  
Garry Walker, Kansas Independent Oil and Gas Association  
David Dayvault, Kansas Independent Oil and Gas Association  
Brent Moore, OXY USA, Inc.  
Will Larson, Kansas Contractors Association and Associated General Contractors  
Wyatt Hoch, Coalition to Preserve Freedom of Contract  
Corey Peterson, Associated General Contractors

## **Tuesday, September 18 Morning Session**

*Representative O'Neal moved and Representative Rhoades seconded that the minutes of the meetings of the Special Committee on Judiciary held on August 27 and 28, 2007, be approved. Motion carried.*

Chairperson Vratil opened the hearing on **Topic No. 6 – Change in Judge in a Civil Action (2007 SB 86)**.

Gary Carnivale, Citizen, Johnson County, described the current statutes relating to change in judge in a civil action and related his support of SB 86. However, he is concerned with the time limitation, as the bill is written, on requesting a change of judge. He believes this potential legislation could add an additional "check and balance" to the judicial system. He asked that consideration be given to proposing a law that allows litigants to request a change of judge once, without cause. He

noted, currently arguments are presented and decisions are made in the judge's chambers where there is no official record. To avoid any appearance of impropriety, evidence should be presented and decisions made in court, on the record (Attachment 1).

The Honorable Thomas Foster, District Judge, Division No. 12, and member of the Kansas District Judges' Association (KDJA) Executive Committee, presented personal comments and observations about SB 86. He stated the KDJA Executive Committee has taken a neutral position on the bill. He stated positive considerations of the bill are:

- Due process;
- Judicial evaluation; and
- Attorney preference.

He also stated negative considerations of the bill are:

- Extra cost involved in districts with one or two district judges;
- Specialized dockets not conducive to "changing judges" upon request and reviewed the various statutes this would include;
- Centralized dockets;
- Negativity;
- Access to justice; and
- Administrative statutes versus court rule.

He suggested establishing a Committee of judges and attorneys to develop a court rule that would consider the benefits and costs of implementing a "change of judge" rule in appropriate circumstances (Attachment 2).

The Chairperson closed the hearing on Topic No. 6.

The Chairperson opened for discussion and recommendations by the Committee on **Topic No. 3 - Operation of Kansas Parole Board** (heard on August 27).

After considerable discussion, Chairperson Vratil summarized the views of the Committee on the topic as a concern about the fact that post-guideline offenders seem to be released earlier than pre-guideline offenders and this has an adverse effect on pre-guideline offenders. The Committee recommends the addition of three additional criteria to the Parole Suitability Factors found in statute:

- Proportionality between pre- and post-guideline offenders;
- Risk factor as revealed by the LSI-R; and
- An opportunity for input from institutional personnel.

It was recommended that a bill be drafted.

*It was moved by Representative O'Neal, seconded by Senator Journey, that the staff of the Office of the Revisor of Statutes be directed to draft a bill regarding the operation of the Kansas Parole Board to include the Committee recommendations of adding three additional criteria to the Parole Suitability Factors on:*

- *Proportionality between pre- and post-guideline offenders;*
- *Risk factor as revealed by the LSI-R; and*

- *An opportunity for input from institutional personnel.*

Motion carried.

### **Afternoon Session**

Chairperson Vratil opened the hearing on **Topic No. 5 – Subrogation Clauses in Health Insurance Contracts (2007 SB 44)**.

Senator Journey spoke in support of SB 44 and his awareness of the issue known as collateral source. Originally, SB 44 was drafted as an alternative to the collateral source proposal. SB 44 works significantly differently than collateral source. The various provisions authorized to, and required by a health insurance carrier are set out. Subrogation is a concept that has been successfully applied in other areas of reimbursement such as insurance benefits paid involving automobile accidents and medical services provided to Medicaid or Medicare recipients. Currently, administrative rules propounded by the Kansas Department of Insurance Commissioner prohibit subrogation (Attachment 3).

Ryan Woody, attorney with the national subrogation firm, Matthiesen, Wickert & Lehrer, S.C. of Hartford, Wisconsin, noted that health insurance subrogation refers to the efforts by health care insurers to recover money by virtue of the rights of its insured against a liable third party. He reviewed the importance of health insurance subrogation and the views of both courts and legal scholars who agree that subrogation affects premiums. He commented that allowing health insurance subrogation will reduce the number of lawsuits. He concluded allowing health care insurers to recoup funds through subrogation will not cure the health care crisis, but it will help fight the trend in rising health care costs and premium payments (Attachment 4).

Mr. Woody provided several attachments to his testimony. The attachments are:

- Health Care Costs – A Primer – The Kaiser Family Foundation - Exhibit A
- Cost of Health Insurance - Employer Health Benefits 2007 Annual Survey – Exhibit B
- Health Benefits Offer Rates - Employer Health Benefits 2007 Annual Survey -- Exhibit C
- South Dakota Law Review 1996 – Exhibit D
- Case - In the Supreme Court of the United States – *Sereboff v. Mid Atlantic Medical Services* – Exhibit E

Jim Clark, Legislative Counsel, Kansas Bar Association (KBA), stated that the KBA has a long-standing legislative policy against a statutory right of subrogation by health insurance companies. He presented the KBA's objections to the bill (Attachment 5).

Michael Helbert, Kansas Trial Lawyers Association (KTLA), noted current state law assures that, where federal law does not otherwise apply, injured Kansans who have responsibly maintained their health insurance coverage are protected from being sued by their insurance company for reimbursement of medical expenses. KTLA recommends that no change be made to current state law prohibiting subrogation (Attachment 6).

Corrie Edwards, Executive Director, Kansas Health Consumer Coalition, expressed their opposition to SB 44, in that:

- It is not fair to Kansas health consumers;
- Compensation is intended to be used by consumers for recovery and future costs;
- Recovery dollars compensate consumers for multiple expenses beyond medical; and
- This is turning the concept of health insurance on its head (Attachment 7).

Written testimony was provided by AARP Kansas State Office (Attachment 8).

The Chairperson closed the hearing on Topic No. 5.

The Chairperson opened for discussion and recommendations of the Committee on **Topic No. 2 – Kansas Administrative Procedure Act and the Act for Judicial Review of Agency Actions**.

The Chairperson reviewed the legislative background and actions that the Legislature has taken in this area. Under the current law, agency heads retain the right to make a final decision.

*It was moved by Representative O’Neal, seconded by Representative Rhoades, that a bill be drafted that:*

- *Judicial review shall be on the entire record, including the record of any adjudicative hearing conducted by, or initial orders issued by, a presiding officer from the Office of Administrative Hearing within the Department of Administration in addition to the record of the trial order under review; and*
- *The burden of proof the agency should use where a substantial property right is affected, i.e., renewal or revocation of license or permit, is clear and convincing evidence.*

Motion carried.

### **Wednesday, September 19 Morning Session**

The Chairperson opened the hearing on **Topic No. 13 – Indemnification Agreements**.

The Chairperson asked the Revisor’s staff to provide a brief explanation of the three bills, introduced in the 2007 Session, relating to this topic:

- HB 2007 extends the current prohibition on indemnification agreements to all contracts;
- HB 2262 extends the current prohibition on indemnification agreements to motor carriers; and
- SB 379 prohibits indemnification for intentional acts and omissions. It also prohibits a provision in a construction contract, except for contracts between the owner of the property and the general contractor, which requires a party to provide liability coverage to another party, as an additional insured, for the other party’s negligence, intentional acts, or omissions.

Bill Miller, American Subcontractors Association, directed his remarks in favor of SB 379. He favored enacting legislation that makes everyone responsible for their own claims and the claims caused by those for whom they are responsible. This law would stop abusive risk transfer and reduce liability insurance costs ([Attachment 9](#)).

Tom Whitaker, Executive Director, Kansas Motor Carrier Association, directed his remarks in favor of HB 2262, which would promote safety in the transportation of goods by motor carriers by eliminating clauses that shield shippers and others who perform their obligations negligently or wrongfully. He supports legislation which prohibits indemnification clauses in motor carrier transportation contracts that require one party to indemnify and hold harmless a second party's negligence or wrongful acts ([Attachment 10](#)).

SueAnn Schultz, Kansas Association of Insurance Agents, supported the basic policy in all three bills that makes it against public policy to transfer one party's negligence to another party. The bills also expand on the protection given to contractors and prohibit requirements to name another party as an additional insured to pick up coverage for their own negligence ([Attachment 11](#)).

Ken Keller, Western Extralite, a distributor of quality electrical and voice/data products, directed his remarks to SB 379, which he felt would eliminate the current practice of requiring subcontractors to name the owner, general contractor, and others as an additional insured on their auto and liability policies. He suggested an amendment which would provide that the subcontractor and his insurance company be reimbursed for his deductible and the cost of defense to the extent the subcontractor is deemed not to be at fault ([Attachment 12](#)).

Gus Meyer, Rau Construction, Builders Association, and Kansas City Chapter of Associate General Contractors, discussed construction contracts containing indemnification clauses that make the contractors responsible for the actions of all contractors involved. He favored the legislation which would restrict indemnification clauses requiring a first party to indemnify a second party for the negligent acts of the second party ([Attachment 13](#)).

Marvin Kleeb, Allied Staffing, Mid-America Association of Personnel and Staffing Services, and Kansas State Council of the NFIB, urged further consideration of legislation that makes indemnification and additional insured clauses in contracts void and unenforceable. He described various claims made by large companies on small businesses ([Attachment 14](#)).

Pat Barnes, Kansas Auto Dealers Association, opposed changing the current Kansas law with respect to indemnification and opposed HB 2007 in particular. He noted the proposal the bill represents for indemnification agreements would not be a good measure for business transactions in general ([Attachment 15](#)).

Edward Cross, Kansas Independent Oil and Gas Association (KIOGA), expressed opposition and KIOGA's concerns on current proposed legislation and noted KIOGA had developed a task force in 2006 to find a workable solution on the indemnification issue. The task force developed a model Master Service Agreement (MSA) which provides a model by which all oil and gas companies can work but is not the answer to the indemnification issue. Mr. Cross was followed by other members of KIOGA ([Attachment 16](#)).

Garry Walker, KIOGA, described three of the five primary uses of indemnity agreements in the Kansas oil and gas industry ([Attachment 16](#)).

David Dayvault, KIOGA, detailed the fourth use where indemnity agreements are frequently used in well servicing contracts and the fifth significant use is in drilling contracts. He noted it has been proposed that indemnity provisions be generally declared as contrary to public policy but

exceptions would be provided in those instances where a strong case could be made as to their benefits. Texas has such a law and if Kansas should adopt such an approach, it was suggested that the five types of indemnity agreements described in this testimony be allowed as good public policy ([Attachment 16](#)).

Brent Moore, OXY USA, Inc., opposed HB 2007 and provided seven reasons for their opposition. OXY believes that the current proposed legislation will cause serious unintended consequences with respect to many contracts within many businesses in Kansas. He suggested if this Committee proceeds to apply this proposed law to the oil and gas industry, that consideration be made to making exemptions or exclusions of its application similar to that under the Texas statute ([Attachment 17](#)).

Will Larson, Kansas Contractors Association and Associated General Contractors, noted the Committee had indicated it would amend the bill in 2008 to eliminate language amended into SB 379 by the Senate Committee on Judiciary on page 2, lines 1 through 3 – namely “...that the provisions of this subsection shall not apply to a construction contract between the owner of the property and the general contractor.” If this is done, he would be a proponent instead of an opponent ([Attachment 18](#)).

Wyatt Hoch, Coalition to Preserve Freedom of Contract, opposed the three bills and summarized his comments that government should not take sides in a non-consumer business transaction. At most, the Legislature should pass a law only prohibiting indemnity provisions from covering the other party’s own negligence and/or require certain clear language in order for risk-allocating indemnity provisions to be upheld ([Attachment 19](#)).

Written testimony was provided by Corey Peterson, Associated General Contractors of Kansas, Inc. ([Attachment 20](#)).

The Chairperson closed the hearing on Topic No. 13.

### **Afternoon Session**

The Chairperson opened for discussion and recommendations from the Committee on **Topic No. 4 — Medical Assistance for Trust Beneficiaries (2007 SB 32)**.

Chairperson Vratil reviewed the balloon which had been agreed upon by the proponents and opponents of SB 32. This amendment would require that at the time of creation or amendment of the trust, the trust state a clear intent that it is supplemental to public assistance and would not be available for medical reasons. Some members inquired as to the definitions of “public assistance” and “medical assistance.”

Staff was directed to prepare a report which reflects the testimony of the proponents and the opponents and conclusions from the Committee that it was never the intent of the Legislature to lay a trap for people who are creating trusts; and that it was always the intent of the Legislature for the person making the trust to have the right to make it supplemental to public assistance. The Committee agreed on the legislation and on the definition for the term “public assistance.” Public assistance includes, but is not limited to Medicaid, Medicare, and the Social Security Act. It was recommended that legislation be introduced to accomplish the intent of the Committee.

*Moved by Senator Goodwin, seconded by Representative O'Neal, the Committee recommends that legislation (SB 32) be introduced to accomplish the intent of the Committee to make trusts supplemental to public assistance and by including a definition of public assistance which includes assistance obtained through Medicaid, Medicare, and the Social Security Act. Motion carried.*

The Chairperson opened for discussion and recommendations from the Committee on **Topic No. 7 — Interference with Parental Custody.**

Written testimony from the Office of the Attorney General was provided to the Committee and set forth balloon amendment to the language in 2007 SB 182. The Attorney General and the Kansas Coalition Against Sexual and Domestic Violence (KCSDV) have agreed to suggest adding the language “without having legal justification or excuse” to the statute would accomplish their goal of creating a defense for a parent who justifiably removes a child from the custody of another parent (Attachment 21).

Ed Klumpp, Legislative Committee Chairperson, Kansas Association of Chiefs of Police, presented additional information concerning SB 182 and voiced his objection to the proposed language from the Attorney General. He urged the Committee to keep it simple and not create another area of proof. He provided two samples of the statute with their recommended language incorporating the language provided by the Attorney General and KCSDV (Attachment 22).

Chairperson Vratil questioned each Committee member regarding their views on the proposed language in SB 182 and summarized as follows:

The Committee is concerned about the problem where it might be necessary for the parent to take children to protect them from abuse from the other parent. However, there has been no evidence presented to the Committee that the problem exists in Kansas where parents are interfering with parental custody. The Committee wants to know how other states are dealing with this problem. The consensus of the Committee is that this issue needs further study. The Committee does not believe the bill should die but is reluctant to recommend new legislation until more is known about the problem.

Representative O'Neal stated interference with parental custody statutes and aggravated interference with parental custody needs to be studied with a possibility the two statutes be merged.

It was suggested the groups interested in this issue should confer and try to reach an agreement on any proposed legislation. The Interim Committee on Judiciary will not make any recommendations on this issue – Topic No. 7 – Interference with Parental Custody and will not introduce any new legislation.

Prepared by Ann McMorris  
Edited by Athena Andaya

Approved by Committee on:

October 11, 2007

(Date)