Approved: 1-25-93
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairman, Representative Michael R. O' Neal at 3:30 p.m. on January 21, 1993 in room 313-S of the Statehouse.

All members were present except:

Representative Clyde Graeber - Excused
Representative Elaine Wells - Excused
Representative Joan Wagnon - Excused

Committee staff present:

Jerry Donaldson, Legislative Research
Jill Wolters, Revisor of Statutes
Cindy Wulfkuhle, Committee Secretary

Conferees appearing before the Committee:

Gene Johnson, Kansas Alcoholism & Drug Addiction Association
Paul Shelby, Assistant Judicial Administrator
Ron Smith, General Counsel, Kansas Bar Association
Jim Clark, Executive Director Counties & District Attorneys Association

Gene Johnson, Kansas Alcoholism & Drug Addiction Association, appeared before the committee for several bill introductions. The first would change the way of reporting who attends the education classes to the Department of Revenue. Currently they report everyone who attends classes but they now want to report only those who don't. The second deals with the clean up of the open container statute so ABC Officers can make arrests. The third would reduce the per se alcohol limit from .1% to .08% for those over age 21 and would impose a .02% limit for those under age 21. Another would also to strike the word motor in motor vehicle, to include mopeds in the law. The next request would provide that conviction of three or more serious offenses be classified as a habitual violator. Last, would have administrative hearings held at the Department of Revenue.

Chairman O'Neal asked if these five bills could be introduced as one bill. Gene said he doesn't see any problem with that.

Committee discussion followed. Representative Carmody made a motion to have this introduced as a committee bill. Representative Robinett seconded the motion. The motion carried.

The Committee received a request from the Department of Wildlife & Parks, asking for a bill introduction increasing the penalty of boating under the influence of drugs or alcohol. In addition to the current penalty, they propose anyone found guilty of refusing to take a breath test would be prohibited from operating a boat for 30 days after conviction and be required to attend an approved boater education course.

Representative Carmody made a motion to have this introduced as a committee bill. Representative Scott seconded the motion. The motion carried.

Paul Shelby, Assistant Judicial Administrator, had one bill request that would allow retired justices and judges to be assigned temporarily to the Supreme Court with full voting privileges and allowing temporary service of an active Court of Appeals judges on the Supreme Court. This temporary assignment would be approved by all member of the court. (Attachment #1)

Committee discussion followed. Representative Smith made a motion to have this introduced as a committee bill. Representative Macy seconded the motion. The motion carried.

Minutes of the House Committee on Judiciary, Room 313-S, Statehouse, at 3:30 p.m. on January 21, 1993.

Ron Smith, General Counsel, Kansas Bar Association, wants to modify the wording in the Uniform Limited Partnership Act where it says "except as provided in the Certificate of Limited Partnership..." to say "except as provided in the partnership agreement..." (Attachment #2)

Committee discussion followed. Representative Smith made a motion to have this introduced as a committee bill. Representative Bradley seconded the motion. The motion carried.

Jim Clark, Executive Director County & District Attorney Association, appeared before the committee with one bill request. It would be a clean-up bill of 1992 HB 3057.(Attachment #3)

Representative Smith made a motion to have this introduced. Representative Mays seconded the motion. The motion carried.

The Committee adjourned at 4:25 p.m. The next Committee meeting is January 25, 1993 at 3:30 p.m. in room 313-S.

Request for Legislation
House Judiciary Committee
January 21, 1993

Testimony of Paul Shelby
Assistant Judicial Administrator
Office of Judicial Administration

This a request from the Chief Justice and members of the Supreme Court.

It is a request for legislation that would allow retired justices and judges to be assigned temporarily to the Supreme Court with full voting privileges and allowing temporary service of an active Court of Appeals judge on the Supreme Court. This temporary assignment would be approved by all members of the court.

It amends K.S.A. 20-2616 and K.S.A. 20-3002.

K.S.A. 20-2616 provides generally for the assignment of retired justices, as well as retired judges of the court of appeals and the district courts, to perform such judicial services and duties as they are willing to accept. The statute now allows those retired justices and judges full power and authority to decide all matters which come before them on assignment, <u>except</u> when the assignment involves service on the supreme court.

"(b) A retired justice or judge so designated and asigned to perform judicial service or duties shall have the power and authority to hear and determine all matters covered by the assignment, <u>but as to any matter pending in the supreme court the retired justice or judge shall act in an advisory capacity only.</u>"

The Kansas Constitution, Article 3, subsection 6, allows the supreme court to assign a district judge to serve temporarily on the supreme court and in the past it has been assumed that any district judge assigned under this constitutional provision would be an <u>active</u> district judge who has full judicial authority to vote and participate as a supreme court justice when so assigned. By this statute, those assigned district judges who have already retired are restricted to acting in an advisory capacity only, when they are assigned to the supreme court.

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Presently, if we wish to avoid the possibility of a deadlock in the absence of one of our justices (whether because of an illness, a disqualification, etc.) we must temporiarily fill the position with an active district court judge. In order to get an active district court judge to sit temporarily on the supreme court, we must disrupt the operation of the district court. It may take a significant amount of the trial judge's valuable time to prepare for and attend to the supreme court functions.

In 1963, the Legislature established the position of a supreme court commissioner. At that time, the Consitituion limited the size of the supreme court to seven justices. Consequently, the commissioner, although deemed necessary to assist with the court's case load, was not allowed to be a voting member of the court. In 1965, the number of non-voting supreme court commissioners was raised to two.

The 1963 session also saw the enactment of a statute which permitted retired justices and retired district judges to serve, without compensation, as supreme court commissioners and as judges pro tempore in the district courts. (K.S.A. 20-2615). That statute did not appear to give the retired justices and judges any choice as to whether they wanted to serve or not.

In 1967, the Legislature enacted the first version of K.S.A. 20-2616 (in an act which also repealed K.S.A. 20-2615). It too allowed retired justices and retired district judges to be assigned to judicial duties. A very significant difference between this statute and its predecessor was that the retirees could only be assigned <u>if they were willing to accept the assignment.</u> One of those assignments under this statute, just as they were allowed under K.S.A. 20-2615, was that of supreme court commissioner.

In March 1972, K.S.A. 20-2616 was amended. The reference to assignment as a commissioner was deleted. The statute simply allowed assignment to matters "pending" in the supreme court (in addition to its reference to district court assignments) without using the word "commissioner." This version of the statute included, for the first time, the language which we are now ready to propose deleting. It said,

"(B)ut as to any matter pending the supreme court (the retired justice or judge) shall act in an advisory capacity only."

Eight months later, in November of 1972, the people of Kansas approved amendments to the Consitution which substantially changed the Kansas judicial system and the structure of the Judicial Branch. Significantly, the supreme court is now to comprise "not less than seven justices". If the Legislature now wanted to do so, it could add positions to the court. The rationale for adding "commissioners" with no voting power no longer exists. However, no corresponding change in K.S.A. 20-2616 was made.

In 1976, this statute once again underwent some revision. The Legislature inserted the word "district" in reference to retired judges. Another change made at that time had to do with making the statute gender neutral.

In 1980, the statute received more significant modifications. Retired court of appeals judges were added to the list. They would also be allowed to accept judicial assignments. And, any retired justices and judges willing to take those assignements were given provisions for compensation, subsistence, mileage and expenses. However, the restriction to supreme court advisory service remained intact.

In 1981, the statute was again amended. That change was minor and does not appear related in any way to our present concern and proposal.

Once a judge or justice has been constitutionally qualified to hold a judicial office, retirement has no effect except that at age 70 the judicial officer is to apply for retirement at the end of the officer's term. K.S.A.20-2608 and K.S.A. 20-2616(b).

We feel that there is no reason, based upon the Constitution, why a retired judge or justice who is still an actively registered lawyer, not otherwise engaged in practicing law, could not be temporarily assigned to the supreme court with full judicial authority.

It is indeed odd that a district judge, having barely five years of legal experience before assuming the judicial office (K.S.A. 20-334(a)(3) can, under Article 3, subsection 6(f), be temporarily lifted to the supreme court with full voting authority while a retired justice, who had to have more legal experience to begin with (K.S.A. 20-105), can only be assigned to serve as an advisor.

Section 2 of our proposal: Our amendment to K.S.A. 20-3002 would allow the supreme court to assign an active judge of the court of appeals to serve temporarily on the supreme court.

Court of Appeals judges must possess the same qualifications as supreme court justices [K.S.A. 20-3002(a)]. And, court of appeals judges are selected in the same manner as supreme court justices. K.S.A. 20-3004. Court of Appeals judges are judges with full constitutional judicial authority. Under the statutory scheme, a retired court of appeals judge may be assigned to sit in a district court and, just like any other constitutional judicial officer or judge pro tempore, fully determine any case which comes before him or her. K.S.A. 20-2616.

In the event of a sudden absence of a supreme court justice, it would be expedient and efficient to simply call to the court of appeals, residing in the same building, for an available judge to temporarily fill the spot.

Once these statutory provisions are amended, we see no constitutional bar to assigning any retired supreme court justice, retired court of appeals judge, retired district judge, or active court of appeals judge (all of whom have otherwise met the constitutional qualifications for the judicial position which they hold or have held) to sit temporarily on the supreme court with full judicial power and authority, including voting privileges and the opportunity to write dissenting or concurring opinions.

We would appreciate your favorable consideration of this request.

KANSAS BAR ASSOCIATION

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MEMORANDUM

TO: Sen. Jerry Moran
Rep. Mike O'Neal

FROM: Ron Smith, General Counsel

SUBJ: KBA Bill Requests

DATE: January 19, 1993

Per the new joint rules on bill introductions, and subject to my individual conversations with each of you, here is the list of legislation KBA would like to see introduced this session in time for consideration this year:

1. **Uniform Limited Partnership Act.** Amend KSA 56-1a351, 56-1a355, 56-1a404 and 56-1a451, or where otherwise appropriate, so that in all places in the Revised Uniform Limited Partnership Act (ULPA) where it provides "except as provided in the Certificate of Limited Partnership..." or similar language, this language be modified to provide "except as provided in the partnership agreement ..."

Requested by: David Becker, President, KBA Corporations Section, and supported by the KBA Legislative Committee and Board action of 1/15/93.

In support: Uniform Laws Commission's John McCabe. Perhaps the Secretary of State's office, too. KBA Board of Governors.

Rationale: While Kansas has the revised Uniform Limited Partnership Act, which shortens and simplifies the certificate of limited partnership which is filed with the Secretary of State to form a limited partnership. Numerous provisions remain in the Act to the effect that if one wants to take advantage of statutorily authorized provisions, you must set forth the provisions in the Certificate of Limited Partnership. Most other states with the Revised Act provide that putting such provisions in the partnership agreement itself is sufficient, and they need not be put in the Certificate. The Act as drafted is a trap for the unwary. Those who file the certificate containing only the minimum requirements of the act and put the substantive provisions in the partnership agreement may not have a valid document. Our recommendations cure this possible defect.

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2. **Fictitious Names Filing Legislation.** It is my understanding the Secretary of State's office is going to request introduction of such legislation. If they do, then we do not need our own bill. I do want to reserve a slot, however.

Requested by: Stan Woodworth of the Corporate, Business and Banking Law section.

Supported by: the Secretary of State's office, the KBA Board of Governors.

Rationale: The legislation requires businesses to list actual owners of a "dba" business forms so the public knows whom they're dealing with if not obvious from the corporate or partnership name. Lawyers collecting overdue accounts like the idea of knowing who is actually behind an ambiguous business name, and providing a central filing system within the Secretary of State's system provides access to the information through such mechanisms as the Information Network of Kansas.

3. **Technical Amendments, Probate Code.**

Requested by: Nancy Roush, Shook, Hardy & Bacon.

Supported by: KBA Real Estate, Probate and Trust Law Section; KBA Board of Governors.

Rationale: In 1991 KBA supported and obtained minor changes in the statutory allowance for surviving spouses and children, allowing the judge to dispose of certain real property to allow for the $25,000 allowance. Nancy Roush suggests another technical amendment of the same type and nature to K.S.A. 59-2287(a)(1) so that it conforms to 1991 changes in Chapter 58.

If there is to be a real estate or other probate code bill going through the process this could be attached as an amendment. Right now, however, I'm uncertain whether an appropriate noncontroversial vehicle is available.

4. **Judicial Districts allowed Optional ADR Filing Fees**

Requested by: KBA ADR committee

Supported by: Same, and the KBA Board of Governors.

Rationale: In 1991, KBA supported and obtained a change to K.S.A. 60-2002 to allow courts discretion to impose ADR fees by or from any combination of parties, or from the proceeds of any settlement or judgment. There was a companion bill, HB 2052, which did not pass that year. We would like re-introduction of 1991 HB 2052.

5. **Division of Assets & Medicaid Eligibility.**

Requested by: Judge Marla Luckert, and KBA's Committee on the Elderly.

Supported by: Same. Also KBA Board of Governors.

Rationale: Last year, in SB 607, allowed SRS to file claims for Medicaid reimbursements on estates of former patients. The law did not provide for a statute of limitations, yet probate law has a nonclaim statute, which provides that after a certain time, claims against the estate are disallowed. The state has no such limit, however. The problem is that no one selling title to property out of an estate can attest to valid title so long as the state may exercise a claim -- perhaps even after the estate is closed.

We recommend a statute of limitations on filing this claim be applied to the state as well as others, and that the limit be the same as the nonclaim statute. I do not yet have precise language but do want to reserve a "request" slot.

We have several positions that can be covered by amendments to existing legislation, or we are supportive or in opposition to existing interim legislation.

cc: Ben Neill, Chair, Legislative Committee
Bill Swearer, President, KBA

(ii) the average person applying contemporary community standards would find that the material or performance has patently offensive representations or descriptions of (A) ultimate sexual acts, normal or perverted, actual or simulated, including sexual intercourse or sodomy, or (B) masturbation, excretory functions, sadomasochistic abuse or lewd exhibition of the genitals; and

(iii) taken as a whole, a reasonable person would find that the material or performance lacks serious literary, educational, artistic, political or scientific value.

(b) "Material" means any tangible thing which is capable of being used or adapted to arouse interest, whether through the medium of reading, observation, sound or other manner.

(c) "Obscene device" means a device, including a dildo or artificial vagina, designed or marketed as useful primarily for the stimulation of human genital organs, *except such devices disseminated or promoted for the purposes of medical or psychological therapy.*

(d) "Performance" means any play, motion picture, dance or other exhibition performed before an audience.

(e) "Sexual intercourse" and "sodomy" have the meanings provided by K.S.A. 21-3501, and amendments thereto.

(f) "Wholesaler" means a person who sells, distributes or offers for sale or distribution obscene materials or devices only for resale and not to the consumer and who does not manufacture, publish or produce such materials or devices.

(4) It is a defense to a prosecution for obscenity that:

(a) The persons to whom the allegedly obscene material was disseminated, or the audience to an allegedly obscene performance, consisted of persons or institutions having scientific, educational or governmental justification for possessing or viewing the same;

(b) the defendant is an officer, director, trustee or employee of a public library and the allegedly obscene material was acquired by such library and was disseminated in accordance with regular library policies approved by its governing body; or

(c) the allegedly obscene material or obscene device was purchased, leased or otherwise acquired by a public, private or parochial school, college or university, and that such material was either sold, leased, distributed or disseminated by a teacher, instructor, professor or other faculty member or administrator of such school as part of or incident to an approved course or program of instruction at such school.

(5) The provisions of this section and the provisions of ordinances of any city prescribing a criminal penalty for exhibit of any obscene motion picture shown in a commercial showing to the general public

shall not apply to a projectionist, or assistant projectionist, if projectionist or assistant projectionist has no financial interest show or in its place of presentation other than regular employ as a projectionist or assistant projectionist and no personal know of the contents of the motion picture. The provisions of this s shall not exempt any projectionist or assistant projectionist criminal liability for any act unrelated to projection of motion pi in commercial showings to the general public.

(6) Promoting obscenity is a class A misdemeanor on conv of a first offense and a class E felony on conviction of a seco subsequent offense. Conviction of a violation of a municipal ordi prohibiting acts which constitute promoting obscenity shall be sidered a conviction of promoting obscenity for the purpose termining the number of prior convictions and the classificati the crime under this section.

(7) Upon any conviction of promoting obscenity, the court require, in addition to any fine or imprisonment imposed, tha defendant enter into a reasonable recognizance with good an ficient surety, in such sum as the court may direct, but not to e $50,000, conditioned that, in the event the defendant is conv of a subsequent offense of promoting obscenity within two years such conviction, the defendant shall forfeit the recognizance.

Sec. 2. K.S.A. 21-4301 is hereby repealed.

Sec. 3. This act shall take effect and be in force from and its publication in the statute book.

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