Approved: 3-10-93
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY

The meeting was called to order by Chairman, Representative Michael R. O' Neal at 12:45 p.m. on February 26, 1993 in room 313-S of the Statehouse.

All members were present except:

Representative Tom Bradley - Excused
Representative Gilbert Gregory - Excused
Representative David Heinemann - Excused
Representative Rand Rock - Excused
Representative Joan Wagnon - Absent

Committee staff present:

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

HB 2332 - increase penalties for second or subsequent conviction of criminal use of weapons and criminal possession of firearms.

Chairman O'Neal stated that Representative Bowden requested this bill. (Attachment #1) The subcommittee recommendation was to amend out the enhancement penalties for subsequent violations. The Sentencing Commission proposed amendment would make it so subsequent violations would automatically be picked up under the "criminal history portion" of the sentencing grids. The subcommittee also recommended the committee amend on page 3, line 24 and on page 4, line 24 to strike the word "select". (Attachment #2)

Chairman O'Neal made a motion to adopt the subcommittee report. Representative Carmody seconded the motion. The motion carried.

Representative Macy explained her balloon amendment which would amend current law prohibiting convicted felons from having firearms. (Attachment #3)

Representative Macy made a substitute motion to adopt the balloon amendment. Representative Wells seconded the motion. The motion carried.

Jill Wolters, Revisor of Statutes, stated that the committee needs to make a technical amendment to strike the last three lines of the new section 3 (a)(1).

The motion on the balloon was amended, with permission of the second, to strike the language that Wolters recommended.The motion carried.

Chairman O'Neal made a motion to adopt the Sentencing Commission proposed amendment. Representative Macy seconded the motion. The motion carried.

Representative Macy made a motion to report HB 2332 favorably for passage as amended. Representative Carmody seconded the motion. The motion carried.

HB 2411 - deleting references in sentencing statute dealing with sexually violent crimes.

Chairman O'Neal explained that the sexual predator provision was not originally part of the sentencing guidelines and the Commission requested that the committee strike that provision because it is unworkable. The problem is how a judge reasserts jurisdiction after a period

of post release supervision, for the purpose of extending the post release supervision in a sexual predator case where there has been failure to complete the program. The Sentencing Commission requested to amend the provision so it would be workable. The subcommittee recommended adopting the Sentencing Commission's amendments, and also remove misdemeanors from the list of sexually violent & sexually motivated crimes. (Attachment #4)

Helen Pedigo, Kansas Sentencing Commission, summarized the Sentencing Commission's recommendations. The judge would establish an amount of post release supervision time when the inmate is sentenced. The court would be allowed to order treatment programs. It would be up to the Parole Board and Department of Corrections to enforce the accomplishment of the programs. An early termination would be allowed, through the Parole Board, if the offender had done a suitable amount of post release supervision, either 1 year or 2 years from the time committed. It would also remove the misdemeanors in subsection (4) from the list of sexually violent & sexually motivated crimes. (Attachment #5)

Chairman O'Neal made a motion to adopt the subcommittee report. Representative Scott seconded the motion. The motion carried.

Representative Plummer made a substitute motion to adopt the Sentencing Commission's proposed amendment. Representative Garner seconded the motion. The motion carried.

Chairman O'Neal stated that he received an amendment from Nola Foulston, Sedgwick County District Attorney, regarding new language for the rape statute that would change the language in subsection (c) to say " ...disease, or when the victim is incapable of giving consent because of the effect of any alcohol liquor, narcotic, drug or other substance; which condition was known by or apparent to the offender." (Attachment #6)

Representative Everhart made a motion to adopt the proposed amendment. Representative Macy seconded the motion. The motion carried.

Chairman O'Neal asked the committee if there was any interest in addressing jury instructions which would state that in a prosecution for rape the jury would be instructed that there is no presumption of consent based upon involuntary intoxication, the nature of the clothing worn by the victim, or where the violation took place.

Representative Everhart stated that she liked the language but thought that by putting it into this bill it would make the bill more controversial.

Chairman O'Neal asked permission of the committee to write to the Judicial Council PIK Instruction committee and request that they address this subject of jury instructions and address involuntary intoxication in regard to rape cases.

Chairman O'Neal asked if the committee would consider amending HB 2131 into HB 2411 so the House doesn't have to run the obscene device bill by itself.

Representative Everhart commented that she would not like to see it amended into this bill. She would like to keep the bill noncontroversial. No further action on the suggestion was taken.

Jill Wolters stated that the change in language to the rape statute doesn't amend the aggravated criminal sodomy and aggravated sexual battery statutes.

Representative Pauls made a motion to adopt the language to apply the rape amendment to aggravated criminal sodomy and aggravated sexual battery. Representative Everhart seconded the motion. The motion carried.

Representative Everhart made a motion to report HB 2411 favorably for passage as amended. Representative Macy seconded the motion. The motion carried.

Minutes of the House Committee on Judiciary, Room 313-S, Statehouse, at 12:45 p.m. on February 26, 1993.

HB 2459 - bill of rights for crime victims; crime does not include violations of city ordinances.

Chairman O'Neal stated that the question has come up as to whether the crimes contemplated by the crimes victims constitutional amendment apply to city ordinances. This bill was requested by the League of Kansas Municipalities to define a crime as acts or omissions in violation of laws of the State of Kansas but not include acts or omissions in violation of city ordinances and encourage Municipalities to adopt policies with regard to victims rights. The Attorney General is against the bill and believes that victims are victims and the law shouldn't distinguish between a district court filing or a municipal filing.

The League of Municipalities drafted a balloon amendment to address this concern. It would strike on page 2, all in line 10 after the word "crime" and all in line 11 up through the word "shall". Also, on line 13 strike "Municipalities....to" and add "The governing body of any city which has established a municipal court shall". In line 16 strike "to...municipality." and add "specified in such policies." (Attachment #7)

The subcommittee recommended adoption of the League of Municipalities balloon. The subcommittee also recommended that the committee work an amendment Representative Pauls' requested that would require the attorney handling the case in municipal court to handle the notification of victims.
(Attachments # 8-#11)

Chairman O'Neal made a motion to adopt the subcommittee report. Representative Goodwin seconded the motion. The motion carried.

Representative Carmody stated that he sat on the committee when the Attorney General appeared before the committee and the Attorney General stated that the constitutional amendment would have no effect, no expense, no impact on the way the courts operate.

Representative Mays made a substitute motion to adopt the balloon amendment. Representative Carmody seconded the motion. The motion carried.

Representative Pauls made a motion to adopt her proposed amendment to have the attorney prosecuting the case handle victim notification. Representative Carmody seconded the motion. The motion carried.

Representative Carmody made a motion to report HB 2459 favorably for passage as amended. Representative Mays seconded the motion. The motion carried.

HB 2355 - alcohol-related offenses.

Chairman O'Neal stated that he wanted the committee to incorporate several other alcohol related bills into this one. He announced that the committee discussion would be broken down into specific issues that the committee would like addressed in the DUI bill.

Representative Adkins made a motion to report HB 2355 favorably for passage. Representative Mayans seconded the motion.

Tuck Duncan, offered a proposed amendment that would prohibit insurance carriers from canceling insurance on the first suspension of driving privileges. (Attachment #12)

The first issue would be whether the committee is going to approve a per se .08% BAC limit, amending the current .10% BAC level.

The next issue is to strike the word "motor" from the bill so that it applies to all vehicles.

There is also the provision for the use of the ignition interlock device for second and subsequent offenses of .15% or above BAC level. The Chairman stated the Department of Transportation suggested that this would put the state out of compliance and lose federal funds. However, the issue was resolved when the Chairman talked with Norman McPherson, Regional Administrator, National Highway Safety Administration, and he stated that the language is ok as worded as long as the provision was applied after the period of administration suspension has expired. This provision would require the court to impose the requirement that after the period of initial administration on second and subsequent offenses the Interlock device be installed.

The next provision provides for no diversions where an individual tests at .15% or above BAC level.

A .08% BAC level standard for boating is also included, which would result in three months suspension from operation of a vessel and requires boater education upon conviction.

The bill also combines cereal malt beverage and alcoholic beverage into the same section and counts ordinance convictions the same as a regular conviction.

Representative Carmody made a substitute motion to adopt the Kansas Alcohol and Drug Addiction Counselors Association proposed amendment that would strike the language on page 12, line 37 starting with "The alcohol... evaluation." Representative Mays seconded the motion. The motion carried.

The next provision states that anyone under the age of 21 who violates the open container provisions must complete an alcohol and drug safety action program.

The bill also contains an affirmative defense to any prosecution under the open container law that an occupant of the vehicle other than the driver was in exclusive possession of the alcoholic beverage.

Representative Pauls stated that this provision was what killed the .08% BAC level bill last year and made a motion to return the bill to present law of open containers by striking on page 32, line 27 the affirmative defense provision. Representative Everhart seconded the motion.

Chairman O'Neal stated that this was an effort to create an affirmative defense to the driver of the vehicle if they can prove that someone else was in control of the alcohol. It guarantees a conviction in every case, and encourages designated drivers.

Representative Garner commented that the nation is trying to promote designated drivers and he is in support of the language in the bill.

The motion failed 7-7.

Representative Scott proposed adopting the amendment of the City of Junction City which would add the following language "conviction of an act which was committed on a military reservation and which would constitute a violation of K.S.A. 8-1567, and amendments thereto, or would constitute a crime described in subsection (b)(1)(A) if committed off a military reservation in this state". Representative Macy seconded the motion. The motion carried.

The Kansas County and District Attorneys Association requested two amendments. The first would treat a third and subsequent conviction as a nonperson felony. The second would delete the language " to a degree that renders the person incapable of safely driving a vehicle" on page 19, line 30 and replace it with "under the influence".

Representative Garner made a motion to adopt the first proposed amendment regarding the third and subsequent conviction. Representative Adkins seconded the motion. The motion carried.

No interest was shown for the second proposed amendment.

Minutes of the House Committee on Judiciary, Room 313-S, Statehouse, at 12:45 p.m. on February 26, 1993.

Chairman O'Neal offered a balloon amendment on HB 2355 which as proposed would create a .04% BAC level for those under the age of 21 years and impose an administrative suspension for the first time offense being a thirty day suspension, a second and subsequent offenses being six months and a $25 fine to cover the lab cost. (Attachment #13)

Representative Garner had some concerns about treating 18-21 year olds differently.

Chairman O'Neal made a motion to adopt the balloon amendment. Representative Carmody seconded the motion. The motion failed 6-6.

The Chairman proposed taking the language from HB 2263 and amend it so the bill would allow municipalities to charge "not less than the minimum nor more than the maximum"

Representative Adkins made a motion to add the language from HB 2263 as amended. Representative Robinett seconded the motion. The motion carried.

Chairman O'Neal asked the committee if there was any interest in adding HB 2518 into the bill. No interest was shown.

Representative Scott made a motion to report HB 2355 favorably for passage as amended. Representative Plummer seconded the motion. The motion carried.

HB 2475 - Uniform declaratory judgements act.

Chairman O'Neal stated that the Uniform declaratory judgements act has been adopted by 40 states. The State has adopted some of the provisions. This bill would adopt the rest. (Attachment # 14) The subcommittee recommended that the full committee work the bill.

Representative Adkins made a motion to adopt the subcommittee report. Representative Carmody seconded the motion. The motion carried.

Representative Adkins made a motion to report HB 2475 favorably for passage. Representative Carmody seconded the motion. The motion carried.

HB 2257 - interpreters for hearing/speech impaired and non-English speaking persons.

Representative Carmody made a motion to adopt the balloon amendment which was adopted in the subcommittee. Representative Robinett seconded the motion. The motion carried.

The subcommittee recommendations are incorporated into the balloon amendment which utilized Leonard Hall's testimony. (Attachments # 15 & #22)

Representative Carmody made a motion to report HB 2257 favorably for passage as amended. Representative Robinett seconded the motion. The motion carried.

HB 2500 - Americans with Disabilities Act update.

Representative Carmody stated that this bill was requested by the Attorney General's office to bring the State into conformity with the Federal ADA standards. The subcommittee recommended the whole committee work the bill. (Attachments #23-#28)

Representative Carmody made a motion to adopt the subcommittee report. Representative Scott seconded the motion. The motion carried.

Representative Adkins made a substitute motion to amend state law to incorporate by reference the ADA Federal language and repeal the Kansas language. Representative Garner seconded the motion. The motion carried.

Minutes of the House Committee on Judiciary, Room 313-S, Statehouse, at 12:45 p.m. on February 26, 1993.

Representative Carmody made a motion to report HB 2500 favorably for passage as amended. Representative Adkins seconded the motion. The motion carried.

Representative Carmody made a motion to approve the committee minutes of February 15,16,17,18 & 19. Representative Mayans seconded the motion. The motion carried.

The Committee adjourned at 3:30 p.m.

GUEST LIST

HOUSE JUDICIARY COMMITTEE

DATE FEBRAURY 26, 1993

NAME	ADDRESS	ORGANIZATION
TRUDY ARON	TOPEKA	AMER INST of ARCHITECTS
KEITH R LANDIS	TOPEKA	CHRISTIAN SCIENCE COMM ON PUBLICATION FOR KS
ALAN COBB	Wichita	Wichita Hospitals
Cameron Brewer	Topeka	KTLA
[illegible]	Topeka	BTE
[illegible]	Topeka	WU. Soc. Work.
[illegible]	Topeka	League of KS. Mun.
phyllis fast	"	AG
Mary Jane Stattelman	"	"
[illegible]	Topeka	KWA
Gene Johnson	Topeka	KS. NASW assn
[illegible]	Topeka	KSC
[illegible]	Topeka	Student Comm
PATRICIA HENSHALL	TOPEKA	OJA
Jim Clark	Topeka	KCDAA.

STATE OF KANSAS

RICK BOWDEN
REPRESENTATIVE, NINETY-THIRD DISTRICT
433 WALNUT
GODDARD, KANSAS 67052-0039

TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
RANKING MINORITY MEMBER: EDUCATION
MEMBER: GOVERNMENTAL ORGANIZATION
AND ELECTIONS

February 23, 1993

TESTIMONY ON HB 2332

Thank you Mr. Chairman for the opportunity to testify on HB 2332. Prior to the 1993 Session I was contacted by representatives of the Wichita School District and the Juvenile Department of the 18th Judicial District Court. They requested introduction of several bills that they believed were necessary in order to address concerns or problems the schools and courts were confronting. HB 2332 was one of those items they requested.

Rick

Rick Bowden, Representative
District 93

HOUSE JUDICIARY
Attachment #1
02-26-93

SENTENCING RANGE - DRUG OFFENSES

Category ⇒	A	B	C	D	E	F	G	H	I
Severity Level ⇓	3 + Person Felonies	2 Person Felonies	1 Person & 1 Nonperson Felonies	1 Person Felony	3 + Nonperson Felonies	2 Nonperson Felonies	1 Nonperson Felony	2 + Misdemeanors	1 Misdemeanor No Record
I	204 194 185	196 186 176	187 178 169	179 170 161	170 162 154	167 158 150	162 154 146	161 150 142	154 146 138
II	83 78 74	77 73 68	72 68 65	68 64 60	62 59 55	59 56 52	57 54 51	54 51 49	51 49 46
III	51 49 46	47 44 41	42 40 37	36 34 32	32 30 28	26 24 23	23 22 20	19 18 17	16 15 14
IV	42 40 37	36 34 32	32 30 28	26 24 23	22 20 18	18 17 16	16 15 14	14 13 12	12 11 10

SENTENCING RANGE - NONDRUG OFFENSES

Category⇒	A	B	C	D	E	F	G	H	I
Severity Level ⇓	3 + Person Felonies	2 Person Felonies	1 Person & 1 Nonperson Felonies	1 Person Felony	3 + Nonperson Felonies	2 Nonperson Felonies	1 Nonperson Felony	2 + Misdemeanors	1 Misdemeanor No Record
I	204 194 185	193 183 173	178 170 161	167 158 150	154 146 138	141 134 127	127 122 115	116 110 104	103 97 92
II	154 146 138	144 137 130	135 128 121	125 119 113	115 109 103	105 100 95	96 91 86	86 82 77	77 73 68
III	103 97 92	95 90 86	89 85 80	83 78 74	77 73 68	69 66 62	64 60 57	59 55 51	51 49 46
IV	86 81 77	81 77 72	75 71 68	69 66 62	64 60 57	59 56 52	52 50 47	48 45 42	43 41 38
V	68 65 61	64 60 57	60 57 53	55 52 50	51 49 46	47 44 41	43 41 38	38 36 34	34 32 31
VI	46 43 40	41 39 37	38 36 34	36 34 32	32 30 28	29 27 25	26 24 22	21 20 19	19 18 17
VII	34 32 30	31 29 27	29 27 25	26 24 22	23 21 19	19 18 17	17 16 15	14 13 12	13 12 11
VIII	23 21 19	20 19 18	19 18 17	17 16 15	15 14 13	13 12 11	11 10 9	11 10 9	9 8 7
IX	17 16 15	15 14 13	13 12 11	13 12 11	11 10 9	10 9 8	9 8 7	8 7 6	7 6 5
X	13 12 11	12 11 10	11 10 9	10 9 8	9 8 7	8 7 6	7 6 5	7 6 5	7 6 5

HOUSE JUDICIARY #2
02-26-93

KSA 21-4201, Criminal Use of Weapons	Ch. 239	Ch. 298	Merger
1. swich blades	B nonperson select misd	A misdemeanor	A nonperson misdemeanor
2. concealed knives, etc.	B nonperson select misd	A misdemeanor	A nonperson misdemeanor
3. smoke bombs, etc.	B nonperson select misd	A misdemeanor	A nonperson misdemeanor
4. concealed firearms	B nonperson select misd	A misdemeanor	A nonperson misdemeanor
5. spring gun	B nonperson select misd	A misdemeanor	A nonperson misdemeanor
6. silencers	B nonperson select misd	E felony	9 nonperson felony
7. automatic weapons	9 nonperson felony	E felony	9 nonperson felony
8. plastic coated bullets	9 nonperson felony	E felony	9 nonperson felony
9. molotov cocktail	B nonperson select misd	A misdemeanor	A nonperson misdemeanor

KSA 21-4201, Criminal Use of Weapons	HB 2332, 1st conv	HB 2332, 2nd conv	HB 2332, 3rd conv
1. swich blades	B nonperson select misd	A nonperson select misd	10 nonperson felony
2. concealed knives, etc.	B nonperson select misd	A nonperson select misd	10 nonperson felony
3. smoke bombs, etc.	B nonperson select misd	A nonperson select misd	10 nonperson felony
4. concealed firearms	B nonperson select misd	A nonperson select misd	10 nonperson felony
5. spring gun	B nonperson select misd	A nonperson select misd	10 nonperson felony
6. silencers	B nonperson select misd	A nonperson select misd	10 nonperson felony
7. automatic weapons	9 nonperson felony	8 nonperson felony	7 nonperson felony
8. plastic coated bullets	9 nonperson felony	8 nonperson felony	7 nonperson felony
9. molotov cocktail	B nonperson select misd	A nonperson select misd	10 nonperson felony

KSA 21-4204, Criminal Possession of a Firearm	Ch. 239	Ch. 298	Merger
1. Addict and unlawful user of a controlled substance	B nonperson select misd	B misdemeanor	B nonperson select misd
2. Firearm with a barrel < 12" by offender within 5 yrs of conviction, release from prison, or adjucation as a juvenile	9 nonperson felony	D felony	8 nonperson felony
3. Firearm by offender within 10 yrs of conviction, release from prison, or adjudication on certain felonies	9 nonperson felony	D felony	8 nonperson felony
4. Possession of a firearm on school grounds	not treated	B misdemeanor	B nonperson select misd.
5. Refusal to surrender firearm on school grounds	not treated	A misdemeanor	A nonperson misdemeanor

The Sentencing Guidelines do not include an enhanced sentence for violations of this offense stated within the statutory language of this section. The Sentencing Guidelines enhance criminal sentences through the criminal history categories. Felony convictions move an offender into a higher criminal history category, thus receiving a harsher sentence.

KSA 21-4204, Criminal Possession of a Firearm	HB 2332, 1st conv	HB 2332, 2nd conv	HB 2332, 3rd conv
1. Addict and unlawful user of a controlled substance	B nonperson select misd	A nonperson select misd	10 nonperson felony
2. Firearm with a barrel < 12" by offender within 5 yrs of conviction, release from prison, or adjucation as a juvenile	9 nonperson felony	8 nonperson felony	7 nonperson felony
3. Firearm by offender within 10 yrs of conviction, release from prison, or adjudication on certain felonies	9 nonperson felony	8 nonperson felony	7 nonperson felony
4. Possession of a firearm on school grounds	not treated	not treated	not treated
5. Refusal to surrender firearm on school grounds	not treated	not treated	not treated

This bill includes an enhanced sentence for prior violations of this section. If an offender is convicted of a crime which prescribes an enhanced sentence within the statutory language, then this specific prior conviction will not be reflected in the criminal history. In other words, the conviction will not cause the offender to move both up the grid by severity level and across the grid in criminal history.

This bill does not include subsections (d) nor (e) of KSA 1991 Supp. 21-4204 as amended in section 70 of chapter 298 of the 1992 Session Laws of Kansas.

KSA 21-4202, Aggravated Criminal Use of Weapons	Ch. 239	Ch. 298	Merger
1. swich blades	9 nonperson felony	E felony	9 nonperson felony
2. concealed knives, etc.	9 nonperson felony	E felony	9 nonperson felony
3. smoke bombs, etc.	9 nonperson felony	E felony	9 nonperson felony
4. concealed firearms	9 nonperson felony	E felony	9 nonperson felony
5. spring gun	9 nonperson felony	E felony	9 nonperson felony
6. silencers	9 nonperson felony	D felony	8 nonperson felony
7. automatic weapons	9 nonperson felony	D felony	8 nonperson felony
8. plastic coated bullets	9 nonperson felony	D felony	8 nonperson felony
9. molotov cocktail	9 nonperson felony	E felony	9 nonperson felony

Relates to prior violations of KSA 21-4201

SEX OFFENSES

Chapter 239, 1992 Session Laws of Kansas (SB 479)				Chapter 298, 1992 Session Laws of Kansas (SB 358)			
Statute	Description	Class	Level	Statute	Description	Class	Level
21-3502	**Rape**			21-3502	**Rape**		
	non consensual, overcome by force or fear, etc.	B	2P		non consensual, overcome by force or fear, etc.	B	
21-3503	**Indecent liberties with a child**				sexual intercourse with a child < 14 yoa	B	
	intercourse with child < 13 yoa	C	3P	21-3503	**Indecent liberties with a child ≥ 14 yoa < 16 yoa**		
	intercourse with a child ≥ 13 but < 16 yoa	C	4P		lewd fondling or touching of a child	D	5P
	lewd fondling or touching of a child < 13 yoa	C	5P		soliciting a child to engage in lewd fondling	D	5P
	lewd fondling or touching of a child ≥ 13 but < 16 yoa	C	6P	21-3504	**Aggravated indecent liberties with a child**		
	soliciting a child < 13 yoa to engage in lewd fondling	C	5P		sexual intercourse with a child ≥ 14 yoa < 16 yoa	C	3P
	soliciting a child ≥ 13 but < 16 yoa to engage in lewd fondling	C	6P		lewd fondling of child (without consent) ≥ 14 yoa < 16 yoa	C	4P
21-3504	**Aggravated indecent liberties with a child**				lewd fondling of child < 14 yoa	C	3P
	indecent liberties with a child by a guardian, foster parent, etc.			21-3505	**Criminal sodomy**		
	applicable prior to July 1, 1993 only	B	n/a		sodomy between persons ≥ 16 yoa	B msd	Bnp
21-3505	**Criminal sodomy**				sodomy with a child ≥14 yoa < 16 yoa	C	3P
	sodomy between persons of same sex or animal	B msd	B np misd		causing a child ≥14 yoa < 16 yoa to engage in sodomy	C	3P
21-3506	**Aggravated criminal sodomy**			21-3506	**Aggravated criminal sodomy**		
	sodomy with child < 16 yoa	B	2P		sodomy with a child < 14 yoa	B	2P
	sodomy with a person who does not consent	B	2P		causing a child < 14 yoa to engage in sodomy	B	2P
21-3509	**Enticement of a child**				sodomy with a person who does not consent	B	2P
	persuading a child < 16 yoa to enter secluded place w/intent...	D	6P	21-3509	**Enticement of a child**		
21-3510	**Indecent solicitation of a child**				repealed, included in KSA 21-3510	n/a	n/a
	soliciting a child < 16 yoa to commit an unlawful sexual act	A msd	A prsn misd	21-3510	**Indecent solicitation of a child ≥ 14 yoa < 16 yoa**		
21-3511	**Aggravated indecent solicitation of a child**				enticing or soliciting child to engage in unlawful sex	E	7P
	soliciting a child < 12 yoa to commit an unlawful sexual act	E	6P		persuading child to enter secluded place to commit such	E	7P
21-3516	**Sexual exploitation of a child**			21-3511	**Aggravated indecent solicitation of a child < 14 yoa**		
	employing child < 16 yoa to engage in sexual conduct	D	5P		enticing or soliciting child to engage in unlawful sex	D	6P
	possessing visual medium of child < 16 yoa in such conduct	D	5P		persuading child to enter secluded place to commit such	D	6P
	guardian permitting child < 16 yoa to engage in such conduct	D	5P	21-3516	**Sexual exploitation of a child < 16 yoa**		
21-3517	**Sexual battery**				employing, etc., child to engage in sexual explicit conduct	D	5P
	touching another without consent to arouse sexual desires	A msd	A prsn misd		possessing visual medium of shild in such conduct	D	5
21-3518	**Aggravated sexual battery**				guardian permitting child to engage in such conduct	D	5P
	forcibly touching another without consent to arouse desires	D	5P		promoting such performance, knowing character and content	D	5P
	sexual battery against a person < 16 yoa	D	5P	21-3519	**Promoting sexual performance by a minor**		
	sexual battery committed in another's dwelling w/out authority	D	5P		repealed, included in KSA 21-3516	n/a	n/a
	sexual battery of a person who is unconscious or powerless	D	5P	21-3517	**Sexual battery**		
	sexual battery of a person incapable of giving consent	D	5P		touching of another who is ≥ 16 yoa	A msd	Ap
21-3519	**Promoting sexual performance by a minor**			21-3518	**Aggravated sexual battery**		
	promoting sexual performance of child < 18 yoa	E	6P		touching of another who is ≥ 16 yoa without consent	D	5P
21-3602	**Incest**			21-3602	**Incest**		
	lawful or unlawful sex (21-3501) with relative ≥ 18 yoa	E	10P		otherwise lawful sex with relative ≥ 18 yoa	E	10P
21-3603	**Aggravated incest**			21-3603	**Aggravated incest**		
	incestuous intercourse with relative < 18 yoa	D	5P		otherwise lawful sex with relative ≥ 16 yoa < 18 yoa	D	5P
	incestuous lewd fondling or touching of relative < 18 yoa	D	7P		marriage to relative < 16 yoa	D	

Attachment #2
02-26-93

Session of 1993

HOUSE BILL No. 2332

By Representative Bowden

2-5

AN ACT concerning crimes and punishment; relating to criminal use of weapons and criminal possession of a firearm; amending K.S.A. 21-4201, as amended by section 199 of chapter 239 of the 1992 Session Laws of Kansas and K.S.A. 1991 Supp. 21-4204, as amended by section 202 of chapter 239 of the 1992 Session Laws of Kansas, and repealing the existing sections; also repealing K.S.A. 21-4201, as amended by section 67 of chapter 298 of the 1992 Session Laws of Kansas, and K.S.A. 1991 Supp. 21-4204, as amended by section 70 of chapter 298 of the 1992 Session Laws of Kansas.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 21-4201, as amended by section 199 of chapter 239 of the 1992 Session Laws of Kansas, is hereby amended to read as follows: 21-4201. (a) ~~Unlawful~~ *Criminal* use of weapons is knowingly:

(1) Selling, manufacturing, purchasing, possessing or carrying any bludgeon, sandclub, metal knuckles or throwing star, or any knife, commonly referred to as a switch-blade, which has a blade that opens automatically by hand pressure applied to a button, spring or other device in the handle of the knife, or any knife having a blade that opens or falls or is ejected into position by the force of gravity or by an outward, downward or centrifugal thrust or movement;

(2) carrying concealed on one's person, or possessing with intent to use the same unlawfully against another, a dagger, dirk, billy, blackjack, slung shot, dangerous knife, straight-edged razor, stiletto or any other dangerous or deadly weapon or instrument of like character, except that an ordinary pocket knife with no blade more than four inches in length shall not be construed to be a dangerous knife, or a dangerous or deadly weapon or instrument;

(3) carrying on one's person or in any land, water or air vehicle, with intent to use the same unlawfully, a tear gas or smoke bomb or projector or any object containing a noxious liquid, gas or substance;

(4) carrying any pistol, revolver or other firearm concealed on one's person except when on the person's land or in the person's

and 21-4202, as amended by section 200 chapter 239 of the 1992 Session Laws Kansas,

21-4203, as amended by section 201 of chapter 239 of the 1992 Session Laws of Kansas, and

21-4203, as amended by section 69 of chapter 298 of the 1992 Session Laws of Kansas, and

and 21-4202, as amended by section 68 of chapter 298 of the 1992 Session Laws of Kansas,

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abode or fixed place of business;

(5) setting a spring gun;

(6) possessing any device or attachment of any kind designed, used or intended for use in silencing the report of any firearm;

(7) selling, manufacturing, purchasing, possessing or carrying a shotgun with a barrel less than 18 inches in length or any other firearm designed to discharge or capable of discharging automatically more than once by a single function of the trigger;

(8) possessing, manufacturing, causing to be manufactured, selling, offering for sale, lending, purchasing or giving away any cartridge which can be fired by a handgun and which has a plastic-coated bullet that has a core of less than 60% lead by weight; *or*

(9) possessing or transporting any incendiary or explosive material, liquid, solid or mixture, equipped with a fuse, wick or any other detonating device, commonly known as a molotov cocktail or a pipe bomb.

(b) Subsections (a)(1), (2), (3), (4) and (7) shall not apply to nor affect any of the following:

(1) Law enforcement officers, or any person summoned by any such officers to assist in making arrests or preserving the peace while actually engaged in assisting such officer;

(2) wardens, superintendents, directors, security personnel and keepers of prisons, penitentiaries, jails and other institutions for the detention of persons accused or convicted of crime, while acting within the scope of their authority;

(3) members of the armed services or reserve forces of the United States or the Kansas national guard while in the performance of their official duty; or

(4) manufacture of, transportation to, or sale of weapons to a person authorized under subsections (b)(1) through (3) to possess such weapons.

(c) Subsection (a)(4) shall not apply to nor affect the following:

(1) Watchmen, while actually engaged in the performance of the duties of their employment;

(2) licensed hunters or fishermen, while engaged in hunting or fishing;

(3) private detectives licensed by the state to carry the firearm involved, while actually engaged in the duties of their employment;

(4) detectives or special agents regularly employed by railroad companies or other corporations to perform full-time security or investigative service, while actually engaged in the duties of their employment; or

(5) the state fire marshal, the state fire marshal's deputies or any

member of a fire department authorized to carry a firearm pursuant to K.S.A. 31-157 and amendments thereto, while engaged in an investigation in which such fire marshal, deputy or member is authorized to carry a firearm pursuant to K.S.A. 31-157 and amendments thereto.

(d) Subsections (a)(1), (6) and (7) shall not apply to any person who sells, purchases, possesses or carries a firearm, device or attachment which has been rendered unserviceable by steel weld in the chamber and marriage weld of the barrel to the receiver and which has been registered in the national firearms registration and transfer record in compliance with 26 U.S.C. 5841 *et seq.* in the name of such person and, if such person transfers such firearm, device or attachment to another person, has been so registered in the transferee's name by the transferor.

(e) Subsection (a)(8) shall not apply to a governmental laboratory nor to solid plastic bullets.

(f) It shall be a defense that the defendant is within an exemption.

(g) ~~Violation of subsections (a)(1) through (a)(6) is a class B misdemeanor. Violation of subsection (a)(7) or (8) is a class E felony.~~ Violation of subsections (a)(1) through (6) *or violation of subsection (a)(9)* ~~committed on or after July 1, 1993,~~ is a class B nonperson select misdemeanor. *A second conviction of a violation of subsections (a)(1) through (6) or violation of subsection (a)(9) is a class A nonperson select misdemeanor. A third or subsequent conviction of a violation of subsections (a)(1) through (6) or violation of subsection (a)(9) is a severity level 10, nonperson felony.* Violation of subsection (a)(7) or (8) ~~committed on or after July 1, 1993,~~ is a severity level 9, nonperson felony. *A second conviction of a violation of subsection (a)(7) or (8) is a severity level 8, nonperson felony. A third or subsequent conviction of a violation of subsection (a)(7) or (8) is a severity level 7, nonperson felony.*

(h) As used in this section, "throwing star" means any instrument, without handles, consisting of a metal plate having three or more radiating points with one or more sharp edges and designed in the shape of a polygon, trefoil, cross, star, diamond or other geometric shape, manufactured for use as a weapon for throwing.

Sec. 2. K.S.A. 1991 Supp. 21-4204, as amended by section 202 of chapter 239 of the 1992 Session Laws of Kansas, is hereby amended to read as follows: 21-4204. (a) ~~Unlawful~~ *Criminal* possession of a firearm is:

(1) Possession of any firearm by a person who is both addicted to and an unlawful user of a controlled substance;

(2) possession of a firearm with a barrel less than 12 inches long

by a person who, within five years preceding such violation has been convicted of a felony under the laws of Kansas, or any other jurisdiction ~~or~~, has been released from imprisonment for a felony *or was adjudicated as a juvenile offender because of the commission of an act which if done by an adult would constitute the commission of a felony*; or

(3) possession of any firearm by any person who ~~within the preceding 10 years,~~ has been convicted of a ~~crime to which this subsection applies,~~ ~~or~~, has been released from imprisonment for such a crime, *or was adjudicated as a juvenile offender because of the commission of an act which if done by an adult would constitute the commission of ~~a felony~~*, and has not had the conviction of such crime expunged or been pardoned for such crime.

~~(b) Subsection (a)(3) shall apply to a felony under K.S.A. 21-3401, 21-3402, 21-3403, 21-3404, 21-3410, 21-3411, 21-3414, 21-3415, 21-3419, 21-3420, 21-3421, 21-3427, 21-3502, 21-3506, 21-3518, 21-3716, 65-4127a or 65-4127b, and amendments thereto, or a crime under a law of another jurisdiction which is substantially the same as such felony.~~

~~(c)~~ ~~Violation of subsection (a)(1) is a class B misdemeanor; violation of subsection (a)(2) or (a)(3) is a class D felony.~~ Violation of subsection (a)(1) ~~committed on or after July 1, 1993,~~ is a class B nonperson select misdemeanor. *A second conviction of a violation of subsection (a)(1) is a class A nonperson select misdemeanor. A third or subsequent conviction of a violation of subsection (a)(1) is a severity level 10, nonperson felony.* Violation of subsections (a)(2) or (a)(3) ~~committed on or after July 1, 1993,~~ is a severity level 9, nonperson felony. *A second conviction of a violation of subsections (a)(2) or (a)(3) is a severity level 8, nonperson felony. A third or subsequent conviction of a violation of subsections (a)(2) or (a)(3) is a severity level 7, nonperson felony.*

Sec. 3. K.S.A. 21-4201, as amended by section 199 of chapter 239 of 1992 Session Laws of Kansas, ~~and~~ 21-4201, as amended by section 67 of chapter 298 of 1992 Session laws of Kansas and K.S.A. 1991 Supp. 21-4204, as amended by section 202 of chapter 239 of the 1992 Session laws of Kansas and 21-4204, as amended by section 70 of chapter 298 of the 1992 Session Laws of Kansas are hereby repealed.

Sec. 4. This act shall take effect and be in force from and after its publication in the statute book.

nonperson

sentencing guidelines act

such

person felony or drug crime pursuant to the Kansas sentencing guidelines act, a crime under a law of another jurisdiction which is substantially the same as such crime, or

such crime

(b)

See attached sections

, 21-4202, as amended by section 200 of chapter 239 of the 1992 Session Laws of Kansas, and 21-4202, as amended by section 68 of chapter 298 of the 1992 Session Laws of Kansas,

21-4203, as amended by section 201 of chapter 239 of the 1992 Session Laws of Kansas, 21-4203, as amended by section 69 of chapter 298 of the 1992 Session Laws of Kansas,

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Sec. 3. K.S.A. 21-4202, as amended by section 200 of chapter 239 of the 1992 Session Laws of Kansas, is hereby amended to read as follows: 21-4202. (a) An aggravated weapons violation is a violation of any of the provisions of K.S.A. 21-4201, and amendments thereto, by a person who:

(1) Within five years preceding such violation has been convicted of a nonperson felony under the ~~laws--of~~ Kansas sentencing guidelines act or any other jurisdiction or has been released from imprisonment for a such nonperson felony~~.~~, and has not had the conviction of such crime expunged or been pardoned for such crime; or

(2) has been convicted of a person felony or drug crime pursuant to the Kansas sentencing guidelines act or in any other jurisdiction or has been released from imprisonment for such crime, and has not had the conviction of such crime expunged or been pardoned for such crime.

(b) ~~Aggravated--weapons--violation--is--a--class--E--felony.~~ Aggravated weapons violation ~~committed-on-or-after-July-1,--1993,~~ is a severity level 9, nonperson felony for a violation of subsections (a)(1) through (a)(5) or subsection (a)(9) of K.S.A. 21-4201, and amendments thereto. Aggravated weapons violation is a severity level 8, nonperson felony for a violation of subsections (a)(6) through (a)(8) of K.S.A. 21-4201, and amendments thereto.

Sec. 4. K.S.A. 1991 Supp. 21-4203, as amended by section 201 of chapter 239 of the 1992 Session Laws of Kansas, is hereby amended to read as follows: 21-4203. (a) ~~Unlawful~~ Criminal disposal of firearms is knowingly:

(1) Selling, giving or otherwise transferring any firearm with a barrel less than 12 inches long to any person under 18 years of age;

(2) selling, giving or otherwise transferring any firearms to any person who is both addicted to and an unlawful user of a controlled substance;

(3) selling, giving or otherwise transferring any firearm with a barrel less than 12 inches long to any person who, within the preceding five years, has been convicted of a nonperson felony under the ~~laws of this~~ Kansas sentencing guidelines act or any other jurisdiction or has been released from imprisonment for a felony, and has not had the conviction of such crime expunged or been pardoned for such felony; or

(4) selling, giving or otherwise transferring any firearm to any person who~~, within the preceding 10 years,~~ has been convicted of a ~~crime to which this subsection (a)(4) applies,~~ person felony or drug crime pursuant to the Kansas sentencing guidelines act, a crime under a law of another jurisdiction which is substantially the same as such crime or has been released from imprisonment for such a crime, and has not had the conviction of such crime expunged or been pardoned for such crime.

~~(b) Subsection (a)(4) shall apply to a felony under K.S.A. 21-3401, 21-3402, 21-3403, 21-3404, 21-3410, 21-3411, 21-3414, 21-3415, 21-3419, 21-3420, 21-3421, 21-3427, 21-3502, 21-3506, 21-3518, 21-3716, 65-4127a or 65-4127b, and amendments thereto, or a crime under a law of another jurisdiction which is substantially the same as such felony.~~

~~(c)~~ Unlawful (b) Criminal disposal of firearms is a class A misdemeanor. Unlawful disposal of firearms committed ~~on or after July 1, 1993,~~ is a class A nonperson misdemeanor.

KANSAS BAR ASSOCIATION

1200 SW Harrison St.
P.O. Box 1037
Topeka, Kansas 66601-1037
FAX (913) 234-3813
Telephone (913) 234-5696

M E M O R A N D U M

TO: House Judiciary Subcommittee #1

FROM: Ron Smith, General Counsel

SUBJ: HB 2411

DATE: February 22, 1993

KBA supports this legislation.

When the 1992 sentencing guideline legislation was being discussed, the concept of creating post-release systems that monitor those who had been convicted of sex crimes and had fully served their sentence was tucked in SB 479 without any hearings on either the Senate or House side.

The attempt was to bring into our statutes the concept known as monitoring "sexually violent predators." This concept has both supporters and opponents and raises several constitutional issues. It is our understanding that the desire with this bill is to delete these references and to have the Judicial Council or the Sentencing Commission study this issue. We fully support that effort.

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A SUMMARY OF TESTIMONY PROVIDED FOR
HOUSE JUDICIARY COMMITTEE

ON HB 2411

MONDAY, FEBRUARY 22, 1993

BY HELEN J. PEDIGO
ACTING EXECUTIVE DIRECTOR
KANSAS SENTENCING COMMISSION

1. The sexual predator provision was not originally part of sentencing guidelines. It was originally introduced in 1991 as Senate Bill 18, a way to impose civil commitment upon individuals convicted of sexually violent crimes, who were not subject to civil commitment, whose criminal sentence had expired or was about to, and who continued to be a danger to the public.

2. This provision was an incomplete version of a sexual predator bill fashioned after a Washington law. To date, the Supreme Court of Washington, in the case In re the Detention of Andre Brigham Young and In re the Detention of Vance Russell Cunningham (No. 57837-1), has issued no ruling as to whether this statute should be upheld. This case was argued December 5, 1991. There is some question as to whether this statute violates Fouche v. Louisiana, (118 L. Ed. 2nd 437, 504 U.S. ____, 112 S. Ct. ____, 1992), which allows civil commitment only if the offender is mentally ill and dangerous.

3. We requested striking subsection (d)(3) and part of subsection (d)(4) because the procedure outlined in this section was unworkable.
   a. Subsection (3) gave the court the ability to order specific treatment once the defendant was sentenced to the Department of Corrections.
   b. Subsection (3) assumed the court could reassert jurisdiction after the offender served a sentence in the custody of the Department of Corrections.
   c. No procedure was defined regarding who may bring a motion to extend postrelease supervision period before the court for consideration.
   d. Four misdemeanors were included in subsection (4), sexual battery (class B misdemeanor), assault (class C misdemeanor), battery (class B misdemeanor), and unlawful restraint (class A misdemeanor).

4. If this provision was determined to be criminal in nature, the provision violated:
   a. the prohibition against double jeopardy because if the judge reasserted jurisdiction, the offender could be retried after serving a sentence.
   b. the prohibition against ex Post Facto laws because offenders could be resentenced.

5. We also request the Judicial Council study and recommend either a civil or criminal statute to address sexual predator concerns.

OFFICE OF THE DISTRICT ATTORNEY
EIGHTEENTH JUDICIAL DISTRICT
SEDGWICK COUNTY COURTHOUSE
535 N. MAIN
WICHITA, KANSAS 67203

NOLA FOULSTON
District Attorney

(316) 383-7281

February 18, 1993

Rep. Mike O'Neal
Statehouse
Room 426-S
Topeka, Kansas 66612

Dear Mike:

In discussion with attorneys at this office, it was determined that we submit the following language to you for your consideration regarding revision of the rape statute. We believe that this proposed legislation would satisfy the critics of the various bills that are presently before the legislature in an effort to resolve critical issues regarding the prosecution of sexual assaults. We propose the following language:

K.S.A. 21-3502. Rape. (1) Rape is sexual intercourse with a person who does not consent to the sexual intercourse, under any of the following circumstances:
(a) When the victim is overcome by force or fear;
(b) when the victim is unconscious or physically powerless;
(c) when the victim is incapable of giving consent because of mental deficiency or disease, *or when the victim is incapable of giving consent because of the effect of any alcoholic liquor, narcotic, drug or other substance;* which condition was known by the offender or was reasonably apparent to the offender.
(2) Rape is a class B felony.

What we have done is to eliminate subsection (d) and incorporate the relevant portions into subsection (c). We believe that the changes would be appropriate and necessary. If you need any further information with regard to this proposed legislation, please do not hesitate to contact me.

Very truly yours,

Nola Foulston
District Attorney

NF:vm

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Session of 1993

HOUSE BILL No. 2459

By Committee on Judiciary

2-12

AN ACT concerning the bill of rights for victims of crime; amending K.S.A. 74-7333 and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 74-7333 is hereby amended to read as follows: 74-7333. (a) In order to ensure the fair and compassionate treatment of victims of crime and to increase the effectiveness of the criminal justice system by affording victims of crime certain basic rights and considerations, victims of crime shall have the following rights:

(1) Victims should be treated with courtesy, compassion and with respect for their dignity and privacy and should suffer the minimum of necessary inconvenience from their involvement with the criminal justice system.

(2) Victims should receive, through formal and informal procedures, prompt and fair redress for the harm which they have suffered.

(3) Information regarding the availability of criminal restitution, recovery of damages in a civil cause of action, the crime victims compensation fund and other remedies and the mechanisms to obtain such remedies should be made available to victims.

(4) Information should be made available to victims about their participation in criminal proceedings and the scheduling, progress and ultimate disposition of the proceedings.

(5) The views and concerns of victims should be ascertained and the appropriate assistance provided throughout the criminal process.

(6) When the personal interests of victims are affected, the views or concerns of the victim should, when appropriate and consistent with criminal law and procedure, be brought to the attention of the court.

(7) Measures may be taken when necessary to provide for the safety of victims and their families and to protect them from intimidation and retaliation.

(8) Enhanced training should be made available to sensitize criminal justice personnel to the needs and concerns of victims and guidelines should be developed for this purpose.

(9) Victims should be informed of the availability of health and social services and other relevant assistance that they might continue

to receive the necessary medical, psychological and social assistance through existing programs and services.

(10) Victims should report the crime and cooperate with law enforcement authorities.

(b) As used in this act, "victim" means any person who suffers direct or threatened physical, emotional or financial harm as the result of the commission or attempted commission of a crime against such person.

(c) As used in this act and as used in article 15 of section 15 of the Kansas constitution, the term "crime" ~~*means an act or omission in violation of the laws of the state of Kansas, but such term*~~ *shall not include acts or omissions in violation of ordinances of cities* [Delete] [except as provided in paragraph (d) of this section,

(d) ~~*Municipalities and municipal courts are encouraged to*~~ *adopt policies which afford the rights granted to victims of crime pursuant to this act and pursuant to article 15 of section 15 of the Kansas constitution to victims of ordinance violations* [The governing body of any city which has established a municipal court shall] ~~*to the extent the adoption of such policies is practicable in the particular municipality.*~~ [specified in such policies.

~~(c)~~ *(e)* Nothing in this act shall be construed as creating a cause of action on behalf of any person against the state, a county, a municipality or any of their agencies, instrumentalities or employees responsible for the enforcement of rights as provided in this act.

~~(d)~~ *(f)* This section shall be known and may be cited as the bill of rights for victims of crime act.

Sec. 2. K.S.A. 74-7333 is hereby repealed.

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

THE LEAGUE
OF KANSAS
MUNICIPALITIES

Municipal Legislative Testimony

AN INSTRUMENTALITY OF KANSAS CITIES 112 W. 7TH TOPEKA, KS 66603 (913) 354-9565 FAX (913) 354-4186

TO: Subcommittee #1, House Judiciary Committee

FROM: Chris McKenzie, Executive Director

DATE: February 22, 1993

RE: HB 2459

I am appearing today on behalf of the over 500 member cities of the League of Kansas Municipalities in support of HB 2459. When the Legislature adopted SCR No. 1634 concerning victims' rights last session, little, if any, attention was given to its potential impact in municipal court. If it is applied to the 452,579 cases in municipal court in the 343 cities with such courts, the League is seriously concerned about the fiscal impact on the taxpayers of those cities. Since the constitutional amendment on victims' rights, found at Article 15 of the Kansas Constitution, specifically provides that the legislature shall define key terminology in the amendment such as "victims of crime" and "public hearings", we respectfully request legislative examination of this sensitive issue.

Our reasons for supporting this legislation are as follows:

(1) Municipal courts prosecutee a large number of cases dealing primarily with "misdemeanor" offenses for which no victim may exist. As mentioned above, the 343 municipal courts in Kansas prosecuted 452,579 cases in state fiscal year 1992. In contrast, the state district courts prosecuted 329,022 cases, approximately 81% of which are traffic cases. We suspect that more than 80% of the cases prosecuted in municipal courts are traffic cases. If municipal courts are not relieved of any significant burden resulting from the added administrative costs of the victims' rights amendment, we suspect more cases may be filed in district courts. This will have a direct fiscal impact on the state itself.

(2) There are at least three statutory definitions of "victim of crime" in Kansas statutes, and it is unclear which applies. Definitions of "victim" can be found in K.S.A. 19-4802(h), K.S.A. 1992 Supp. 74-7301(m), and K.S.A. 1992 Supp. 74-7333(b). At this time, we are unsure which of these definitions applies.

(3) If the victims' rights amendment applies to municipal courts, it is another unfunded state mandate. In today's tight fiscal times, cities are faced with a growing number of state and federal mandates. Implementation of the amendment on a broad scale will be extremely expensive for the cities of the state.

(4) If the amendment is found applicable to municipal courts, it should be narrowly construed. In the current environment of uncertainty as to the scope of the amendment, the cities of the state are concerned about the administrative and financial burden facing them in implementation of this mandate. Either HB 2459 or some alternative language is needed to narrow the scope of the potential application of the amendment.

Thank you for your attention. I would be happy to answer any questions.

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The Overland Park KANSAS

Law Department
Robert J. Watson, City Attorney

City Hall • 8500 Santa Fe Drive
Overland Park, Kansas 66212
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PROCOMM 913/ 381-0558

TESTIMONY IN SUPPORT OF HOUSE BILL NO. 2459

TO: The Honorable Michael R. O'Neal, Chairperson
Members of Sub-committee No. 1 of the Judiciary
Committee of the House of Representatives
Kansas Legislature
Room 313 South
State Capitol
Topeka, Kansas 66612

DATE: February 22, 1993

RE: House Bill No. 2459 -- Bill of Rights for Victims of Crime -- Acts or Omissions in Violation of Ordinances of Cities.

Ladies and Gentlemen:

- The City of Overland Park is generally in sympathy with the goals and objectives of the crime victims' rights movement. The city gladly has been complying with the requirement found at K.S.A. 8-1019 that victims of alcohol and drug-related offenses be notified that they are entitled to submit a victim impact statement at the time of sentencing, and the city does not object to continuing to do so. Furthermore, the city certainly does not want to be perceived as taking a calloused view toward the plight of victims of crime. However, the city also does not want the new constitutional amendment granting rights to victims of crime to be trivialized by being taken to impractical extremes that unnecessarily bog down municipal court processes or force unwarranted expenditures of taxpayer funds.

- Therefore, the City of Overland Park supports passage of House Bill No. 2459.

- Like in Kansas, the voters of our sister state of Colorado passed a state constitutional amendment on November 3, 1992, granting the right to victims of crime to participate in the criminal justice process.

- At the same time, the Colorado General Assembly enacted a statute which defines the term "crimes" to mean violations only of state statutes and not city ordinances. However,

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the statute also invites Colorado cities to adopt policies which afford rights to victims of city ordinance violations to the extent that it is practicable to do so in the particular city.

- House Bill No. 2459 follows the Colorado General Assembly's model for dealing with the problem of how the crime victims rights amendment should apply to cities and their municipal courts.

- Such a practical approach to cities recognizes the home rule powers of cities, recognizes the fact that different cities regulate different activities in different ways, and recognizes the fact that not all cities are equally capable of complying with a rigid and categorical set of guidelines due to the varying sizes of their police forces, prosecutorial staffs and court staffs.

- We are convinced that it was not the intention of the Kansas legislature when it passed Senate Concurrent Resolution No. 1634 last session that the constitutional amendment apply to municipal courts.

- Our guess is that there are many cities across Kansas which are unaware that the new victims' rights constitutional amendment has the potential for applying to their municipal court operations.

- Most municipal court operations are geared toward processing large numbers of cases in a short amount of time using minimum staffing levels.

- Most municipal courts know the number of cases that can be processed through the existing system given the number of days the court is in session and given the number of clerical, judicial and prosecutorial personnel available. If additional duties are imposed upon those personnel through an unfunded state mandate, the same number of cases can be processed in the same amount of time only if either (1) the mandated additional work is absorbed by the existing staff while other necessary duties presently being carried out by that staff are abandoned, or (2) additional personnel are hired at additional taxpayer expense.

- How many additional personnel Overland Park would have to hire if the new constitutional amendment is made applicable to municipal courts is still under study, although we think it would be a considerable number. The additional personnel would be needed in the police department, the prosecutors' office and the municipal court clerk's office.

- In the Overland Park Municipal Court alone, 42,000 cases were processed in 1992. Most of those cases were relatively minor when compared to those filed in the Johnson County District Court. Depending upon how the terms "crime" and "victim" are defined, at least 40% of those cases, or 17,000 cases, involved one or more "victims."

- The City of Overland Park regulates and makes unlawful -- "criminalizes," if you will -- hundreds of activities ranging from peeling paint, to speeding, to operating as a transient merchant without a license. Under the circumstances of the particular case, any of those hundreds of illegal activities may involve one or more "victims."

- To take one example, depending upon how broadly the terms "victim" and "public hearing" are defined, the owner of a house with peeling paint or weeds more than 18 inches high in violation of various codes of the city may thereby have caused the neighbors to conclude that the values of their own houses have fallen as a result and therefore that they have suffered direct financial harm. Must every owner of every house in the neighborhood be given notice of every step in the proceedings against the offending home owner before the next step in the prosecutorial process can be taken?

- To take another example, Section 6.08.080 of the Overland Park Municipal Code makes it unlawful to allow a dog to make excessive noise that disturbs the neighbors. In a barking dog case must the prosecutor or the city officer determine all neighbors who are disturbed by the barking dog and give them notice of all public hearings before the case can proceed?

- To take a third example, some 25 cases of vandalism were prosecuted in the Overland Park Municipal Court last year. Many others involving much larger losses were prosecuted by the Johnson County District Attorney. Had the city been required to examine each police report to determine who were the victims, and then to notify each victim in each case of each step in the adjudicatory process, counting continuances, the city would have had to send out some 110 separate letters. When this level of effort is multiplied by the hundreds of different kinds of cases prosecuted, the mandate becomes unduly burdensome and impracticable.

- Also please be aware that the Kansas Supreme Court determined in a 1990 case that the term "crimes" includes all "traffic infractions," that is, all of those 131 different municipal ordinance violations which a person can dispose of by mailing in the fine. There were 36,000 traffic infraction cases in Overland Park alone in 1992. A

requirement that cities give notice of all "public hearings" to "victims" of "traffic infractions" would nullify any expedition and efficiency in the criminal justice process intended to be fostered by the mail-in statutes.

- Finally, we ask that you consider in your deliberations the fiscal impact any new mandates will have upon the budgets of cities across the state and to vote in favor of House Bill No. 2459.

Robert J. Watson
City Attorney

/rjw

cc: Governing Body
City Manager
Administrative Judge

STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

ROBERT T. STEPHAN
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
TELECOPIER: 296-6296

TESTIMONY OF
ROBERT T. STEPHAN
ATTORNEY GENERAL
BEFORE THE HOUSE JUDICIARY SUB-COMMITTEE #1
RE: HOUSE BILL 2459
FEBRUARY 22, 1993

1992 can be remembered as the year in which Kansas acknowledged the plight of its victims of crime by making certain that they were a part of the state constitution. On November 3rd of that year, the Constitutional Amendment for Victims' Rights was passed in Kansas by more than 84% of the vote.

This bill of rights which gives victims "a greater voice" in the criminal justice system reads as follows:

Victims' Rights. (a) Victims of crime, as defined by law, shall be entitled to certain basic rights, including the right to be informed of and to be present at public hearings, as defined by law, of the criminal justice process, and to be heard at sentencing or at any other time deemed appropriate by the court, to the extent that these rights do not interfere with the constitutional or statutory rights of the accused.

(b) Nothing in this section shall be construed as creating a cause of action for money damages against the

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state, a county, a municipality, or any of the agencies, instrumentalities, or employees thereof. The Legislature may provide for other remedies to ensure adequate enforcement of this section.

(c) Nothing in this section shall be construed to authorize a court to set aside or to void a finding of guilty or not guilty or an acceptance of a plea of guilty or to set aside any sentence imposed or any other final disposition in any criminal case.

It is very clear that the victims' rights constitutional amendment does not separate victims depending on which court they are in. The amendment does speak to victims "as provided by law," but it would be a violation of that constitutional provision to separate victims by definition not based on the crime that was committed, but upon the manner in which they were charged, whether that refers to a felony or a misdemeanor or a district or municipal court.

While the League of Municipalities has stated that there are three definitions of victims defined by law, all three definitions could apply to the constitutional amendment. Each definition describes victims who are protected by the constitution. Is the legislature going to recognize the victim in district court but establish that the victim in municipal court does not exist?

The bottom line is that a victim is the same in any court in this state and the only variance or definition possible

would be in regard to those crimes where there may be no identifiable victim. I appreciate that there will be an obligation on municipalities to notify victims. I have extended a willingness to attempt to define those crimes where there is no identifiable victim for municipal courts. Also, to assist municipalities in waiver procedures whereby those crimes where there is a victim, a waiver not to be notified could be signed by the victim of any future notices.

Frankly, I think the personnel necessary to notify victims has been exaggerated. As an example, the Johnson County District Attorney's Office provided approximately 11,500 notices for hearings at an estimated cost of $11,235.00 in 1992. This cost includes postage, stationery, and staff time. To comply with the constitutional amendment, the Johnson County District Attorney's Office spends 97 cents per victim to provide notices of all public hearings.

In the long run, the necessity of notifying victims might expedite municipal court proceedings rather than delay the proceedings. If it is necessary to notify victims, I am sure you would see fewer continuances, but the bottom line and the only reason for the constitutional amendment was to ensure that there is justice, that all parties are allowed to participate, and finally, that the victim who was involuntarily made a part of the court process is not shut out.

On behalf of my Victims' Rights Task Force, I ask that you not support House Bill 2459.

Kansas County & District Attorneys Association

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Testimony in Opposition to

HOUSE BILL NO. 2459

The Kansas County and District Attorneys Association appears in opposition to HB 2459 for two reasons.

1. The language in subsection c (p. 2, lines 9 - 12) inserts a definition of "crime" applicable to both the statutory victims' bill of rights and the constitution. The effect of such expansion is to cause an enormous increase in the already onerous duty of victim notification that currently falls on county and district attorneys in K.S.A. 74-7335(c). Currently, the definition of victim is found at K.S.A. 74-7301(m), which defines a victim as a person who suffers personal injury or death as the result of "criminally injurious conduct", defined at K.S.A. 747301(e) as a crime which causes personal injury or death, or threat of same. Clearly, present law limits the victim notification to only the few, more serious crimes. The definition proposed in HB 2459 could lead to a huge increase in county and district attorneys duties -- a duty not currently shared by city prosecutors as they are not listed in 74-7335(c).

2. The language in subsection c of the bill also creates two classes of victims: those whose cases are filed in municipal court; and those whose cases are filed in district court. The latter are entitled to victims' rights and the former are not (unless their respective municipal courts voluntarily adopt the appropriate policies suggested in subsection d of the bill). While the result of such bifurcation is unfair, it is questionable whether there is a due process or equal protection claim to be made on behalf of municipal court victims. A number of cases recognize that concurrent jurisdiction exists over offenses which are violations of both city ordinances and state statutes. State v. Frazier, 12 K.A. 2d 164, 736 P.2d 656. Anderson Construction Co. v. City of Kansas City, 228 Kan. 73, 612 P. 2d 595. In State v. Everly, 59547, an unpublished Court of Appeals opinion, the defendant attempted a constitutional attack on the fact that his DUI was filed in district court (where there was no diversion), rather than in the municipal court in the city where the crime occurred (which offered diversion to first offenders). The Court of Appeals rejected both due process and equal protection arguments and even found no violation of Article 2, Section 12 of the Kansas constitution which requires the uniform application of state law. Since a criminal defendant cannot challenge the court where a case is filed, it is unlikely that a crime victim would be any more successful. Clearly, then, these inequities must be dealt with as a matter of sound legislative policy.

Proposed
Amendment
to HB 2133

40-277. Automobile liability insurance policies; limitations on policy conditions for cancellation. No insurance company shall issue a policy of automobile liability insurance in this state unless the cancellation condition of the policy or endorsement thereon includes the following limitations pertaining to cancellation by the insurance company:

After this policy has been in effect for 60 days, or if the policy is a renewal, effective immediately, the company shall not exercise its right to cancel the insurance afforded under (here insert the appropriate coverage references) solely because of age or unless

1. The named insured fails to discharge when due any obligations in connection with the payment of premium for this policy or any installment thereof whether payable directly or under any premium finance plan; or

2. the insurance was obtained through fraudulent misrepresentation; or

3. the insured violates any of the terms and conditions of the policy; or

4. the named insured or any other operator, either resident in the same household, or who customarily operates an automobile insured under the policy,

(a) has had such person's driver's license suspended or revoked during the policy period, or

(b) is or becomes subject to epilepsy or heart attacks, and such individual cannot produce a certificate from a physician testifying to such person's ability to operate a motor vehicle, or

(c) is or has been convicted during the 36 months immediately preceding the effective date of the policy or during the policy period, for:

(1) Any felony, or

(2) criminal negligence, resulting in death, homicide or assault, arising out of the operation of a motor vehicle, or

(3) operating a motor vehicle while in an intoxicated condition or while under the influence of drugs, or

(4) leaving the scene of an accident without stopping to report, or

(5) theft of a motor vehicle, or

(6) making false statements in an application for a driver's license, or

(7) a third moving violation, committed within a period of 18 months, of (i) any regulation limiting the speed of motor vehicles, (ii) any of the provisions in the motor vehicle laws of any state, the violation of which constitutes a misdemeanor or traffic infraction, or (iii) any ordinance traffic infraction, or ordinance which prohibits the same acts as a misdemeanor statute of the uniform act regulating traffic on highways, whether or not the violations were repetitious of the same offense or were different offenses.

History: L. 1967, ch. 271, § 2; L. 1984, ch. 39, § 47; Jan. 1, 1985.

Cross References to Related Sections:
Limitation on consideration of certain speeding violations, see 8-1341a.

Law Review and Bar Journal References:
Voiding of cancellation of insurance as against public policy, 17 K.L.R. 544 (1969).
"Expungement of Criminal Convictions in Kansas: A Necessary Rehabilitative Tool," Richard M. Klinge, 13 W.L.J. 93, 94 (1974).

Retitle the bill
to be an act
concerning driving
privileges

except for the first suspension of driving privileges as a result of a diversion or conviction arising pursuant to the provisions of K.S.A. 8-_____, and amendments thereto.

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HOUSE JUDICIARY
Attachment #12
02-26-93

Session of 1993

2/10/93

HOUSE BILL No. 2355

By Representatives Crowell and O'Neal, Boston, Cornfield, Flower, Goossen, Graeber, Mason, Mayans, Mays, Myers, O'Connor, Samuelson, Shallenburger, Shore, M. Smith and Wagle

2-5

AN ACT concerning alcohol-related offenses involving the driving or operating of vehicles or vessels; amending K.S.A. 8-1001, 8-1002, 8-1005, 8-1008, 8-1011, 8-1012, 8-1013, 8-1014, 8-1015, 8-1567, as amended by section 1 of chapter 298 of the 1992 Session Laws of Kansas, 8-2204, 12-4305, 12-4415, 22-2908, as amended by section 257 of chapter 239 of the 1992 Session Laws of Kansas, 41-201 and 41-804 and K.S.A. 1992 Supp. 32-1131 and 32-1132 and repealing the existing sections; also repealing K.S.A. 41-2719 and 41-2720.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 8-1001 is hereby amended to read as follows: 8-1001. (a) Any person who operates or attempts to operate a ~~motor~~ vehicle within this state is deemed to have given consent, subject to the provisions of this act, to submit to one or more tests of the person's blood, breath, urine or other bodily substance to determine the presence of alcohol or drugs. The testing deemed consented to herein shall include all quantitative and qualitative tests for alcohol and drugs. A person who is dead or unconscious shall be deemed not to have withdrawn the person's consent to such test or tests, which shall be administered in the manner provided by this section.

(b) A law enforcement officer shall request a person to submit to a test or tests deemed consented to under subsection (a) if the officer has reasonable grounds to believe the person was operating or attempting to operate a ~~motor~~ vehicle while under the influence of alcohol or drugs, or both, or to believe that the person was driving a commercial motor vehicle, as defined in K.S.A. 8-2,128, and amendments thereto, while having alcohol or other drugs in such person's system; and one of the following conditions exists: (1) The person has been arrested or otherwise taken into custody for any offense involving operation or attempted operation of a ~~motor~~ vehicle while under the influence of alcohol or drugs, or both, or involving driving a commercial motor vehicle, as defined in K.S.A. 8-2,128, and amendments thereto, while having alcohol or other drugs in

such person's system, in violation of a state statute or a city ordinance; or (2) the person has been involved in a ~~motor~~ vehicle accident or collision resulting in property damage, personal injury or death. The law enforcement officer directing administration of the test or tests may act on personal knowledge or on the basis of the collective information available to law enforcement officers involved in the accident investigation or arrest.

(c) If a law enforcement officer requests a person to submit to a test of blood under this section, the withdrawal of blood at the direction of the officer may be performed only by: (1) A person licensed to practice medicine and surgery or a person acting under the supervision of any such licensed person; (2) a registered nurse or a licensed practical nurse; or (3) any qualified medical technician. When presented with a written statement by a law enforcement officer directing blood to be withdrawn from a person who has tentatively agreed to allow the withdrawal of blood under this section, the person authorized herein to withdraw blood and the medical care facility where blood is withdrawn may rely on such a statement as evidence that the person has consented to the medical procedure used and shall not require the person to sign any additional consent or waiver form. In such a case, the person authorized to withdraw blood and the medical care facility shall not be liable in any action alleging lack of consent or lack of informed consent. No person authorized by this subsection to withdraw blood, nor any person assisting in the performance of a blood test nor any medical care facility where blood is withdrawn or tested that has been directed by any law enforcement officer to withdraw or test blood, shall be liable in any civil or criminal action when the act is performed in a reasonable manner according to generally accepted medical practices in the community where performed.

(d) If there are reasonable grounds to believe that there is impairment by a drug which is not subject to detection by the blood or breath test used, a urine test may be required. If a law enforcement officer requests a person to submit to a test of urine under this section, the collection of the urine sample shall be supervised by persons of the same sex as the person being tested and shall be conducted out of the view of any person other than the persons supervising the collection of the sample and the person being tested, unless the right to privacy is waived by the person being tested. The results of qualitative testing for drug presence shall be admissible in evidence and questions of accuracy or reliability shall go to the weight rather than the admissibility of the evidence.

(e) No law enforcement officer who is acting in accordance with

this section shall be liable in any civil or criminal proceeding involving the action.

(f) (1) Before a test or tests are administered under this section, the person shall be given oral and written notice that: (A) Kansas law requires the person to submit to and complete one or more tests of breath, blood or urine to determine if the person is under the influence of alcohol or drugs, or both; (B) the opportunity to consent to or refuse a test is not a constitutional right; (C) there is no constitutional right to consult with an attorney regarding whether to submit to testing; (D) if the person refuses to submit to and complete any test of breath, blood or urine hereafter requested by a law enforcement officer, the person's driving privileges will be suspended for at least one year; (E) if the person submits to and completes the test or tests and the test results show an alcohol concentration of ~~.10~~ *.08* or greater, the person's driving privileges will be suspended for at least 30 days; (F) if the person refuses a test or the test results show an alcohol concentration of ~~.10~~ *.08* or greater and if, within the past five years, the person has been convicted or granted diversion on a charge of driving under the influence of alcohol or drugs, or both, or a related offense or has refused or failed a test, the person's driving privileges will be suspended for at least one year; (G) refusal to submit to testing may be used against the person at any trial on a charge arising out of the operation or attempted operation of a ~~motor~~ vehicle while under the influence of alcohol or drugs, or both; (H) the results of the testing may be used against the person at any trial on a charge arising out of the operation or attempted operation of a ~~motor~~ vehicle while under the influence of alcohol or drugs, or both; and (I) after the completion of the testing, the person has the right to consult with an attorney and may secure additional testing, which, if desired, should be done as soon as possible and is customarily available from medical care facilities and physicians. If a law enforcement officer has reasonable grounds to believe that the person has been driving a commercial motor vehicle, as defined in K.S.A. 8-2,128, and amendments thereto, while having alcohol or other drugs in such person's system, the person must also be provided the oral and written notice pursuant to K.S.A. 8-2,145 *and amendments thereto*. Any failure to give the notices required by K.S.A. 8-2,145 *and amendments thereto* shall not invalidate any action taken as a result of the requirements of this section. After giving the foregoing information, a law enforcement officer shall request the person to submit to testing. The selection of the test or tests shall be made by the officer. If the person refuses to submit to and complete a test as requested pursuant to

is 21 or more years of age at the time of the test,

if the person is less than 21 years of age at the time of the test, submits to and completes the test or tests, and the test results show an alcohol concentration of .04 or greater, the person's driving privileges will be suspended for at least 90 days; (G)

this section, additional testing shall not be given unless the certifying officer has probable cause to believe that the person, while under the influence of alcohol or drugs, or both, has operated a ~~motor~~ vehicle in such a manner as to have caused the death of or serious injury to another person. In such event, such test or tests may be made pursuant to a search warrant issued under the authority of K.S.A. 22-2502, and amendments thereto, or without a search warrant under the authority of K.S.A. 22-2501, and amendments thereto. If the test results show a blood or breath alcohol concentration of ~~.10~~ *.08* or greater, the person's driving privileges shall be subject to suspension, or suspension and restriction, as provided in K.S.A. 8-1002, ~~and amendments thereto, and K.S.A.~~ *and* 8-1014, and amendments thereto. The person's refusal shall be admissible in evidence against the person at any trial on a charge arising out of the alleged operation or attempted operation of a ~~motor~~ vehicle while under the influence of alcohol or drugs, or both. If a law enforcement officer had reasonable grounds to believe the person had been driving a commercial motor vehicle, as defined in K.S.A. 8-2,128, and amendments thereto, and the test results show a blood or breath alcohol concentration of .04 or greater, the person shall be disqualified from driving a commercial motor vehicle, pursuant to K.S.A. 8-2,142, and amendments thereto. If a law enforcement officer had reasonable grounds to believe the person had been driving a commercial motor vehicle, as defined in K.S.A. 8-2,128, and amendments thereto, and the test results show a blood or breath alcohol concentration of ~~.10~~ *.08* or greater, or the person refuses a test, the person's driving privileges shall be subject to suspension, or suspension and restriction, pursuant to this section, in addition to being disqualified from driving a commercial motor vehicle pursuant to K.S.A. 8-2,142, and amendments thereto.

(2) Failure of a person to provide an adequate breath sample or samples as directed shall constitute a refusal unless the person shows that the failure was due to physical inability caused by a medical condition unrelated to any ingested alcohol or drugs.

(3) It shall not be a defense that the person did not understand the written or oral notice required by this section.

(g) Nothing in this section shall be construed to limit the admissibility at any trial of alcohol or drug concentration testing results obtained pursuant to a search warrant.

(h) Upon the request of any person submitting to testing under this section, a report of the results of the testing shall be made available to such person.

Sec. 2. K.S.A. 8-1002 is hereby amended to read as follows: 8-

.04 or greater but less than .08, if such person is less than 21 years of age, or

of any person

Attachment #13 — 4
02-26-93

1002. (a) Whenever a test is requested pursuant to this act and results in either a test failure or test refusal, a law enforcement officer's certification shall be prepared. If the person had been driving a commercial motor vehicle, as defined in K.S.A. 8-2,128, and amendments thereto, a separate certification pursuant to K.S.A. 8-2,145~~,~~ *and amendments thereto* shall be prepared in addition to any certification required by this section. The certification required by this section shall be signed by one or more officers to certify:

(1) With regard to a test refusal, that: (A) There existed reasonable grounds to believe the person was operating or attempting to operate a ~~motor~~ vehicle while under the influence of alcohol or drugs, or both, or to believe that the person had been driving a commercial motor vehicle, as defined in K.S.A. 8-2,128, and amendments thereto, while having alcohol or other drugs in such person's system; (B) the person had been placed under arrest, was in custody or had been involved in a ~~motor~~ vehicle accident or collision; (C) a law enforcement officer had presented the person with the oral and written notice required by K.S.A. 8-1001, and amendments thereto; and (D) the person refused to submit to and complete a test as requested by a law enforcement officer.

(2) With regard to a test failure, that: (A) There existed reasonable grounds to believe the person was operating a ~~motor~~ vehicle while under the influence of alcohol or drugs, or both, or to believe that the person had been driving a commercial motor vehicle, as defined in K.S.A. 8-2,128, and amendments thereto, while having alcohol or other drugs in such person's system; (B) the person had been placed under arrest, was in custody or had been involved in a ~~motor~~ vehicle accident or collision; (C) a law enforcement officer had presented the person with the oral and written notice required by K.S.A. 8-1001, and amendments thereto; and (D) the result of the test showed that the person had an alcohol concentration of ~~.10~~ *.08* or greater in [such] person's blood or breath.

(3) With regard to failure of a breath test, in addition to those matters required to be certified under subsection (a)(2), that: (A) The testing equipment used was certified by the Kansas department of health and environment; (B) the testing procedures used were in accordance with the requirements set out by the Kansas department of health and environment; and (C) the person who operated the testing equipment was certified by the Kansas department of health and environment to operate such equipment.

(b) For purposes of this section, certification shall be complete upon signing, and no additional acts of oath, affirmation, acknowledgment or proof of execution shall be required. The signed cer-

.04 or greater but less than .08, if such person is less than 21 years of age, in such person's blood or breath or

any

tification or a copy or photostatic reproduction thereof shall be admissible in evidence in all proceedings brought pursuant to this act, and receipt of any such certification, copy or reproduction shall accord the department authority to proceed as set forth herein. Any person who signs a certification submitted to the division knowing it contains a false statement is guilty of a class B, misdemeanor. nonperson

(c) When the officer directing administration of the testing determines that a person has refused a test and the criteria of subsection (a)(1) have been met or determines that a person has failed a test and the criteria of subsection (a)(2) have been met, the officer shall serve upon the person notice of suspension of driving privileges pursuant to K.S.A. 8-1014, and amendments thereto. If the determination is made while the person is still in custody, service shall be made in person by the officer on behalf of the division of vehicles. In cases where a test failure is established by a subsequent analysis of a breath, blood or urine sample, the officer shall serve notice of such suspension in person or by another designated officer or by mailing the notice to the person at the address provided at the time of the test.

(d) The notice shall contain the following information: (1) The person's name, driver's license number and current address; (2) the reason and statutory grounds for the suspension; (3) the date notice is being served and the effective date of the suspension, which shall be the 20th day after the date of service; (4) the right of the person to request an administrative hearing; and (5) the procedure the person must follow to request an administrative hearing. The notice of suspension shall also inform the person that all correspondence will be mailed to the person at the address contained in the notice of suspension unless the person notifies the division in writing of a different address or change of address. The address provided will be considered a change of address for purposes of K.S.A. 8-248, and amendments thereto, if the address furnished is different from that on file with the division.

(e) If a person refuses a test or if a person is still in custody when it is determined that the person has failed a test, the officer shall take any license in the possession of the person and, if the license is not expired, suspended, revoked or canceled, shall issue a temporary license effective until the date of suspension stated in the notice. If the test failure is established by a subsequent analysis of a breath or blood sample, the temporary license shall be served together with the notice of suspension. A temporary license issued pursuant to this subsection shall bear the same restrictions and limitations as the license for which it was exchanged. The officer shall

also provide the person with a copy of the officer's certification as set forth in subsection (c). Within five days after the date of certification of the test refusal or test failure, the officer who effected service shall forward the officer's certification and a copy of the notice of suspension, along with any licenses taken, to the division.

(f) Upon receipt of the law enforcement officer's certification, the division shall review the certification to determine that it meets the requirements of subsection (a). Upon so determining, the division shall proceed to suspend the person's driving privileges in accordance with the notice of suspension previously served. If the requirements of subsection (a) are not met, the division shall dismiss the administrative proceeding and return any license surrendered by the person.

(g) If the person mails a written request which is postmarked within 10 days after service of the notice, if by personal service, or 13 days after service, if by mail, the division shall schedule a hearing in the county where the alleged violation occurred, or in a county adjacent thereto. The licensee may request that subpoenas be issued in accordance with the notice provided pursuant to subsection (d). Any request made by the licensee to subpoena witnesses must be made in writing at the time the hearing is requested and must include the name and current address of such witnesses and, except for the law enforcement officer or officers certifying refusal or failure, a statement of how the testimony of such witness is relevant. Upon receiving a timely request for a hearing, the division shall mail to the person notice of the time, date and place of hearing in accordance with subsection (l) and extend the person's temporary driving privileges until the date set for the hearing by the division.

(h) (1) If the officer certifies that the person refused the test, the scope of the hearing shall be limited to whether: (A) A law enforcement officer had reasonable grounds to believe the person was operating or attempting to operate a ~~motor~~ vehicle while under the influence of alcohol or drugs, or both, or to believe that the person had been driving a commercial motor vehicle, as defined in K.S.A. 8-2,128, and amendments thereto, while having alcohol or other drugs in such person's system; (B) the person was in custody or arrested for an alcohol or drug related offense or was involved in a ~~motor~~ vehicle accident or collision resulting in property damage, personal injury or death; (C) a law enforcement officer had presented the person with the oral and written notice required by K.S.A. 8-1001, and amendments thereto; and (D) the person refused to submit to and complete a test as requested by a law enforcement officer.

(2) If the officer certifies that the person failed the test, the scope

of the hearing shall be limited to whether: (A) A law enforcement officer had reasonable grounds to believe the person was operating a ~~motor~~ vehicle while under the influence of alcohol or drugs, or both, or to believe that the person had been driving a commercial motor vehicle, as defined in K.S.A. 8-2,128, and amendments thereto, while having alcohol or other drugs in such person's system; (B) the person was in custody or arrested for an alcohol or drug related offense or was involved in a ~~motor~~ vehicle accident or collision resulting in property damage, personal injury or death; (C) a law enforcement officer had presented the person with the oral and written notice required by K.S.A. 8-1001, and amendments thereto; (D) the testing equipment used was reliable; (E) the person who operated the testing equipment was qualified; (F) the testing procedures used were reliable; (G) the test result determined that the person had an alcohol concentration of ~~.10~~ .08 or greater in [such] person's blood or breath; and (H) the person was operating a ~~motor~~ vehicle.

any

.04 or greater but less than .08, if such person is less than 21 years of age, in such person's blood or breath

(i) At a hearing pursuant to this section, or upon court review of an order entered at such a hearing, an affidavit of the custodian of records at the Kansas department of health and environment stating that the breath testing device was certified and the operator of such device was certified on the date of the test shall be admissible into evidence in the same manner and with the same force and effect as if the certifying officer or employee of the Kansas department of health and environment had testified in person. Such affidavit shall be admitted to prove such reliability without further foundation requirement. A certified operator of a breath testing device shall be competent to testify regarding the proper procedures to be used in conducting the test.

(j) At a hearing pursuant to this section, or upon court review of an order entered at such hearing, in which the report of blood test results have been prepared by the Kansas bureau of investigation or other forensic laboratory of a state or local law enforcement agency are to be introduced as evidence, the report, or a copy of the report, of the findings of the forensic examiner shall be admissible into evidence in the same manner and with the same force and effect as if the forensic examiner who performed such examination, analysis, comparison or identification and prepared the report thereon had testified in person.

(k) If no timely request for hearing is made, the suspension period imposed pursuant to this section shall begin upon the expiration of the temporary license granted under subsection (e). If a timely request for hearing is made, the hearing shall be held within

30 days of the date the request for hearing is received by the division. At the hearing, the director or the representative of the director, shall either affirm the order of suspension or suspension and restriction or dismiss the administrative action. If the division is unable to hold a hearing within 30 days of the date upon which the request for hearing is received, the division shall extend the person's temporary driving privileges until the date set for the hearing by the division. No extension of temporary driving privileges shall be issued for continuances requested by or on behalf of the licensee. If the person whose privileges are suspended is a nonresident licensee, the license of the person shall be forwarded to the appropriate licensing authority in the person's state of residence if the result at the hearing is adverse to such person or if no timely request for a hearing is received.

(l) All notices affirming or canceling a suspension under this section, all notices of a hearing held under this section and all issuances of temporary driving privileges pursuant to subsection (k) shall be sent by first-class mail and a U.S. post office certificate of mailing shall be obtained therefor. All notices so mailed shall be deemed received three days after mailing.

(m) The division shall prepare and distribute forms for use by law enforcement officers in giving the notice required by this section.

Sec. 3. K.S.A. 8-1005 is hereby amended to read as follows: 8-1005. Except as provided by K.S.A. 8-1012 and amendments thereto, in any criminal prosecution for violation of the laws of this state relating to operating or attempting to operate a motor vehicle while under the influence of alcohol or drugs, or both, or the commission of vehicular homicide or manslaughter while under the influence of alcohol or drugs, or both, or in any prosecution for a violation of a city ordinance relating to the operation or attempted operation of a motor vehicle while under the influence of alcohol or drugs, or both, evidence of the concentration of alcohol or drugs in the defendant's blood, urine, breath or other bodily substance may be admitted and shall give rise to the following:

(a) If the alcohol concentration is less than ~~.10~~ *.08*, that fact may be considered with other competent evidence to determine if the defendant was under the influence of alcohol, or both alcohol and drugs.

(b) If the alcohol concentration is ~~.10~~ *.08* or ~~more~~ *greater*, it shall be prima facie evidence that the defendant was under the influence of alcohol to a degree that renders the person incapable of driving safely.

(c) If there was present in the defendant's bodily substance any

narcotic, hypnotic, somnifacient, stimulating or other drug which has the capacity to render the defendant incapable of safely driving a vehicle, that fact may be considered to determine if the defendant was under the influence of drugs, or both alcohol and drugs, to a degree that renders the defendant incapable of driving safely.

Sec. 4. K.S.A. 8-1008 is hereby amended to read as follows: 8-1008. (a) Community-based alcohol and drug safety action programs certified in accordance with subsection (b) shall provide:

(1) Presentence alcohol and drug evaluations of any person who is convicted of a violation of K.S.A. 8-1567 and amendments thereto, or the ordinance of a city in this state which prohibits the acts prohibited by that statute;

(2) supervision and monitoring of all persons who are convicted of a violation of K.S.A. 8-1567 and amendments thereto, or the ordinance of a city in this state which prohibits the acts prohibited by that statute, and whose sentences or terms of probation require completion of an alcohol and drug safety action program, as provided in this section, or an alcohol and drug abuse treatment program, as provided in this section;

(3) alcohol and drug evaluations of persons whom the prosecutor considers for eligibility or finds eligible to enter a diversion agreement in lieu of further criminal proceedings on a complaint alleging a violation of K.S.A. 8-1567 and amendments thereto, or the ordinance of a city in this state which prohibits the acts prohibited by that statute;

(4) supervision and monitoring of persons required, under a diversion agreement in lieu of further criminal proceedings on a complaint alleging a violation of K.S.A. 8-1567 and amendments thereto, or the ordinance of a city in this state which prohibits the acts prohibited by that statute, to complete an alcohol and drug safety action program, as provided in this section, or an alcohol and drug abuse treatment program, as provided in this section; or

(5) any combination of (1), (2), (3) and (4).

(b) The presentence alcohol and drug evaluation shall be conducted by a community-based alcohol and drug safety action program certified in accordance with the provisions of this subsection to provide evaluation and supervision services as described in subsections (c) and (d). A community-based alcohol and drug safety action program shall be certified either by the administrative judge of the judicial district to be served by the program or by the secretary of social and rehabilitation services for judicial districts in which the administrative judge declines to certify a program. In establishing the qualifications for programs, the administrative judge or the sec-

retary shall give preference to those programs which have had practical experience prior to July 1, 1982, in diagnosis and referral in alcohol and drug abuse. Certification of a program by the administrative judge shall be done with consultation and approval of a majority of the judges of the district court of the district and municipal judges of cities lying in whole or in part within the district. If within 60 days after the effective date of this act the administrative judge declines to certify any program for the judicial district, the judge shall notify the secretary of social and rehabilitation services, and the secretary of social and rehabilitation services shall certify a community-based alcohol and drug safety action program for that judicial district. The certification shall be for a four-year period. Recertification of a program or certification of a different program shall be by the administrative judge, with consultation and approval of a majority of the judges of the district court of the district and municipal judges of cities lying in whole or in part within the district. If upon expiration of certification of a program there will be no certified program for the district and the administrative judge declines to recertify or certify any program in the district, the judge shall notify the secretary of social and rehabilitation services, at least six months prior to the expiration of certification, that the judge declines to recertify or certify a program under this subsection. Upon receipt of the notice and prior to the expiration of certification, the secretary shall recertify or certify a community-based alcohol and drug safety action program for the judicial district for the next four-year period. To be eligible for certification under this subsection, the administrative judge or the secretary of social and rehabilitation services shall determine that a community-based alcohol and drug safety action program is capable of providing, within the judicial district: (1) The evaluations, supervision and monitoring required under subsection (a); (2) the alcohol and drug evaluation report required under subsection (c) or (d); (3) the follow-up duties specified under subsection (c) or (d) for persons who prepare the alcohol and drug evaluation report; and (4) any other functions and duties specified by law. Community-based alcohol and drug safety action programs performing services in any judicial district under this section prior to the effective date of this act may continue to perform those services until a community-based alcohol and drug safety action program is certified for that judicial district.

(c) A presentence alcohol and drug evaluation shall be conducted on any person who is convicted of a violation of K.S.A. 8-1567 and amendments thereto, or the ordinance of a city in this state which prohibits the acts prohibited by that statute. The presentence alcohol

and drug evaluation report shall be made available to and shall be considered by the court prior to sentencing. The presentence alcohol and drug evaluation report shall contain a history of the defendant's prior traffic record, characteristics and alcohol or drug problems, or both, and a recommendation concerning the amenability of the defendant to education and rehabilitation. The presentence alcohol and drug evaluation report shall include a recommendation concerning the alcohol and drug driving safety education and treatment for the defendant. The presentence alcohol and drug evaluation report shall be prepared by a program which has demonstrated practical experience in the diagnosis of alcohol and drug abuse. The duties of persons who prepare the presentence alcohol and drug evaluation report may also include appearing at sentencing and probation hearings in accordance with the orders of the court, monitoring defendants in the treatment programs, notifying the probation department and the court of any defendant failing to meet the conditions of probation or referrals to treatment, appearing at revocation hearings as may be required and providing assistance and data reporting and program evaluation. The cost of any alcohol and drug education, rehabilitation and treatment programs for any person shall be paid by such person, and such costs shall include, but not be limited to, the assessments required by subsection (e). If financial obligations are not met or cannot be met, the sentencing court shall be notified for the purpose of collection or review and further action on the defendant's sentence.

(d) An alcohol and drug evaluation shall be conducted on any person whom the prosecutor considers for eligibility or finds eligible to enter a diversion agreement in lieu of further criminal proceedings on a complaint alleging a violation of K.S.A. 8-1567 and amendments thereto, or the ordinance of a city in this state which prohibits the acts prohibited by that statute. The alcohol and drug evaluation report shall be made available to the prosecuting attorney and shall be considered by the prosecuting attorney. The alcohol and drug evaluation report shall contain a history of the person's prior traffic record, characteristics and alcohol or drug problems, or both, and a recommendation concerning the amenability of the person to education and rehabilitation. The alcohol and drug evaluation report shall include a recommendation concerning the alcohol and drug driving safety education and treatment for the person. The alcohol and drug evaluation report shall be prepared by a program which has demonstrated practical experience in the diagnosis of alcohol and drug abuse. The duties of persons who prepare the alcohol and drug evaluation report may also include monitoring persons in the treat-

ment programs, notifying the prosecutor and the court of any person failing to meet the conditions of diversion or referrals to treatment, and providing assistance and data reporting and program evaluation. The cost of any alcohol and drug education, rehabilitation and treatment programs for any person shall be paid by such person, and such costs shall include, but not be limited to, the assessments required by subsection (e).

(e) In addition to any fines, fees, penalties or costs levied against a person who is convicted of a violation of K.S.A. 8-1567 and amendments thereto, or the ordinance of a city in this state which prohibits the acts prohibited by that statute, or who enters a diversion agreement in lieu of further criminal proceedings on a complaint alleging a violation of that statute or such an ordinance, $110 shall be assessed against the person by the sentencing court or under the diversion agreement. The $110 assessment may be waived by the court or, in the case of diversion of criminal proceedings, by the prosecuting attorney, if the court or prosecuting attorney finds that the defendant is an indigent person *or that the defendant has completed an alcohol and drug treatment program subsequent to being charged with a violation of K.S.A. 8-1567 and amendments thereto*. Except as otherwise provided in this subsection, the clerk of the court shall deposit all assessments received under this section in the alcohol and drug safety action fund of the court, which fund shall be subject to the administration of the judge having administrative authority over that court. If the secretary of social and rehabilitation services certifies the community-based alcohol and drug safety action program for the judicial district in which the court is located, the clerk of the court shall remit, during the four-year period for which the program is certified, 15% of all assessments received under this section to the secretary of social and rehabilitation services. Moneys credited to the alcohol and drug safety action fund shall be expended by the court, pursuant to vouchers signed by the judge having administrative authority over that court, only for costs of the services specified by subsection (a) or otherwise required or authorized by law and provided by community-based alcohol and drug safety action programs, except that not more than 10% of the money credited to the fund may be expended to cover the expenses of the court involved in administering the provisions of this section. In the provision of these services the court shall contract as may be necessary to carry out the provisions of this section. The district or municipal judge having administrative authority over that court shall compile a report and send such report to the office of the state judicial administrator on or before January 20 of each year, beginning January 20, 1991.

Such report shall include, but not be limited to:

(1) The balance of the alcohol and drug safety action fund of the court on December 31 of each year;

(2) the assessments deposited into the fund during the 12-month period ending the preceding December 31; and

(3) the dollar amounts expended from the fund during the 12-month period ending the preceding December 31.

The office of the state judicial administrator shall compile such reports into a statewide report and submit such statewide report to the legislature on or before March 1 of each year, beginning March 1, 1991.

(f) The secretary of social and rehabilitation services shall remit all moneys received by the secretary under this section to the state treasurer at least monthly. Upon receipt of the remittance, the state treasurer shall deposit the entire amount in the state treasury and credit it to the certification of community-based alcohol and drug safety action programs fee fund, which is hereby created. All expenditures from such fund shall be made in accordance with appropriation acts upon warrants issued pursuant to vouchers approved by the secretary of social and rehabilitation services or a person designated by the secretary.

Sec. 5. K.S.A. 8-1011 is hereby amended to read as follows: 8-1011. A law enforcement officer, and the state or any political subdivision of the state that employs a law enforcement officer, arresting or taking custody of a person for any offense involving the operation of or attempt to operate a ~~motor~~ vehicle while under the influence of alcohol or drugs, or both, shall have immunity from any civil or criminal liability for the care and custody of the ~~motor~~ vehicle that was being operated by or was in the physical control of the person arrested or in custody if the law enforcement officer acts in good faith and exercises due care.

Sec. 6. K.S.A. 8-1012 is hereby amended to read as follows: 8-1012. A law enforcement officer may request a person who is operating or attempting to operate a ~~motor~~ vehicle within this state to submit to a preliminary screening test of the person's breath to determine the alcohol concentration of the person's breath if the officer has reasonable grounds to believe that the person: (a) Has alcohol in the person's body; (b) has committed a traffic infraction; or (c) has been involved in a ~~motor~~ vehicle accident or collision. At the time the test is requested, the person shall be given oral notice that: (1) There is no right to consult with an attorney regarding whether to submit to testing; (2) refusal to submit to testing is a traffic infraction; and (3) further testing may be required after the

preliminary screening test. Failure to provide the notice shall not be an issue or defense in any action. The law enforcement officer then shall request the person to submit to the test. Refusal to take and complete the test as requested is a traffic infraction. If the person submits to the test, the results shall be used for the purpose of assisting law enforcement officers in determining whether an arrest should be made and whether to request the tests authorized by K.S.A. 8-1001 and amendments thereto. A law enforcement officer may arrest a person based in whole or in part upon the results of a preliminary screening test. Such results shall not be admissible in any civil or criminal action except to aid the court or hearing officer in determining a challenge to the validity of the arrest or the validity of the request to submit to a test pursuant to K.S.A. 8-1001 and amendments thereto. Following the preliminary screening test, additional tests may be requested pursuant to K.S.A. 8-1001 and amendments thereto.

Sec. 7. K.S.A. 8-1013 is hereby amended to read as follows: 8-1013. As used in K.S.A. 8-1001 through 8-1010, 8-1011, 8-1012, 8-1014, 8-1015, 8-1016, 8-1017 and 8-1018, and amendments thereto, and this section:

(a) "Alcohol concentration" means the number of grams of alcohol per 100 milliliters of blood or per 210 liters of breath.

(b) (1) "Alcohol or drug-related conviction" means any of the following: (A) Conviction of vehicular battery or aggravated vehicular homicide, if the crime is committed while committing a violation of K.S.A. 8-1567 and amendments thereto or the ordinance of a city or resolution of a county in this state which prohibits any acts prohibited by that statute, or conviction of a violation of K.S.A. 8-1567 and amendments thereto; (B) conviction of a violation of a law of another state which would constitute a crime described in subsection (b)(1)(A) if committed in this state; or (C) conviction of a violation of an ordinance of a city in this state or a resolution of a county in this state which would constitute a crime described in subsection (b)(1)(A), whether or not such conviction is in a court of record.

(2) For the purpose of determining whether an occurrence is a first, second or subsequent occurrence: (A) "Alcohol or drug-related conviction" also includes entering into a diversion agreement in lieu of further criminal proceedings on a complaint alleging commission of a crime described in subsection (b)(1) which agreement was entered into during the immediately preceding five years, including prior to the effective date of this act; and (B) it is irrelevant whether an offense occurred before or after conviction or diversion for a previous offense.

(c) "Division" means the division of ~~motor~~ vehicles of the department of revenue.

(d) "Ignition interlock device" means a device which uses a breath analysis mechanism to prevent a person from operating a motor vehicle if such person has consumed an alcoholic beverage.

(e) "Occurrence" means a test refusal, test failure or alcohol or drug-related conviction, or any combination thereof arising from one arrest, occurring in the immediately preceding five years, including prior to the effective day of this act.

(f) "Other competent evidence" includes: (1) Alcohol concentration tests obtained from samples taken two hours or more after the operation or attempted operation of a vehicle; and (2) readings obtained from a partial alcohol concentration test on a breath testing machine.

(g) "Samples" includes breath supplied directly for testing, which breath is not preserved.

(h) "Test failure" or "fails a test" refers to a person's having results of a test administered pursuant to this act, other than a preliminary screening test, which show an alcohol concentration of ~~.10~~ .08 or greater in [the] person's blood or breath.

(i) "Test refusal" or "refuses a test" refers to a person's failure to submit to or complete any test, other than a preliminary screening test, in accordance with this act.

Sec. 8. K.S.A. 8-1014 is hereby amended to read as follows: 8-1014. (a) Except as provided by subsection ~~(d)~~ [(e)] and K.S.A. 8-2,142, and amendments thereto, if a person refuses a test, the division, pursuant to K.S.A. 8-1002, and amendments thereto, shall suspend the person's driving privileges for one year.

(b) Except as provided by subsection ~~(d)~~ [(e)] and K.S.A. 8-2,142, and amendments thereto, if a person fails a test, the division, pursuant to K.S.A. 8-1002, and amendments thereto, shall:

(1) On the person's first occurrence, suspend the person's driving privileges for 30 days, then restrict the person's driving privileges as provided by K.S.A. 8-1015, and amendments thereto, for an additional 60 days; and

(2) on the person's second or a subsequent occurrence, suspend the person's driving privileges for one year.

(c) Except as provided by subsection ~~(d)~~ [(e)] and K.S.A. 8-2,142, and amendments thereto, if a person has an alcohol or drug-related conviction in this state, the division shall:

(1) On the person's first occurrence, suspend the person's driving privileges for 30 days or until the person has completed educational and treatment programs required by the court, whichever is longer,

.04 or greater but less than .08, if such person is less than 21 years of age, in such person's blood or breath or

any

(f)

then restrict the person's driving privileges as provided by K.S.A. 8-1015, and amendments thereto, for an additional 330 days; and

(2) on the person's second or a subsequent occurrence, suspend the person's driving privileges for one year or until the person has completed the treatment program required by the court, whichever is longer.

(d) Whenever the division is notified by an alcohol and drug safety action program that a person has failed to complete any alcohol and drug safety action education or treatment program ordered by a court for a conviction of a violation of K.S.A. 8-1567, and amendments thereto, the division shall suspend the person's driving privileges until the division receives notice of the person's completion of such program.

~~(d)~~ *(e)* Except as provided in K.S.A. 8-2,142, and amendments thereto, if a person's driving privileges are subject to suspension pursuant to this section for a test refusal, test failure or alcohol or drug-related conviction arising from the same arrest, the period of such suspension shall not exceed the longest applicable period authorized by subsection (a), (b) ~~or~~ (c), and such suspension periods shall not be added together or otherwise imposed consecutively. In addition, in determining the period of such suspension as authorized by subsection (a), (b) ~~or~~ (c), such person shall receive credit for any period of time for which such person's driving privileges were suspended while awaiting any hearing or final order authorized by this act.

If a person's driving privileges are subject to restriction pursuant to this section for a test failure or alcohol or drug-related conviction arising from the same arrest, the restriction periods shall not be added together or otherwise imposed consecutively. In addition, in determining the period of restriction, the person shall receive credit for 150 days of any period of suspension imposed for a test refusal arising from the same arrest.

~~(e)~~ *(f)* If the division has taken action under subsection (a) or (b) and such action is stayed pursuant to K.S.A. 8-259, and amendments thereto, or if temporary driving privileges are issued pursuant to subsection (k) of K.S.A. 8-1002, and amendments thereto, the stay or temporary driving privileges shall not prevent the division from taking the action required by subsection (c).

~~(f)~~ *(g)* Upon restricting a person's driving privileges pursuant to this section, the division shall issue without charge a driver's license which shall indicate on the face of the license that restrictions have been imposed on the person's driving privileges and that a copy of the order imposing the restrictions is required to be carried by the

(d) insert #1, see attached

,

or (d)

,

or (d)

"(d) Except as provided by subsection (f), if a person less than 21 years of age shows an alcohol concentration of .04 or greater but less than .08 in such person's blood or breath, the division, pursuant to K.S.A. 8-1002, and amendments thereto, shall:

(1) On the person's first occurrence, suspend the person's driving privileges for 30 days;

(2) on the person's second or a subsequent occurrence, suspend the person's driving privileges for six months; and

(3) assess an administrative fine of $25 to the person to cover Kansas bureau of investigation laboratory costs. The division shall remit all fines received under this section to the state treasurer at least monthly. Upon receipt of such remittance, the state treasurer shall deposit the entire amount thereof in the state treasury to the credit of the forensic laboratory and materials fee fund of the Kansas bureau of investigation.";

And by redesignating subsections accordingly;

person for whom the license was issued any time the person is operating a motor vehicle on the highways of this state. If the person is a nonresident, the division shall forward a copy of the order to the motor vehicle administrator of the person's state of residence.

Sec. 9. K.S.A. 8-1015 is hereby amended to read as follows: 8-1015. (a) A driver whose violations were committed in a commercial motor vehicle is exempt from utilizing the below-stated restrictions. When subsection (b)(1) of K.S.A. 8-1014, and amendments thereto, requires the division to place restrictions on a person's driving privileges, the division shall restrict the person's driving privileges to driving only under the following circumstances: In going to and returning from the person's place of employment and in going to and returning from a mandated alcohol education or treatment program.

(b) (1) When subsection (c)(1) of K.S.A. 8-1014, and amendments thereto, requires the division to place restrictions on a person's driving privileges, the division shall restrict the person's driving privileges to driving only under the following circumstances for a period of 60 days: In going to and returning from the person's place of employment and in going to and returning from a mandated alcohol education or treatment program.

(2) Upon expiration of the 60-day period provided by subsection (b)(1), the division shall restrict the person's driving privileges as provided by K.S.A. 8-292, and amendments thereto, for an additional 270 days, unless the convicting court, in lieu of such restrictions, has ordered the restrictions set out in subsection (b)(3).

(3) Upon convicting a person of an alcohol or drug related offense, the convicting court, in lieu of the restrictions set out in subsection (b)(2), may restrict the person's driving privileges to driving only a motor vehicle equipped with an ignition interlock device, approved by the division and obtained, installed and maintained at the person's expense. Any fine imposed by the court for the conviction shall be reduced by the court in an amount equal to the expense incurred by the person for obtaining, installing and maintaining the ignition interlock device.

(4) Upon a person's second or subsequent conviction for an alcohol related offense and the person had an alcohol concentration of .15 or more in the person's blood or breath, the convicting court shall restrict the person's driving privileges to driving only a motor vehicle equipped with an ignition interlock device, approved by the division and obtained, installed and maintained at the person's expense. Any fine imposed by the court for the conviction shall be reduced by the court in an amount equal to the expense incurred

by the person for obtaining, installing and maintaining the ignition interlock device.

(c) Upon expiration of the period of time for which restrictions are imposed pursuant to this section, the licensee may apply to the division for the return of any license previously surrendered by the licensee. If the license has expired, the person may apply to the division for a new license, which shall be issued by the division upon payment of the proper fee and satisfaction of the other conditions established by law, unless the person's driving privileges have been suspended or revoked prior to expiration.

(d) Violation of restrictions imposed under this section is a misdemeanor subject to punishment and suspension of driving privileges as provided by K.S.A. 8-291, and amendments thereto.

Sec. 10. K.S.A. 8-1567, as amended by section 1 of chapter 298 of the 1992 Session Laws of Kansas, is hereby amended to read as follows: 8-1567. (a) No person shall operate or attempt to operate any vehicle within this state while:

(1) The alcohol concentration in the person's blood or breath as shown by any competent evidence, including other competent evidence, as defined in paragraph (1) of subsection (f) of K.S.A. 8-1013, and amendments thereto, is ~~.10~~ *.08* or more;

(2) the alcohol concentration in the person's blood or breath, as measured within two hours of the time of operating or attempting to operate a vehicle, is ~~.10~~ *.08* or more;

(3) under the influence of alcohol to a degree that renders the person incapable of safely driving a vehicle;

(4) under the influence of any drug or combination of drugs to a degree that renders the person incapable of safely driving a vehicle; or

(5) under the influence of a combination of alcohol and any drug or drugs to a degree that renders the person incapable of safely driving a vehicle.

(b) No person shall operate or attempt to operate any vehicle within this state if the person is a habitual user of any narcotic, hypnotic, somnifacient or stimulating drug.

(c) If a person is charged with a violation of this section involving drugs, the fact that the person is or has been entitled to use the drug under the laws of this state shall not constitute a defense against the charge.

(d) Violation of this section is a misdemeanor. Upon a first conviction of a violation of this section, a person shall be sentenced to not less than 48 consecutive hours nor more than six months' imprisonment, or in the court's discretion 100 hours of public service,

and fined not less than $200 nor more than $500. The person convicted must serve at least 48 consecutive hours' imprisonment or 100 hours of public service either before or as a condition of any grant of probation or suspension, reduction of sentence or parole. In addition, the court shall enter an order which requires that the person enroll in and successfully complete an alcohol and drug safety action education program or treatment program as provided in K.S.A. 8-1008, and amendments thereto, or both the education and treatment programs.

(e) On a second conviction of a violation of this section, a person shall be sentenced to not less than 90 days nor more than one year's imprisonment and fined not less than $500 nor more than $1,000. The five days' imprisonment mandated by this subsection may be served in a work release program only after such person has served 48 consecutive hours' imprisonment, provided such work release program requires such person to return to confinement at the end of each day in the work release program. Except as provided in subsection (g), the person convicted must serve at least five consecutive days' imprisonment before the person is granted probation, suspension or reduction of sentence or parole or is otherwise released. As a condition of any grant of probation, suspension of sentence or parole or of any other release, the person shall be required to enter into and complete a treatment program for alcohol and drug abuse as provided in K.S.A. 8-1008, and amendments thereto.

(f) On the third or a subsequent conviction of a violation of this section, a person shall be sentenced to not less than 90 days nor more than one year's imprisonment and fined not less than $1,000 nor more than $2,500. Except as provided in subsection (g), the person convicted shall not be eligible for release on probation, suspension or reduction of sentence or parole until the person has served at least 90 days' imprisonment. The court may also require as a condition of parole that such person enter into and complete a treatment program for alcohol and drug abuse as provided by K.S.A. 8-1008, and amendments thereto. The 90 days' imprisonment mandated by this subsection may be served in a work release program only after such person has served 48 consecutive hours' imprisonment, provided such work release program requires such person to return to confinement at the end of each day in the work release program.

(g) On a second or subsequent conviction of a violation of this section, the court may place the person convicted under a house arrest program, pursuant to K.S.A. 21-4603b, and amendments thereto, to serve the remainder of the minimum sentence only after

such person has served 48 consecutive hours' imprisonment.

(h) The court may establish the terms and time for payment of any fines, fees, assessments and costs imposed pursuant to this section. Any assessment and costs shall be required to be paid not later than 90 days after imposed, and any remainder of the fine shall be paid prior to the final release of the defendant by the court.

(i) In lieu of payment of a fine imposed pursuant to this section, the court may order that the person perform community service specified by the court. The person shall receive a credit on the fine imposed in an amount equal to $5 for each full hour spent by the person in the specified community service. The community service ordered by the court shall be required to be performed not later than one year after the fine is imposed or by an earlier date specified by the court. If by the required date the person performs an insufficient amount of community service to reduce to zero the portion of the fine required to be paid by the person, the remaining balance of the fine shall become due on that date.

(j) The court shall report every conviction of a violation of this section and every diversion agreement entered into in lieu of further criminal proceedings or a complaint alleging a violation of this section to the division. Prior to sentencing under the provisions of this section, the court shall request and shall receive from the division a record of all prior convictions obtained against such person for any violations of any of the motor vehicle laws of this state.

(k) For the purpose of determining whether a conviction is a first, second, third or subsequent conviction in sentencing under this section:

(1) "Conviction" includes being convicted of a violation of this section or entering into a diversion agreement in lieu of further criminal proceedings on a complaint alleging a violation of this section;

(2) "conviction" includes being convicted of a violation of a law of another state or an ordinance of any city, or resolution of any county, which prohibits the acts that this section prohibits or entering into a diversion agreement in lieu of further criminal proceedings in a case alleging a violation of such law, ordinance or resolution;

(3) only convictions occurring in the immediately preceding five years, including prior to the effective date of this act, shall be taken into account, but the court may consider other prior convictions in determining the sentence to be imposed within the limits provided for a first, second, third or subsequent offender, whichever is applicable; and

(4) it is irrelevant whether an offense occurred before or after

conviction for a previous offense.

(l) Upon conviction of a person of a violation of this section or a violation of a city ordinance or county resolution prohibiting the acts prohibited by this section, the division, upon receiving a report of conviction, shall suspend, restrict or suspend and restrict the person's driving privileges as provided by K.S.A. 8-1014, and amendments thereto.

(m) Nothing contained in this section shall be construed as preventing any city from enacting ordinances, or any county from adopting resolutions, declaring acts prohibited or made unlawful by this act as unlawful or prohibited in such city or county and prescribing penalties for violation thereof, but the minimum penalty prescribed by any such ordinance or resolution shall not be less than nor exceed the minimum penalty prescribed by this act for the same violation, nor shall the maximum penalty in any such ordinance or resolution exceed the maximum penalty prescribed for the same violation. In addition, any such ordinance or resolution shall authorize the court to order that the convicted person pay restitution to any victim who suffered loss due to the violation for which the person was convicted.

(n) No plea bargaining agreement shall be entered into nor shall any judge approve a plea bargaining agreement entered into for the purpose of permitting a person charged with a violation of this section, or a violation of any ordinance of a city or resolution of any county in this state which prohibits the acts prohibited by this section, to avoid the mandatory penalties established by this section or by the ordinance. For the purpose of this subsection, entering into a diversion agreement pursuant to K.S.A. 12-4413 *et seq.* or 22-2906 *et seq.*, and amendments thereto, shall not constitute plea bargaining.

(o) The alternatives set out in subsections (a)(1) (2) and (3) may be pleaded in the alternative, and the state, city or county, but shall not be required to, may elect one or two of the three prior to submission of the case to the fact finder.

(p) For the purpose of this section, "alcohol concentration" means the number of grams of alcohol per 100 milliliters of blood or per 210 liters of breath.

Sec. 11. K.S.A. 8-2204 is hereby amended to read as follows: 8-2204. This act shall be known and may be cited as the uniform act regulating traffic on highways. The uniform act regulating traffic on highways includes K.S.A. 8-1334 ~~to 8-1341, inclusive, and~~ *through 8-1341, and amendments thereto;* all sections located in articles 10 and 14 ~~to 22, inclusive,~~ *through* 22 of chapter 8 of Kansas Statutes Annotated ~~and,~~ K.S.A. 8-1,129, 8-1,130a, 8-1428a, 8-1742a ~~and~~, 8-2118 *and K.S.A. 41-804*, and amendments ~~to these sections~~ *thereto*.

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Sec. 12. K.S.A. 12-4305 is hereby amended to read as follows: 12-4305. (a) The municipal judge shall establish a schedule of fines which shall be imposed for municipal ordinance violations that are classified as ordinance traffic infractions. Also, the municipal judge may establish a schedule of fines which shall be imposed for the violation of certain other ordinances. Any fine so established shall be within the minimum and maximum allowable fines established by ordinance for such offenses by the governing body. The following traffic violations are specifically excluded from any schedule of fines:

(1) Reckless driving;

(2) driving while under the influence of alcohol or drugs, or both, or driving with a blood or breath alcohol concentration of ~~.10~~ .08 or more;

(3) driving without a valid license issued or on a canceled, suspended or revoked license;

(4) fleeing or attempting to elude a police officer; or

(5) offense comparable to those prescribed by K.S.A. 8-1602, 8-1603 and 8-1604 and amendments thereto.

(b) A person charged with the violation of an ordinance contained in a schedule of fines established under subsection (a) shall, except as provided in subsection (c), appear at the place and time specified in the notice to appear. If the person enters an appearance, waives right to trial, pleads guilty or no contest, the fine shall be no greater than that specified in the schedule.

(c) Prior to the time specified in the notice to appear, a person charged with the violation of an ordinance contained in a schedule of fines established under subsection (a) may enter an appearance, waive right to trial, plead guilty or no contest and pay the fine for the violation as specified in the schedule. At the election of the person charged, such appearance, waiver, plea and payment may be made by mail or in person and payment may be by personal check. The complaint shall not have been complied with if a check is not honored for any reason, or the fine is not paid in full prior to the time specified in the notice to appear. When a person charged with an ordinance traffic infraction or other ordinance violation on a schedule of fines makes payment without executing a written waiver of right to trial and plea of guilty or no contest, the payment shall be deemed such an appearance, waiver of right to trial and plea of no contest.

The municipal judge may authorize the clerk of the municipal court or some other person to accept by mail or in person such voluntary appearance, plea of guilty or no contest and payment of the fine imposed by the schedule.

The schedule of fines and persons authorized to accept such pleas shall be conspicuously displayed in the office where such voluntary appearance, plea of guilty and payment of fine occurs.

Sec. 13. K.S.A. 12-4415 is hereby amended to read as follows: 12-4415. (a) In determining whether diversion of a defendant is in the interests of justice and of benefit to the defendant and the community, the city attorney shall consider at least the following factors among all factors considered:

(1) The nature of the crime charged and the circumstances surrounding it;

(2) any special characteristics or circumstances of the defendant;

(3) whether the defendant is a first-time offender of an alcohol related offense and if the defendant has previously participated in diversion, according to the certification of the division of vehicles of the state department of revenue;

(4) whether there is a probability that the defendant will cooperate with and benefit from diversion;

(5) whether the available diversion program is appropriate to the needs of the defendant;

(6) the impact of the diversion of the defendant upon the community;

(7) recommendations, if any, of the involved law enforcement agency;

(8) recommendations, if any, of the victim;

(9) provisions for restitution; and

(10) any mitigating circumstances.

(b) A city attorney shall not enter into a diversion agreement in lieu of further criminal proceedings on a complaint alleging an alcohol related offense if the defendant:

(1) Has previously participated in diversion of an alcohol related offense;

(2) has previously been convicted of or pleaded *nolo contendere* to an alcohol related offense in this state or has previously been convicted of or pleaded *nolo contendere* to a violation of K.S.A. 8-1567, and amendments thereto, or of a law of another state, or of a political subdivision thereof, which prohibits the acts prohibited by that statute; ~~or~~

(3) at the time of the alleged alcohol related offense had an alcohol concentration of .15 or more in the defendant's blood or breath; or

~~(3)~~ (4) during the time of the alleged alcohol related offense was involved in a motor vehicle accident or collision resulting in personal injury or death.

Sec. 14. K.S.A. 22-2908, as amended by section 257 of chapter 239 of the 1992 Session Laws of Kansas, is hereby amended to read as follows: 22-2908. (a) In determining whether diversion of a defendant is in the interests of justice and of benefit to the defendant and the community, the county or district attorney shall consider at least the following factors among all factors considered:

(1) The nature of the crime charged and the circumstances surrounding it;

(2) any special characteristics or circumstances of the defendant;

(3) whether the defendant is a first-time offender and if the defendant has previously participated in diversion, according to the certification of the Kansas bureau of investigation or the division of vehicles of the department of revenue;

(4) whether there is a probability that the defendant will cooperate with and benefit from diversion;

(5) whether the available diversion program is appropriate to the needs of the defendant;

(6) the impact of the diversion of the defendant upon the community;

(7) recommendations, if any, of the involved law enforcement agency;

(8) recommendations, if any, of the victim;

(9) provisions for restitution; and

(10) any mitigating circumstances.

(b) A county or district attorney shall not enter into a diversion agreement in lieu of further criminal proceedings on a complaint if:

(1) The complaint alleges a violation of K.S.A. 8-1567, and amendments thereto, and the defendant: (A) Has previously participated in diversion upon a complaint alleging a violation of that statute or an ordinance of a city in this state which prohibits the acts prohibited by that statute; (B) has previously been convicted of or pleaded *nolo contendere* to a violation of that statute or a violation of a law of another state or of a political subdivision of this or any other state, which law prohibits the acts prohibited by that statute; *(C) at the time of the alleged alcohol related offense had an alcohol concentration of .15 or more in the defendant's blood or breath;* or ~~(C)~~ *(D)* during the time of the alleged violation was involved in a motor vehicle accident or collision resulting in personal injury or death; or

(2) the complaint alleges that the defendant committed a class A or B felony or for crimes committed on or after July 1, 1993, a severity level 1, 2 or 3 felony for nondrug crimes or drug severity level 1 or 2 felony for drug crimes.

Sec. 15. K.S.A. 1992 Supp. 32-1131 is hereby amended to read as follows: 32-1131. (a) No person shall operate or attempt to operate any vessel within this state while:

(1) The alcohol concentration in the person's blood or breath, at the time or within two hours after the person operated or attempted to operate the vessel, is ~~.10~~ *.08* or more;

(2) under the influence of alcohol;

(3) under the influence of any drug or combination of drugs to a degree that renders the person incapable of safely operating a vessel; or

(4) under the influence of a combination of alcohol and any drug or drugs to a degree that renders the person incapable of safely operating a vessel.

(b) No person shall operate or attempt to operate any vessel within this state if the person is a habitual user of any narcotic, hypnotic, somnifacient or stimulating drug.

(c) If a person is charged with a violation of this section involving drugs, the fact that the person is or has been entitled to use the drug under the laws of this state shall not constitute a defense against the charge.

(d) No person shall operate or attempt to operate any vessel within this state for three months after the date of refusal of submitting to a test if such person refuses to submit to a test pursuant to K.S.A. 32-1132, and amendments thereto.

~~(d)~~ *(e)* Violation of this section is a misdemeanor punishable:

(1) On the first conviction, by imprisonment of not more than one year or a fine of not less than $100 nor more than $500, or both; and

(2) on the second or a subsequent conviction, by imprisonment for not less than 90 days nor more than one year and, in the court's discretion, a fine not exceeding $500.

(f) In addition to any other penalties prescribed by law or rule and regulation, any person convicted of a violation of this section shall be required to satisfactorily complete a boater education course of instruction approved by the secretary before such person subsequently operates or attempts to operate any vessel.

Sec. 16. K.S.A. 1992 Supp. 32-1132 is hereby amended to read as follows: 32-1132. (a) Any person who operates or attempts to operate a vessel within this state is deemed to have given consent, subject to the provisions of this act, to submit to one or more tests of the person's blood, breath, urine or other bodily substance to determine the presence of alcohol or drugs. The testing deemed consented to herein shall include all quantitative and qualitative tests

for alcohol and drugs. A person who is dead or unconscious shall be deemed not to have withdrawn the person's consent to such test or tests, which shall be administered in the manner provided by this section.

(b) A law enforcement officer shall request a person to submit to a test or tests deemed consented to under subsection (a) if the officer has reasonable grounds to believe the person was operating or attempting to operate a vessel while under the influence of alcohol or drugs, or both, and one of the following conditions exists: (1) The person has been arrested or otherwise taken into custody for any offense involving operation or attempted operation of a vessel while under the influence of alcohol or drugs, or both, in violation of a state statute or a city ordinance; or (2) the person has been involved in a vessel accident or collision resulting in property damage, personal injury or death. The law enforcement officer directing administration of the test or tests may act on personal knowledge or on the basis of the collective information available to law enforcement officers involved in the accident investigation or arrest.

(c) If a law enforcement officer requests a person to submit to a test of blood under this section, the withdrawal of blood at the direction of the officer may be performed only by: (1) A person licensed to practice medicine and surgery or a person acting under the supervision of any such licensed person; (2) a registered nurse or a licensed practical nurse; or (3) any qualified medical technician. When presented with a written statement by a law enforcement officer directing blood to be withdrawn from a person who has tentatively agreed to allow the withdrawal of blood under this section, the person authorized herein to withdraw blood and the medical care facility where blood is withdrawn may rely on such a statement as evidence that the person has consented to the medical procedure used and shall not require the person to sign any additional consent or waiver form. In such a case, the person authorized to withdraw blood and the medical care facility shall not be liable in any action alleging lack of consent or lack of informed consent. No person authorized by this subsection to withdraw blood, nor any person assisting in the performance of a blood test nor any medical care facility where blood is withdrawn or tested that has been directed by any law enforcement officer to withdraw or test blood, shall be liable in any civil or criminal action when the act is performed in a reasonable manner according to generally accepted medical practices in the community where performed.

(d) If there are reasonable grounds to believe that there is impairment by a drug which is not subject to detection by the blood

or breath test used, a urine test may be required. If a law enforcement officer requests a person to submit to a test of urine under this section, the collection of the urine sample shall be supervised by persons of the same sex as the person being tested and shall be conducted out of the view of any person other than the persons supervising the collection of the sample and the person being tested, unless the right to privacy is waived by the person being tested. The results of qualitative testing for drug presence shall be admissible in evidence and questions of accuracy or reliability shall go to the weight rather than the admissibility of the evidence.

(e) No law enforcement officer who is acting in accordance with this section shall be liable in any civil or criminal proceeding involving the action.

(f) (1) Before a test or tests are administered under this section, the person shall be given oral and written notice that: (A) There is no right to consult with an attorney regarding whether to submit to testing; (B) refusal to submit to testing may be used against the person at any trial on a charge arising out of the operation or attempted operation of a vessel while under the influence of alcohol or drugs, or both; (C) the results of the testing may be used against the person at any trial on a charge arising out of the operation or attempted operation of a vessel while under the influence of alcohol or drugs, or both; and (D) after the completion of the testing, the person has the right to consult with an attorney and may secure additional testing, which, if desired, should be done as soon as possible and is customarily available from medical care facilities and physicians. After giving the foregoing information, a law enforcement officer shall request the person to submit to testing. The selection of the test or tests shall be made by the officer. If the person refuses to submit to and complete a test as requested pursuant to this section, additional testing shall not be given. The person's refusal shall be admissible in evidence against the person at any trial on a charge arising out of the alleged operation or attempted operation of a vessel while under the influence of alcohol or drugs, or both.

(2) Failure of a person to provide an adequate breath sample or samples as directed shall constitute a refusal unless the person shows that the failure was due to physical inability caused by a medical condition unrelated to any ingested alcohol or drugs.

(3) It shall not be a defense that the person did not understand the written or oral notice required by this section.

(g) Nothing in this section shall be construed to limit the admissibility at any trial of alcohol or drug concentration testing results obtained pursuant to a search warrant.

(h) Upon the request of any person submitting to testing under this section, a report of the results of the testing shall be made available to such person.

(i) In addition to any other penalties prescribed by law or rule and regulation, any person refusing to take a test or tests when requested to do so by a law enforcement officer pursuant to this section shall be required to satisfactorily complete a boater education course of instruction approved by the secretary before such person subsequently operates or attempts to operate any vessel.

Sec. 17. K.S.A. 41-201 is hereby amended to read as follows: 41-201. (a) The director of alcoholic beverage control and agents and employees of the director designated by the director, with the approval of the secretary of revenue, are hereby vested with the power and authority of peace and police officers, in the execution of the duties imposed upon the director of alcoholic beverage control by this act and in enforcing the provisions of this act *and the provisions of K.S.A. 41-804, and amendments thereto.*

(b) The director and each agent and employee designated by the director under subsection (a), with the approval of the secretary of revenue, shall have the authority to make arrests, conduct searches and seizures and carry firearms while investigating violations of this act *or violations of K.S.A. 41-804, and amendments thereto,* and during the routine conduct of their duties as determined by the director or designee. In addition to the above, the director and such agents and employees shall have the authority to make arrests, conduct searches and seizures and generally to enforce all the criminal laws of the state as violations of those laws are encountered by such employees or agents during the routine performance of their duties. In addition to or in lieu of the above, the director and the director's agents and employees shall have the authority to issue notices to appear pursuant to K.S.A. 22-2408 and amendments thereto. No agent or employee of the director shall be certified to carry firearms under the provisions of this section without having first successfully completed the firearm training course or courses prescribed for law enforcement officers under subsection (a) of K.S.A. 74-5604a and amendments thereto. The director may adopt rules and regulations prescribing other training required for such agents or employees.

(c) The attorney general shall appoint, with the approval of the secretary of revenue, an assistant attorney general who shall be the attorney for the director of alcoholic beverage control and the division of alcoholic beverage control, and who shall receive an annual salary fixed by the attorney general with the approval of the director of alcoholic beverage control and the state finance council.

Sec. 18. K.S.A. 41-804 is hereby amended to read as follows: 41-804. (a) *As used in this section, "alcoholic beverage" means any alcoholic liquor, as defined by K.S.A. 41-102 and amendments thereto, or any cereal malt beverage, as defined by K.S.A. 41-2701 and amendments thereto.*

(b) No person shall transport in any vehicle upon a highway or street any alcoholic ~~liquor~~ *beverage* unless such liquor is:

(1) In the original unopened package or container, the seal of which has not been broken and from which the original cap, cork or other means of closure has not been removed;

(2) in the locked rear trunk or rear compartment, or any locked outside compartment which is not accessible to any person in the vehicle while it is in motion; or

(3) in the exclusive possession of a passenger in a vehicle which is a recreational vehicle, as defined by K.S.A. 75-1212 *and amendments thereto*, or a bus, as defined by K.S.A. 8-1406 *and amendments thereto*, who is not in the driving compartment of such vehicle or who is in a portion of such vehicle from which the driver is not directly accessible.

~~(b)~~ *(c)* Violation of this section is a misdemeanor punishable by a fine of not more than $200 or by imprisonment for not more than six months, or both.

~~(c) Except as provided in subsection (f) upon conviction or adjudication of a violation of this section, the judge, in addition to any other penalty or disposition ordered pursuant to law, shall suspend the person's driver's license or privilege to operate a motor vehicle on the streets and highways of this state. Upon conviction or adjudication of the first violation by such person, the suspension shall be for three months. Upon adjudication of a second or subsequent violation, the suspension shall be for one year.~~

~~(d) Upon suspension of a license pursuant to this section, the court shall require the person to surrender the license to the court, which shall transmit the license to the division of motor vehicles of the department of revenue, to be retained until the period of suspension expires. At that time, the licensee may apply to the division for return of the license. If the license has expired, the person may apply for a new license, which shall be issued promptly upon payment of the proper fee and satisfaction of other conditions established by law for obtaining a license unless another suspension or revocation of the person's privilege to operate a motor vehicle is in effect.~~

~~(e) As used in this section, "highway" and "street" have~~

the meanings provided by K.S.A. 8-1424 and 8-1473, and amendments thereto.

(f) In lieu of suspending the driver's license or privilege to operate a motor vehicle on the highways of this state of any person convicted of violating this section, as provided in subsection (e), the judge of the court in which such person was convicted may enter an order which places conditions on such person's privilege of operating a motor vehicle on the highways of this state, a certified copy of which such person shall be required to carry any time such person is operating a motor vehicle on the highways of this state. Any such order shall prescribe the duration of the conditions imposed, which in no event shall be for a period of less than three months for a first violation nor more than one year for a second violation.

Upon entering an order restricting a person's license hereunder, the judge shall require such person to surrender such person's driver's license to the judge who shall cause it to be transmitted to the division of vehicles, together with a copy of the order. Upon receipt thereof, the division of vehicles shall issue without charge a driver's license which shall indicate on its face that conditions have been imposed on such person's privilege of operating a motor vehicle and that a certified copy of the order imposing such conditions is required to be carried by the person for whom the license was issued any time such person is operating a motor vehicle on the highways of this state. If the person convicted is a nonresident, the judge shall cause a copy of the order to be transmitted to the division and the division shall forward a copy of it to the motor vehicle administrator, of such person's state of residence. Such judge shall furnish to any person whose driver's license has had conditions imposed on it under this section a copy of the order, which shall be recognized as a valid Kansas driver's license until such time as the division shall issue the restricted license provided for in this section.

Upon expiration of the period of time for which conditions are imposed pursuant to this subsection, the licensee may apply to the division for the return of the license previously surrendered by such licensee. In the event such license has expired, such person may apply to the division for a new license, which shall be issued immediately by the division upon payment of the proper fee and satisfaction of the other conditions established by law, unless such person's privilege to operate a motor vehicle on the highways of this state has been suspended or

~~revoked prior thereto. If any person shall violate any of the conditions imposed under this subsection, such person's driver's license or privilege to operate a motor vehicle on the highways of this state shall be revoked for a period of not less than 60 days nor more than one year by the judge of the court in which such person is convicted of violating such conditions.~~

(d) The court shall report to the division every conviction of a violation of this section or of a city ordinance or county resolution that prohibits the acts prohibited by this section. Prior to sentencing under the provisions of this section, the court shall request and shall receive from the division a record of all prior convictions obtained against such person for any violations of any of the motor vehicle laws of this state.

(e) Subject to the provisions of subsection (f), the division, upon receiving a report under subsection (d), shall suspend the driving privileges of the convicted person pursuant to K.S.A. 8-255 and amendments thereto as follows: (1) Upon the first reported conviction of such person, a suspension for three months; and (2) upon the second or a subsequent reported conviction of such person, a suspension for one year.

(f) In lieu of suspension of a person's driving privileges as provided by subsection (e), the court may place restrictions on the person's driving privileges as provided by K.S.A. 8-292 and amendments thereto for a period of: (1) Not less than three months upon the first reported conviction of such person; and (2) not less than one year upon the second or a subsequent reported conviction.

(g) It shall be an affirmative defense to any prosecution under this section that an occupant of the vehicle other than the defendant was in exclusive possession of the alcoholic beverage.

(h) The court shall require any person who is under the age of 21 who violates this section to enter into and complete an alcohol and drug safety action program as provided by K.S.A. 8-1008, and amendments thereto.

(i) For the purpose of determining whether a conviction is a first, second or subsequent conviction in sentencing under this section:

(1) "Conviction" includes being convicted of a violation of an ordinance of any city, or resolution of any county, which prohibits the acts that this section prohibits;

(2) only convictions occurring in the immediately preceding five years, including prior to the effective date of this act, shall be taken into account, but the court may consider other prior convictions in determining the sentence to be imposed within the limits provided

for a first, second or subsequent offender, whichever is applicable; and

(3) it is irrelevant whether an offense occurred before or after conviction for a previous offense.

(j) This section shall not be construed as preventing any city from enacting ordinances, or any county from adopting resolutions, declaring acts prohibited by this section as unlawful or prohibited in such city or county and prescribing penalties for violation thereof, but such ordinance or resolution shall provide for suspension or restriction of driving privileges as provided by this section and the convicting court shall be required to report convictions for violations of such ordinance or resolution as provided by subsection (d).

(k) This section shall be part of and supplemental to the uniform act regulating traffic on highways.

Sec. 19. K.S.A. 8-1001, 8-1002, 8-1005, 8-1008, 8-1011, 8-1012, 8-1013, 8-1014, 8-1015, 8-1567, as amended by section 1 of chapter 298 of the 1992 Session Laws of Kansas, 8-2204, 12-4305, 12-4415, 22-2908, as amended by section 257 of chapter 239 of the 1992 Session Laws of Kansas, 41-201, 41-804, 41-2719 and 41-2720 and K.S.A. 1992 Supp. 32-1131 and 32-1132 are hereby repealed.

Sec. 20. This act shall take effect and be in force from and after its publication in the statute book.

MEMORANDUM

TO: The Honorable Michael R. O'Neal
Chairman, House Judiciary Committee

FROM: William W. Sneed

DATE: February 23, 1993

RE: House Bill 2475

Mr. Chairman, Members of the Committee: My name is Bill Sneed and I am an attorney here in Topeka, Kansas and have been asked by the Kansas Civil Law Forum to speak to you on behalf of H.B. 2475.

During 1992 the Kansas Civil Law Forum was approached about a concern regarding the use of declaratory judgments within the Kansas civil law system. Brad Smoot, coordinator, asked me to research this particular issue and report back to the coalition. While researching the issue I became aware of the Uniform Declaratory Judgment Act.

Through several contacts I ultimately got in touch with Mr. Dick Hite, an attorney in Wichita, Kansas, who also serves as a member of the Uniform Laws Commission. During our conversation Mr. Hite gave me a general overview of the Uniform Declaratory Judgment Act ("UDJA") and explained that in his opinion it is a bill that should be looked at by the Kansas Legislature. As you and members of your Committee are aware, Kansas is known as being very progressive in the enactment of uniform laws. It is interesting to note that forty other states, including all of Kansas' neighbors, have adopted

the UDJA. Thus, because of the current situation in Kansas, it is the opinion of the Kansas Civil Law Forum that the Legislature should enact the UDJA.

Our current problem in this state deals with case law interpreting two areas of civil law and the conflict that these cases give, and ultimately, the limiting effect they provide to district court judges in certain situations. The obvious legislative intent in adopting the Kansas Declaratory Judgment Act (K.S.A. 60-1701, et seq.) was to promote an expeditious means by which legal questions concerning the interpretation of contract provisions, statutory provision and other similar matters could be obtained in an attempt to avoid full-blown lawsuits. Unfortunately, it would appear that the legislative intent has been significantly eroded by various Supreme Court cases, principally *State Farm Fire and Casualty Company v. Finney*, 244 Kan. 554, 770 P.2d 460 (1989). In that case, the Kansas Supreme Court grappled with several issues involving declaratory judgment actions as they relate to the determination of insurance coverage. The Court in that decision set forth the following rules:

1. Declaratory judgment actions may not be used to determine the existence of insurance coverage in advance of a final disposition of a tort lawsuit involving the potentially insured tortfeasor unless there are no key factual issues relating to coverage that need to be determined in the tort lawsuit.

2. If a liability insurance carrier disclaims coverage to an insured in a tort lawsuit, the insured is collaterally estopped from litigating any factual issues involving

coverage in a subsequent garnishment action if the factual issues have already been decided in the tort action.

The upshot of this twin pronouncement is that most insurance coverage issues cannot be resolved by way of declaratory judgment since there are very few coverage defenses that do not involve some degree of factual interplay between the tort lawsuit and the declaratory judgment action. This, coupled with the Supreme Court decisions regarding duty to defend, place a burdensome procedure on our civil justice system. The major problem with this is that by the time the coverage issue is resolved both the plaintiff and the defendant have incurred the expense of prosecuting the tort litigation, which might very well have been settled had the parties known the posture of the insurance coverage issue.

The present declaratory judgment mechanism with its judicial appendages is a drain on the economy since it forces cases to proceed to trial and exhausts substantial resources when the case would probably not otherwise have ever seen the courtroom. The current state of the law upsets the well-balanced principle that settlement is to be encouraged. Moreover, the current system foster re-litigation of insurance coverage issues which wastes precious judicial time. Thus, it is our opinion that all parties would be much better served by a reinstitution of a legislative intent to promote an expeditious means through declaratory judgments.

Therefore, based upon the discussions we have had with the Uniform Law members, it would appear to us that by implementing the Uniform Declaratory Judgment

Act we would be giving district court judges more flexibility in this area. It has been our experience that in many instances judges would like to utilize the Declaratory Judgment Act, but because of the *Finney* decision, the believe they are stifled in utilizing the declaratory judgment procedure in quickly resolving these types of issues.

Thus, on behalf of the Kansas Civil Law Forum, I respectfully request that the Committee look favorably on H.B. 2475. Further, we appreciate the opportunity to present testimony, and if we can answer any questions or provide any additional information, please feel free to contact Mr. Smoot.

Respectfully submitted,

William W Sneed

William W. Sneed

No. 62,711

No. 62,712

STATE FARM FIRE AND CASUALTY COMPANY, An Insurance Corporation, *Appellant*, v. GORDON FINNEY and DEAN JOHNSON, *Appellees*, and GORDON FINNEY, *Appellee*, v. DEAN JOHNSON, *Defendant*, v. STATE FARM FIRE AND CASUALTY COMPANY, Proposed Intervenor, *Appellant*.

(770 P.2d 460)

SYLLABUS BY THE COURT

1. INSURANCE—*Defense of Insured by Insurer's Attorney—Insurer Not Estopped from Asserting Policy Defense in Subsequent Civil Proceeding.* Where an insurance company provides an attorney to defend its insured against a pending action while reserving its policy defenses, that attorney's defense of the action does not estop the insurance company from asserting its policy defenses in a subsequent civil proceeding. *Bell v. Tilton*, 234 Kan. 461, 674 P.2d 468 (1983).

2. SAME—*Declaratory Judgment—Insurer Has No Absolute Right to Maintain Action to Determine Coverage Issue.* An insurer has no absolute right to maintain a declaratory judgment action to determine the issue of coverage. *U.S. Fidelity & Guaranty Co. v. Continental Ins. Co.*, 216 Kan. 5, 531 P.2d 9 (1975).

3. JUDGMENTS—*Declaratory Judgment—Key Factual Issues in Civil Action May Not Be Determined through Declaratory Judgment Action.* Under the Kansas rule, declaratory judgment actions may not be maintained to decide key factual issues in underlying civil actions. *U.S. Fidelity and Guaranty Co. v. Continental Ins. Co.*, 216 Kan. 5, 531 P.2d 9 (1975); and *State Automobile & Casualty Underwriters v. Gardiner*, 189 Kan. 544, 370 P.2d 91 (1962).

Appeal from Leavenworth district court; DAVID J. KING, judge. Opinion filed March 3, 1989. Affirmed.

Jerome V. Bales, of Wallace, Saunders, Austin, Brown and Enochs, Chartered, of Overland Park, argued the cause and *Kevin Bennett*, of the same firm, was with him on the briefs for appellant.

John L. White, of Norton, White & Norton, P.C., of Leavenworth, argued the cause and was on the brief for appellee.

David P. Troup, of Weary, Davis, Henry, Struebing & Troup, of Junction City, was on the *amicus curiae* brief for Kansas Trial Lawyers Association.

The opinion of the court was delivered by

LOCKETT, J.: *State Farm Fire & Casualty Co. v. Gordon Finney and Dean Johnson*, Case No. 62,711, and *Gordon Finney v. Dean Johnson v. State Farm and Casualty Company, Proposed Intervenor*, Case No. 62,712, are consolidated for appeal. In the first action, State Farm Fire & Casualty Co. (State Farm) appeals the

district court's finding that an insurer may not maintain a declaratory judgment action to determine if there is coverage for the acts of its insured if the declaratory judgment also decides key factual issues in an underlying tort suit brought against the insured. In the second action, State Farm appeals the district court's denial of its motion to intervene in the underlying tort suit to stay that action until the declaratory judgment action was decided.

On January 22, 1988, Gordon Finney brought an action in Leavenworth County District Court against Dean Johnson claiming that on July 2, 1987, Johnson shot him with a gun either (1) willfully, wantonly, maliciously, and intentionally or (2) negligently. At the time of the incident, Johnson was insured under a homeowners policy issued by appellant, State Farm. The policy provided coverage for personal liability and medical payments under "coverages L and M," but contained the following exclusion:

"1. Coverage L and Coverage M do not apply to:
a. Bodily injury or property damage which is expected or intended by an insured."

After being notified that Finney had filed suit against its insured, State Farm provided Johnson with an attorney. Pursuant to a reservation of rights, State Farm also notified Johnson that, under the policy exclusion, it was denying coverage for intentional or expected acts.

On February 24, 1988, State Farm filed a declaratory judgment action asking the district court to determine that there was no coverage under the policy for the acts alleged in the civil tort suit and, therefore, State Farm had no contractual duty to defend Johnson. At a discovery conference, counsel provided for Johnson requested that State Farm's declaratory judgment action be stayed pending the outcome of the civil tort suit. The district court requested briefs and oral argument. At a subsequent hearing, State Farm argued that the declaratory judgment action should not be stayed because, under its interpretation of our holding in *Patrons Mut. Ins. Ass'n v. Harmon*, 240 Kan. 707, 732 P.2d 741 (1987), it would be collaterally estopped to raise its policy defense (non-coverage for intentional acts) by a judgment in the civil tort suit.

The district court disagreed with State Farm's interpretation of

Patrons and held that, under *Bell v. Tilton*, 234 Kan. 461, 674 P.2d 468 (1983), where an insurer provides an attorney to defend its insured in a pending action, while reserving its policy defenses, that attorney's defense of the action does not estop the insurer from asserting its policy defense in a subsequent civil proceeding. Counsel for Johnson then orally moved to dismiss the declaratory judgment action, contending that a declaratory judgment action cannot be maintained to decide key factual issues to be determined in the underlying tort suit, citing *U.S. Fidelity & Guaranty Co. v. Continental Ins. Co.*, 216 Kan. 5, 531 P.2d 9 (1975), and *State Automobile & Casualty Underwriters v. Gardiner*, 189 Kan. 544, 370 P.2d 91 (1962). The district court sustained Johnson's motion and dismissed the declaratory judgment action. State Farm appealed.

State Farm then filed a motion seeking to intervene in the tort action to stay the civil action and to allow the declaratory judgment action to proceed to trial first. Noting that the declaratory judgment action had been dismissed prior to State Farm's motion to intervene and that, under *Bell*, a judgment in the civil tort action would not impede State Farm's right to protect its interest in a subsequent action, the district judge denied the motion. Despite the district court's favorable ruling that State Farm would not be estopped to litigate its policy defenses in the civil tort action, State Farm appeals the dismissal of the declaratory judgment and the denial of its motion to intervene in the civil tort action. Although the denial of its motion to intervene in the civil action was originally an issue on appeal, State Farm has abandoned that issue since it was neither addressed in the briefs nor at oral argument. *Feldt v. Union Ins. Co.*, 240 Kan. 108, 112, 726 P.2d 1341 (1986).

It is State Farm's position that its declaratory judgment action is necessary because our holding in *Patrons* reversed *Bell* and precluded State Farm from having its day in court. State Farm framed its first issue as "[w]hether an insurance carrier who is defending an individual in a lawsuit pursuant to a reservation of rights is collaterally estopped to assert policy defenses in a subsequent action when such policy defenses raise essentially the same factual issues decided in the underlying litigation."

Rejecting State Farm's position, the district court held *Patrons* did not overrule *Bell*. Therefore, we must first review *Bell* and

Patrons. In *Bell*, plaintiff sued for injuries suffered as a result of a gunshot wound inflicted by an insured. The defendant made a demand on his insurer to defend under his homeowners policy. The insurer provided counsel for the defendant, but informed the insured that, pursuant to a policy exclusion for intentional acts, it was reserving its rights to assert its policy defenses at a later time.

In the tort case, the jury found that the insured had negligently shot and injured the plaintiff and awarded the plaintiff money damages. At a subsequent garnishment proceeding, the insurer disclaimed liability under the policy exclusion for intentional acts of its insured. The plaintiff contended that the insurer was collaterally estopped to assert this defense in the garnishment action. The trial court ruled in favor of the insurer and we affirmed, holding that where an insurance company provides an attorney to defend its insured against a pending action, while reserving its policy defenses, that attorney's defense of the action does not estop the insurance company from asserting its policy defenses in a subsequent garnishment proceeding. *Bell v. Tilton*, 234 Kan. 461, Syl. ¶ 1.

The facts were different in *Patrons*. There, a husband fatally shot his wife. A jury found that the husband had intentionally caused the death of his wife and returned a verdict of voluntary manslaughter. Meanwhile, their son filed a wrongful death action against his father, claiming that the father had negligently caused the death of the mother. The father/husband requested his insurer, Patrons, to defend him under his homeowners policy. Patrons refused to provide an attorney to defend the husband in the civil action and filed a declaratory judgment action denying coverage on three grounds, including a policy exclusion for intentional acts. Prior to a determination in the declaratory judgment action, the wrongful death action proceeded to a jury trial and the judge found as a matter of law that the shooting was negligent. Later, in the declaratory judgment action, the trial court found Patrons had failed to provide its insured an attorney to defend the civil action and to reserve its rights under its policy, and was collaterally estopped by the judgment in the civil action from relitigating the issue of its insured's intent in a subsequent action. We agreed, finding:

"Because Patrons was in privity with a party, [the insured], in the wrongful death

action, it was bound by that judgment. An exception to the rule would allow Patrons, the insurer, to refuse to defend its insured in the original action and, if the insured lost, would allow the insurer to relitigate the same issue against its insured in a subsequent action." 240 Kan. at 711.

State Farm claims that this statement overruled *Bell*. This claim ignores our subsequent language in *Patrons*, which limited that holding to cases where the insurance company *refuses to defend its insured*. After observing that the interest of the insured and the insurer were adverse in *Patrons*, we stated:

"In *Bell v. Tilton*, [citation omitted], there was a conflict of interest between the insured and the insurer in a civil action. The insurance company hired independent counsel to defend the insured in the civil action and notified the insured that it was reserving its rights under the policy. This procedure protects both the insured's and the insurer's interests and rights and eliminates the necessity of multiple suits to determine the same issues. *We believe this is the proper procedure to protect the rights of both parties under their contract.*" 240 Kan. at 712. (Emphasis added.)

In *Bell*, because there was a potential of liability, we found it proper that the insurance company honored its contractual duty to defend its insured while it retained the right to raise the policy defenses later. Any other rule would create an ethical conflict for the insurer by allowing the insurer to defend its insured, and, in the same action, to claim that the insured's act was excluded from coverage under the insurance contract. *Bell* and *Patrons* encourage insurers to fulfill their contractual duty to defend the insured where there may be a legitimate question of coverage. This procedure protects the interest of the insured and the insurer because it does not bind the insurer to the factual determination of the underlying tort action and allows a subsequent action to determine if the insured's act is covered by the policy. *Patrons* clearly approves our holding in *Bell*. Therefore, the trial court properly found that our determination of the collateral estoppel issue in *Patrons* was limited to those cases where the insurance company refuses to defend its insured in the civil tort action. Here, since State Farm provided an attorney to defend its insured and reserved its policy defenses, the declaratory judgment action is not necessary to preserve its day in court.

For its second issue, State Farm argues that the district court erred in dismissing its declaratory judgment action. State Farm concedes that there is no absolute right to maintain a declaratory

judgment action and that the granting of declaratory relief usually rests in the trial court's discretion. See *U.S. Fidelity & Guaranty Co. v. Continental Ins. Co.*, 216 Kan. 5, 9, 531 P.2d 9 (1975).

When ruling that a declaratory judgment action may not be maintained to decide key factual issues in an underlying action, the district court relied on two cases: *U.S. Fidelity & Guaranty Co. v. Continental Ins. Co.*, 216 Kan. 9, and *State Automobile & Casualty Underwriters v. Gardiner*, 189 Kan. 544. *Gardiner* involved an underlying tort and wrongful death action filed as a result of an automobile accident where the driver of the insured vehicle, Gardiner, was a friend of the insured, Mulder. The insurance policy provided coverage for the insured and anyone driving the car with the insured's permission.

Denying coverage, the insurer filed a declaratory judgment action alleging Gardiner had driven the insured vehicle without Mulder's permission. The district court held for the insurance company and we reversed, stating we would not permit the company to obtain by declaratory judgment a predetermination of at least one very cogent issue of the tort actions, since this is not the purpose for seeking relief by a declaratory judgment action. 189 Kan. at 547.

U.S. Fidelity involved a declaratory judgment action seeking determination of insurance coverage between two insurance companies for damages resulting from an automobile accident. The vehicle in question was driven by a friend of the owner's son. U.S. Fidelity had issued a policy covering a vehicle owned by the driver's parents. Continental had issued a policy to the owners of the vehicle involved in the accident which excluded coverage for persons driving without the insured's permission. After the driver of the other car involved in the accident filed a tort action to recover for his injuries, Continental denied coverage pursuant to the policy exclusion.

Subsequently, U.S. Fidelity, the driver, and the driver's father brought a declaratory judgment action against Continental and the owner of the vehicle. The trial court dismissed the declaratory judgment action, refusing to determine a factual issue which was also a key issue in the underlying tort suit (whether the driver had permission to drive the car), especially since the insurers could be impleaded in the tort action. We affirmed,

holding that *ordinarily* declaratory judgment actions should not be maintained where a question of fact is the main issue or where the object of the action is to try such fact as a determinative issue. 216 Kan. at 10.

In oral argument of the case at bar, State Farm acknowledged that, under the Kansas rule, declaratory judgment actions may not be maintained to decide key factual issues in underlying actions. State Farm argues that, in a proper case, allowing the declaratory judgment to proceed first would promote judicial economy, citing *Stout v. Grain Dealers Mutual Insurance Company*, 307 F.2d 521 (4th Cir. 1962), and *Metro. Property & Liability Ins. Co. v. Kirkwood*, 729 F.2d 61 (1st Cir. 1974). In *Kirkwood*, the First Circuit reasoned that the litigation will proceed with significantly greater efficiency if the declaratory judgment action is tried first. Because the basic issue in the declaratory judgment is not whether there is liability, but whether the insurer's contractual liability flows from a negligent act or is excluded because the insured's act was intentional, that issue can be tried directly in the declaratory judgment action. The court noted that trial by jury is available and a decision binds all parties. 729 F.2d at 63. Without commenting on the constitutional right of the insured not to testify in a declaratory judgment action during the pendency of a criminal action or on the fact that in either situation there are two lawsuits—(1) a declaratory judgment to determine coverage under the policy and (2) a civil suit to determine liability of the insured to the plaintiff—the First Circuit found no disadvantage to the plaintiffs in the underlying tort action by maintenance of the declaratory judgment suit.

A more persuasive analysis of this issue is found in *Brohawn v. Transamerica Ins. Co.*, 276 Md. 396, 347 A.2d 842 (1975). *Brohawn* involved an underlying tort suit for injuries suffered in an assault. The complaint alleged in the alternative that the defendant acted either intentionally or negligently. The defendant's insurance policy contained an exclusion for intentional acts. Subsequently, the insurer filed a declaratory judgment action alleging that the insured's acts were intentional and requesting the court to relieve it from its obligation to defend.

After the circuit court denied declaratory relief and ordered the insurer to defend, the insurer appealed. The Court of Special

Appeals reversed, holding that the issue of intent should be decided first in the declaratory judgment suit and that the determination of this issue would be res judicata in the pending tort suit, leaving only the question of damages to be decided in the tort suit. The Maryland Court of Appeals granted the insured's writ of certiorari and reversed.

Initially, the court noted that, in certain circumstances, maintenance of a declaratory judgment action prior to trial of the underlying tort action could be a valuable means of resolving policy questions "where those questions are independent and separable from the claims asserted in the pending suit." For example, where an insurer claims lack of coverage because of the insured's failure to comply with contract provisions or to pay premiums, a declaratory judgment action would ordinarily be appropriate. 276 Md. at 405.

The court distinguished the cases where the issues to be resolved in the declaratory judgment action would be fully resolved in the tort action and elaborated on factors for a court to consider when deciding whether to grant declaratory relief in a particular case. It determined that, if the granting of the judgment in the declaratory judgment action would unduly inconvenience or burden the parties, or allow one party to wrest control of the litigation from another and cause a confusing alteration of the burden of proof, the court should refuse to grant the relief sought. By determining the question of whether the injuries were intentionally inflicted in the declaratory judgment action, the court would allow the defendant's insurer, not the plaintiff in the tort action, to control the litigation. 276 Md. at 406.

Hartford Ins. Group v. District Court, 625 P.2d 1013 (Colo. 1981), is also instructive. In *Hartford*, the underlying tort suit involved a vehicular accident between two tractor-trailer trucks. After suit alleging negligence was filed by the driver of one of the trucks against the other driver and his employer, Hartford, the employer's insurer, indicated it would provide a defense pursuant to a reservation of rights. The policy in question excluded intentional acts and acts by an employee outside the scope of the employer's permission.

Subsequently, Hartford filed a declaratory judgment action asserting it was not obligated under the policy since the driver's acts were intentional and outside the scope of authority or

permission as extended by the employer. The trial judge ordered a stay of the declaratory judgment action, pending the outcome of the underlying tort suit. Hartford then filed an original proceeding in the Supreme Court of Colorado requesting an order prohibiting the stay. The Supreme Court denied the request. Rejecting Hartford's argument that maintenance of the declaratory judgment action would promote judicial economy, the Colorado Supreme Court agreed that an insurer could, in some cases, seek a declaration of its contractual responsibility of defense and indemnification in connection with a claim filed against a person arguably qualifying as an "insured." However, here, the resolution of the declaratory action first might well place the insured in the dilemma of defending the coverage issue by establishing that the conduct, at most, amounted to simple negligence. Defending the declaratory action on that basis would pose a substantial risk that the insured would unduly compromise its defense in the negligence action. In addition, a finding in the declaratory action that the insured's action was willful and wanton could cause the plaintiff in the negligence action to amend his complaint to assert willful and wanton conduct against the defendant and invoke the doctrine of collateral estoppel. 625 P.2d at 1016.

Brohawn and *Hartford* demonstrate that prejudice to the insured may result by requiring the insured to litigate the key issues in the underlying suit in a declaratory judgment action against his own insurance company. First, the insured may be bound by the declaratory judgment suit by principles of collateral estoppel. Second, since the issue in the declaratory judgment action is whether the insured's acts were intentional or negligent, the insured may be prejudiced by being forced into claiming the acts were *merely* negligent to insure coverage under the insurance policy.

State Farm argues that a factual determination of the issues in a declaratory judgment action does not prejudice the insurer or the insured. We disagree. The duty to defend and the duty to cover are not necessarily coextensive. The duty to defend arises whenever there is a "potential of liability" under the policy. *Spruill Motors, Inc. v. Universal Underwriters Ins. Co.*, 212 Kan. 681, 512 P.2d 403 (1973). The insurer determines if there is a potential of liability under the policy by examining the allega-

tions in the complaint and considering any facts brought to its attention or which it could reasonably discover. Where a petition alleges an act that is clearly not covered, for example, that the defendant acted willfully and intentionally, a declaratory judgment would then be proper to determine the issue of coverage, since there would no "potential of liability" under the policy for intentional acts. Where the complaint alleges both a negligent and intentional act, these alleged facts give rise to the potential for liability and the duty to defend arises. 212 Kan. at 686.

Here, if it is determined in the underlying civil tort suit that the insured acted neither negligently, willfully, nor intentionally, there would be no need for a second action to determine if there was coverage under the policy. If the tort suit determines that the insured acted negligently, the insurer would not be collaterally estopped to litigate the intent issue in a subsequent proceeding. The trial court correctly held this procedure protects the rights of all parties.

Affirmed.

2/22/93

Session of 1993

HOUSE BILL No. 2257

By Representatives Toplikar, Brown, Cox, Macy, O'Connor and Snowbarger

2-5

AN ACT concerning interpreters; relating to the use thereof; amending K.S.A. 75-4351 and 75-4353 and repealing the existing sections.

Be it enacted by the Legislature of the State of Kansas:

New Section 1. A qualified interpreter shall be secured for the deaf, hard of hearing or speech impaired person in the following cases:

(a) In any grand jury, court or jury proceeding whether such person is the plaintiff, defendant, juror or witness in such action and in the case of a deaf, hard of hearing or speech impaired juror, the interpreter shall be available throughout the actual trial and may accompany and communicate with such juror throughout any period during which the jury is sequestered or engaged in its deliberations;

(b) in any proceeding before a board, commission, agency or licensing authority of the state or any political subdivision;

(c) when such person is arrested for an alleged violation of a criminal law of the state, any city ordinance or any county code;

(d) in any services, programs or activities of any institution, department or agency of the state of Kansas or any political subdivision, provided that it does not cause undue burden or undue hardship;

(e) in any services, programs or activities of any place of public accommodation by any person who owns, leases or operates a place of public accommodation, as defined by K.S.A. 44-1002, and amendments thereto, provided that it does not cause undue burden or undue hardship;

(f) in any employment situation, including but not limited to job application procedures, admission, hiring, advancement, discharge, training or any other terms, conditions or privileges of employment, provided that it does not cause undue burden or undue hardship.

New Sec. 2. (a) All interpreters for the deaf, hard of hearing and speech impaired, secured under the provisions of sections 1 through 4, shall be certified by or registered with the Kansas commission for the deaf and hard of hearing or an agency designated by the commission. The chairperson, court, presiding officer or executive

Interpret

the time in

prior to any attempt to interrogate or take a statement from a

who

officer of the company, board, agency, committee or entity shall be responsible for assuring the procurement of the interpreter.

(b) The commission shall recommend reasonable fees for the services of the interpreter. At no time shall the fees for interpreter services be assessed against the person receiving such services.

(c) No person shall serve as an interpreter if such interpreter is married to that person, related to that person or is otherwise interested in the outcome of the proceeding. Exceptions can be made in extreme conditions, subject to the approval of the commission.

(d) No person shall serve as an interpreter pursuant to sections 1 through 4, unless the commission makes the determination that the person is qualified to interpret. The commission may designate the executive director of the commission or another employee of the department of SRS to make such determination and approval under the provisions of sections 1 through 4. A person is qualified to interpret if such person is able to interpret effectively, accurately and impartially, both receptively and expressively, using any necessary specialized vocabulary.

New Sec. 3. An interpreter who is employed to interpret, transliterate or relay a communication between a person who can hear and a person who is deaf, hard of hearing or speech impaired is a conduit for the communication and may not disclose or be compelled to disclose, through reporting, testimony or by subpoena, the contents of the communication.

New Sec. 4. Any person may have the right to enforce the provisions of sections 1 through 4 in the district court. Nothing in sections 1 through 4 shall be construed to limit or impair rights existing under any other state laws.

Sec. 5. K.S.A. 75-4351 is hereby amended to read as follows: 75-4351. A qualified interpreter shall be appointed in the following cases for persons whose primary language is one other than English~~, or who are deaf or mute or both~~: (a) In any grand jury proceeding, when such person is called as a witness;

(b) in any court proceeding involving such person and such proceeding may result in the confinement of such person or the imposition of a penal sanction against such person;

(c) in any civil proceeding, whether such person is the plaintiff, defendant or witness in such action;

(d) in any proceeding before a board, commission, agency, or licensing authority of the state or any of its political subdivisions, when such person is the principal party in interest;

(e) when such person is arrested for an alleged violation of a criminal law of the state or any city ordinance. Such appointment

a local agency

(e) If preferable by the deaf, hard of hearing or speech impaired person and if feasible, other modes of communication, such as notetakers, open-captioning equipment, assistive listening devices or other technology may be used in place of an interpreter.

, not including any sign language used by a deaf, hard of hearing or speech impaired person

prior to any attempt to interrogate or take a statement from a

who

Attachment #15 — 2
02-26-93

shall be made prior to any attempt to interrogate or take a statement from such persons.]

Sec. 6. K.S.A. 75-4353 is hereby amended to read as follows: 75-4353. (a) No one shall be appointed to serve as an interpreter for a person pursuant to the provisions of K.S.A. 75-4351, and amendments thereto, if ~~he or she~~ *such interpreter* is married to that person, related to that person within the first or second degrees of consanguinity, living with that person or is otherwise interested in the outcome of the proceeding, unless the appointing authority determines that no other qualified interpreter is available to serve.

(b) No person shall be appointed as an interpreter pursuant to the provisions of K.S.A. 75-4351, and amendments thereto, unless the appointing authority makes a preliminary determination that the interpreter is able to readily communicate with the person whose primary language is one other than English~~, or who is deaf or mute, or both,~~ and is able to accurately repeat and translate the statement of ~~said~~ *such* person.

Sec. 7. K.S.A. 75-4351 and 75-4353 are hereby repealed.

Sec. 8. This act shall take effect and be in force from and after its publication in the statute book.

TO: Members of the House Judiciary Committee
FROM: Leonard Hall
SUBJECT: Testimony on HB 2257
DATE: February 22, 1993

I am Leonard Hall. I am an Attorney who can be reached at my office in the City of Olathe at 1-913-782-2600 if there are any further questions. I volunteered to represent the Kansas Association of the Deaf, the K.C. Self Help for Hard of Hearing and the Legislative Committee which wrote several provisions of HB 2257.

Last week, we spoke at the hearing on SB 219 which is almost identical to this bill. There are a few more changes that have to be made in HB 2257 so that it will be similar to SB 219.

Background Information

First, in regard to background information, Kansas Commission for the Deaf and Hard of Hearing (KCDHH) and several local agencies have established a system of providing interpreter services. Qualified interpreters are being provided to other agencies, businesses, and local and state governments. Section 504 of the Federal Rehabilitation Act and American with Disabilities Act (ADA) require interpreters to a greater extent than that required under the Kansas interpreter law.

HB 2257 reflects changes to meet the requirements as provided in federal law for qualified interpreters as well as the system providing qualified interpreters.

It is important to note that this bill will separate the current interpreter law into two separate laws: one governing the interpreters for deaf and hard of hearing and the other governing interpreters for foreign language speaking citizens.

Several More Changes Recommended in HB 2257

Second, I am going to recommend changes amending the current HB 2257 based upon requests of other state agencies and what was discussed in the Senate Governmental Organization committee meeting on SB 219.

Please look at the attached sheet entitled recommended changes.

1. In the first change, the Office of the Judicial Administration with the Kansas Courts has suggested that the language reflect that the interpreter shall interpret in the actual trial and in the jury deliberation. The current bill states that the interpreter shall be available and shall accompany and communicate with such juror.

The recommended language is for New Section 1 (a):

"In any grand jury, court or jury proceeding whether such person is the plaintiff, defendant, juror, or witness in such action and in the case of a deaf, hard of hearing, or speech impaired juror, the interpreter shall interpret throughout the actual trial and during which the jury is sequestered or engaged in its deliberations;"

2. The second change is also suggested by the Office of Judicial Administration. It was pointed out that American Sign Language is also a primary language other than English under Section 5. American Sign Language is considered to be a foreign language. It is necessary to exclude "sign language" from Section 5 as follows:

"A qualified interpreter shall be appointed in the following cases for persons whose primary language is one other than English, not including any sign language used by deaf or hard of hearing person:"

or an alternative provision:

"A qualified interpreter shall be appointed in the following cases for persons whose primary spoken language is one other than English:"

3. The third change has been suggested to provide for other modes of communication as an option to use of interpreters. Those options include notetakers, open-captioning equipment, and assistive listening devices to be used by deaf, hard of hearing, and/or speech impaired people in some situations.

The key words are "other modes of communication" which can be used if preferred by deaf or hard of hearing people and if feasible. In many places in Kansas, availability of such technology is very limited.

4. The fourth change is to substitute the following words in NEW SECTION 2 (d). It is recommended that "designated local agency" be substituted for "another employee of the department of SRS". The reason will be explained by Brenda in detail, but there are already several local agencies in Kansas which can provide interpreter services. There are also very few SRS employees who can actually make the determination that a person is qualified to interpret.

Brief Explanation of
Each Provisions in HB 2257

I like to explain each provision of the new statute as set out in HB 2257.

NEW SECTION 1:

New Section 1 (a) to (c) is a combination of those requirements currently set out in K.S.A. 75-4351 (a) to (e).

New Section 1 (d) is taken directly from 42 USC 12132 of Title II of ADA covering local and state governments. This section basically states that a person with disability can not be excluded from the benefits of services, programs or activities of a public entity. For over 15 years, Section 504 has required local and state governments to provide interpreters for deaf and hard of hearing people in its programs and services.

New Section 1 (e) is taken directly from 42 USC 12182 of Title III of ADA covering public accommodation. Note that exceptions are provided in the event that securing interpreters does not cause undue burden.

New Section 1 (f) is taken directly from 42 USC 12112 of Title I of ADA covering employment. Note that exceptions are provided in the event that securing interpreters does not cause undue hardship.

NEW SECTION 2:

New Section 2 (a) includes the requirement that all interpreters shall be <u>certified by or registered with</u> the KCDHH or an agency designated by the Commission. The **first purpose** of this sentence is to provide <u>flexibility</u> in requiring all interpreters regardless of their skill level to register with the Commission. Registered interpreters with some interpreting skills will be encouraged to obtain more training to become certified.

The **second purpose** is to allow designated local agencies across Kansas to certify interpreters as well as to register interpreters. By doing this, more qualified interpreters can become available on the local level. There are local agencies in Johnson County, Wichita, Hays, Topeka, Salina and possibly other communities who can provide these necessary services.

New Section 2 (b) allows the Commission to recommend reasonable fees for services of interpreters.

New Section 2 (c) prohibiting the use of relatives for interpreters is taken from the current state statute and ADA regulations.

exception in extreme situations

New Section 2 (d) simply outlines who can make the determination that the person is qualified to interpret. The last sentence in this section 2 (d) defining "qualified interpreter" is taken directly from the ADA regulations provided by the EEOC.

NEW SECTION 3. This sentence is taken directly from a state statute recently adopted by the State of Texas. The confidentiality and privacy of the deaf or hard of hearing person should be protected. Communication is private/confidential -

NEW SECTION 4. Currently, there is no enforcement provision under the current interpreter statute. Judge or ct.

NEW SECTION 5. This section governing interpreter being provided for those citizens speaking foreign languages.

Please find attached a sheet which summarizes the recommended changes to be made and explanation of each section.

Recommended Changes in HB 2257

1. New Section 1 (a) shall be amended as follows:

> "In any grand jury, court or jury proceeding whether such person is the plaintiff, defendant, juror, or witness in such action and in the case of a deaf, hard of hearing, or speech impaired juror, the interpreter shall interpret throughout the actual trial and during which the jury is sequestered or engaged in its deliberations;"

2. New Section 5 shall be amended to exclude sign language from the definition of primary language other than English:

> "A qualified interpreter shall be appointed in the following cases for person whose primary language is one other than English, not including any sign language used by deaf or hard of hearing person:"

3. A subsection shall be added to New Section 2 to provide for other modes of communication:

KS. law enforcement agency

> "If preferable by the deaf, hard of hearing, or speech impaired person and if feasible, other modes of communication, such as notetakers, open-captioning equipment, assistive listening devices, or other technology, may be used in place of an interpreter."

4. That the following sentence in New Section 1(d) shall be amended to allow "designated local agency" as followed:

> "... The commission may designate the executive director of the commission or another local agency to make such determination and approval of the provisions of sections 1 through 4. ..."

(remove the word "another employee of the department of SRS".

Session of 1993

HOUSE BILL No. 2257

By Representatives Toplikar, Brown, Cox, Macy, O'Connor and Snowbarger

2-5

AN ACT concerning interpreters; relating to the use thereof; amending K.S.A. 75-4351 and 75-4353 and repealing the existing sections.

Be it enacted by the Legislature of the State of Kansas:

New Section 1. A qualified interpreter shall be secured for the deaf, hard of hearing or speech impaired person in the following cases:

(a) In any grand jury, court or jury proceeding whether such person is the plaintiff, defendant, juror or witness in such action and in the case of a deaf, hard of hearing or speech impaired juror, the interpreter shall be available throughout the actual trial and may accompany and communicate with such juror throughout any period during which the jury is sequestered or engaged in its deliberations;

(b) in any proceeding before a board, commission, agency or licensing authority of the state or any political subdivision;

(c) when such person is arrested for an alleged violation of a criminal law of the state, any city ordinance or any county code;

(d) in any services, programs or activities of any institution, department or agency of the state of Kansas or any political subdivision, provided that it does not cause undue burden or undue hardship;

(e) in any services, programs or activities of any place of public accommodation by any person who owns, leases or operates a place of public accommodation, as defined by K.S.A. 44-1002, and amendments thereto, provided that it does not cause undue burden or undue hardship;

(f) in any employment situation, including but not limited to job application procedures, admission, hiring, advancement, discharge, training or any other terms, conditions or privileges of employment, provided that it does not cause undue burden or undue hardship.

New Sec. 2. (a) All interpreters for the deaf, hard of hearing and speech impaired, secured under the provisions of sections 1 through 4, shall be certified by or registered with the Kansas commission for the deaf and hard of hearing or an agency designated by the commission. The chairperson, court, presiding officer or executive

NEW SECTION 1 (a) to (c) is taken from the current K.S.A. 75-4351 (a) to (e) .

To amend New Sec. 1 (a) as follows: "In any grand jury, court or jury proceeding whether such person is the plaintiff, defendant, juror, or witness in such action and in the case of a deaf, hard of hearing, or speech impaired juror, the interpreter shall interpret throughout the actual trial and during which the jury is sequestered or engaged in its deliberations;"

New Sec. 1 (d) is taken from 42 USC 12132 -- Title II of ADA.

New Sec. 1 (e) is taken directly from 42 USC 12182 -- Title III of ADA

New Sec. 1 (f) is taken directly from 42 USC 12112 -- Title I of ADA.

Sec. 2 (a) -- to provide that all interpreters shall be certified by or registered with the KCDHH or an designated agency.

officer of the company, board, agency, committee or entity shall be responsible for assuring the procurement of the interpreter.

(b) The commission shall recommend reasonable fees for the services of the interpreter. At no time shall the fees for interpreter services be assessed against the person receiving such services.

(c) No person shall serve as an interpreter if such interpreter is married to that person, related to that person or is otherwise interested in the outcome of the proceeding. Exceptions can be made in extreme conditions, subject to the approval of the commission.

(d) No person shall serve as an interpreter pursuant to sections 1 through 4, unless the commission makes the determination that the person is qualified to interpret. The commission may designate the executive director of the commission or another employee of the department of SRS to make such determination and approval under the provisions of sections 1 through 4. A person is qualified to interpret if such person is able to interpret effectively, accurately and impartially, both receptively and expressively, using any necessary specialized vocabulary.

New Sec. 3. An interpreter who is employed to interpret, transliterate or relay a communication between a person who can hear and a person who is deaf, hard of hearing or speech impaired is a conduit for the communication and may not disclose or be compelled to disclose, through reporting, testimony or by subpoena, the contents of the communication.

New Sec. 4. Any person may have the right to enforce the provisions of sections 1 through 4 in the district court. Nothing in sections 1 through 4 shall be construed to limit or impair rights existing under any other state laws.

Sec. 5. K.S.A. 75-4351 is hereby amended to read as follows: 75-4351. A qualified interpreter shall be appointed in the following cases for persons whose primary language is one other than English, ~~or who are deaf or mute or both~~: (a) In any grand jury proceeding, when such person is called as a witness;

(b) in any court proceeding involving such person and such proceeding may result in the confinement of such person or the imposition of a penal sanction against such person;

(c) in any civil proceeding, whether such person is the plaintiff, defendant or witness in such action;

(d) in any proceeding before a board, commission, agency, or licensing authority of the state or any of its political subdivisions, when such person is the principal party in interest;

(e) when such person is arrested for an alleged violation of a criminal law of the state or any city ordinance. Such appointment

New Sec. 2 (b) allows the Commission to recommend reasonable fees for services of interpreters.

New Sec. 2 (c) prohibit the use of relatives for interpreters is taken from the current state statute and ADA regulations. Please note that exception are provide in extreme conditions.

New Sec. 2 (d) simply outlines who can make the determination that a person is qualified to interpret.

Note the last sentence defining "qualified interpreter" whichis taken directly from the ADA regulations provided by the EEOC.

New Sec. 3 is taken directly from a state statute adopted by Texas protecting the confidentialy and privacy of the deaf and hard of hearing person.

New Sec. 4 provide that any person may enforce this act in the district court. Current interpreter laws provide for no mean of enforcement.

New Sec. 5 and 6 will overn a seperate set of law governing interpreters for those citizens who speak foreign language.

Attachment #16 — 7
02-26-93

STATE OF KANSAS

JOHN TOPLIKAR
REPRESENTATIVE, 15TH DISTRICT
831 S. TROOST
OLATHE, KANSAS 66061

ROOM 175-W
STATE CAPITOL
TOPEKA, KANSAS 66612-1504
(913) 296-7695

TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
MEMBER ECONOMIC DEVELOPMENT
LOCAL GOVERNMENT
JOINT COMMITTEE ON ECONOMIC DEVELOPMENT

HOUSE JUDICIARY COMMITTEE

H. B. 2257

Rep. John Toplikar

February 22, 1993

Mr. Chairman and members of the Committee,

Thank you for allowing me an opportunity to speak on this bill which would generally provide an interpreter for the deaf, hard of hearing or speech impaired in everyday situations and enable equal citizenship to these Kansans with disabilities.

I ask for your support. Thank you.

KANSAS COMMISSION FOR THE DEAF AND HARD OF HEARING
Brenda J. Eddy, Executive Director

Presenter's name: Brenda Eddy
Executive Director
Kansas Commission for the Deaf and Hard of Hearing
(913) 296-2874 (V/TDD)

Topic: Testimony in favor of HB 2257

Date: February 22, 1993

Committee: House Judiciary Sub-Committee # 2

Mr. Chairman and Members of the Committee: On behalf of the Kansas Commission for the Deaf and Hard of Hearing, I thank you for the opportunity to address you in support of House Bill 2257, with some modifications in the language as written.

My name is Brenda Eddy and I am the executive director of the Kansas Commission for the Deaf and Hard of Hearing. We are an advocacy and coordinating agency with the purpose of representing the needs of deaf and hard of hearing Kansans. We are governed by a 17 member Commission, of which five ex-officio members represent key state agencies. Twelve at-large members are appointed by the Governor. The majority of members must be deaf or hard of hearing. For administrative purposes, we are located with Kansas Rehabilitation Services, which is part of the Kansas Department of Social and Rehabilitation Services.

The Commission for the Deaf and Hard of Hearing started out as an advocacy agency but in the past five years there has been a need to add two important direct services. These two services are statewide interpreter referral coordination and statewide certification of sign language interpreters. The need for interpreter referral services arose out of the fact that many deaf people were not able to participate in the mainstream of society because interpreters were not being provided in doctors offices, courts of law, public agencies and the classrooms. Even those entities that wanted to provide interpreters did not know how to find an interpreter, or what was a reasonable fee, or how to determine which interpreter was qualified to do the job. There was a need to have a centralized agency that could keep an updated list of all the practicing sign language interpreters in Kansas and "match them up" with the people needing the service. We were the logical agency to do this since we have statewide jurisdiction. However, we work very closely with other regional referral agencies to ensure efficient coordination of services.

HB 2257 is about sign language interpreting services. It and SB 219 are bills requiring that qualified interpreters for the deaf, hard of hearing or speech impaired persons be provided in legal situations, by governmental agencies or service providers, and in places of public accommodation. The requirements regarding provision of interpreters essentially duplicates situations currently covered by state and federal laws.

A new provision of this bill requires interpreters to be certified by or registered with the Kansas Commission for the Deaf and Hard of Hearing (KCDHH) or an agency designated by the commission. I would like to make a recommended change in the wording in new section 2(d) from "<u>another employee of the department of SRS</u>" to "<u>designated local agency</u>" to be compatible with SB 219. There are two reasons for

(OVER)

this change. 1.) Due to the specialized knowledge about sign language needed to make qualification decisions, it would be most difficult to expect any SRS employee outside of KCDHH, to be capable of making this decision of who is qualified to interpret. 2.) SRS may have to hire more employees to handle this role, whereas under SB 219, the local agency will be responsible for the funding of its employees who would be making this determination.

Let me explain why registration and certification is important.

Sign language interpreting is a relatively new profession. Only in the last twenty years has interpreting grown from a volunteer service to a bonafide profession. For this reason, the profession is still in the infancy stages and regulatory standards that monitor the profession are weak. Consequently, until we established our state certification system five years ago, there was no quality assurance measure of sign language interpreters in Kansas and deaf consumers were paying the price. In the 1992 legislative session, the legislature recognized the need for certification of sign language interpreters and amended K.S.A. 75-5393, allowing the Kansas Commission for the Deaf and Hard of Hearing to "provide for a program of regulation and certification of interpreters." Last year we certified 60 interpreters and transliterators, finished the development of a third set of videotapes for evaluating interpreters, and developed a certification tool for evaluating manually coded English interpreters. We have six workshops scheduled around the state for interpreters on preparing for the certification process and have two workshops scheduled to train deaf consumers to become evaluators of interpreting skills.

Up until three years ago there was no networking organization that represented all of the interpreter referral agencies in Kansas. There was a lack of consistency and standards in providing interpreter services across the state. There was little recognition or appreciation of each regions' needs and resources. KCDHH formed a network made up of all of the agencies and organizations concerned with interpreter services across the state. This group was so active and beneficial that it evolved into a sub-committee of one of the Commission's standing committees. Each month interpreters and deaf consumers travel at their own expense from around the state to work together on issues of concern to the deaf and interpreting communities. SB 219 is a product of their labor. A draft of this bill was presented at the Feb. 12, 1993 board meeting of the Kansas Commission for the Deaf and Hard of Hearing and they unanimously agreed to support this bill. The Senate version of this bill, SB 219, was heard on February 15, 1993.

HB 2257 is a good, proactive bill and a precedent to improved policies and legislation requiring certification of all interpreters. It reflects the spirit of consensus and cooperation of agencies who work with deaf and hard of hearing people in Kansas. Requiring that all interpreters be certified by or registered with the KCDHH encourages monitoring of the profession by establishing standards and regulations. It will allow those non-certified interpreters the time and opportunity to get ready for certification by becoming registered.

On behalf of quality interpreter services for deaf Kansans, I urge you to support this bill and permit those of us who know about the profession of interpreting to continue our work.

Thank you.

Kansas Department of Human Resources

Joan Finney, Governor
Joe Dick, Secretary

Commission on Disability Concerns
1430 S.W. Topeka Boulevard, Topeka, Kansas 66612-1877
913-296-1722 (Voice) -- 913-296-5044 (TDD)
913-296-4065 (Fax)

HOUSE JUDICIARY SUBCOMMITTEE #2
Given by Martha Gabehart
Kansas Commission on Disability Concerns
February 22, 1993

Thank you for the opportunity to testify in support of HB 2257. The comments I make on behalf of the Kansas Commission on Disability Concerns (KCDC) do not necessarily reflect the opinions of the Kansas Department of Human Resources.

KCDC supports HB 2257. HB 2257 requires the provision of sign language interpreters for people who are deaf, hard of hearing or speech impaired in specific cases and designates the Kansas Commission for the Deaf and Hard of Hearing as the entity which certifies interpreters and maintains a register of interpreters. It also guarantees that interpreters cannot be compelled to disclose the contents of communication they interpret. This bill gives a private right of action to citizens to enforce it when it becomes law.

The provision of sign language interpreters is provided for in the Americans with Disabilities Act (ADA) in general terms. Federal civil rights laws are passed to give citizens basic protection. States are then able to add protection as they see fit for their own situations. When situations are specifically stated as in this bill, there is no question when a covered entity is required to provide interpreters. This gives more protection to people who require sign language interpreters in instances where effective communication is essential for full integration and representation.

The confidentiality requirement in the bill assures the privacy of people who require sign language interpreters. People who do not require a third party to communicate do not have this liability to contend with.

KCDC also supports Section 5 which requires foreign language interpreters in the same instances as for sign language interpreters. KCDC has received

inquiries from the judicial system in other cities about whether or not the ADA requires them to provide foreign language interpreters. The ADA does not require foreign language interpreters to be provided because having English as a second language is not considered a disability unless a person uses sign language as their primary language. However, there is a real need in this state for interpreters for people who do not speak English.

Finally, the prohibition of using an interpreter who is related to the person who requires an interpreter is essential. Too often if a relative is used, the conversation shifts to the relative and the authority leaving the deaf person out of the conversation. This defeats the purpose of provision of an interpreter and the deaf person is no better off.

Thank you for the opportunity to testify.

TO: House Judiciary Committee

FROM: Suzan Pauley, Special Services Officer
City of Olathe, (913) 791-6260

SUBJECT: Support of HB 2257 An act concerning Interpreters

DATE: February 22, 1993

Mr. Chairman and Members of the Committee: I am here speaking on behalf of the profession of sign language interpreting in support of HB 2257. I view this bill will accomplish three objectives; parallell the ADA in situations when and where sign language interpreters should be provided; the quality assurance of interpreters, and upgrade the profession of interpreters.

I have been an interpreter professionally for nearly 15 years and have been signing all my life. I am currently employed at the City of Olathe as the Special Services Officer and am the City's official interpreter. I have experience in interpreting in almost every situation you can think imaginable from the legal setting, to education, employment, to social gatherings, banquets and receptions. Currently I am a Board member of the Kansas City Consortium of Interpreters whose primary mission is to provide professional workshops for interpreters in the 6 state region. I also serve as the Chair for the interpreter sub-committee of the Kansas Commission for the Deaf and Hard of Hearing.

The field of sign language interpreting has seen great strides in the last 30 years from a "helping/volunteer" service to a duly recognized profession. Just as with many issues regarding deafness and American Sign Language, this profession is also misunderstood. Also, as with any specialized field, a lot of training and skill is required to adequately provide the service. A sign language interpreter is not just anyone who may "know how to sign." There needs to be a mechanism in place for quality assurance.

Members of the interpreter sub committee of the Commission have been working diligently over the last couple of years addressing issues affecting the field of interpreting. The committee saw a need to amend the current the state of Kansas law K.S.A. 75-4351 regarding interpreters to reflect the intent of the ADA.

Last year the legislature gave the Kansas Commission for the Deaf and Hard of Hearing the mandate to provide interpreting services, particularly in statewide certification and referral coordination. State certification guidelines are quite specific in defining skill levels of an interpreter and in which situations that skill level should be allowed to interpret in. However, there is a lack of awareness regarding interpreters and there is no centralized monitoring system. The intention of this

bill is to take the mandate one step further by giving the Commission some authority for "quality assurance" of interpreters.

My concern with the House bill is that in New Section 2 (d) allows the Commission to "designate another employee of SRS" to determine whether an interpreter is qualified. This was not our intent and we prefer to keep with the wording designated in SB 219 New Section 4 giving the Commission authority to "designate another agency." This is because currently there are agencies throughout Kansas that work directly with deaf and interpreting services and frequently network with the commission.

The basic role of an interpreter is to facilitate communication between the spoken language to sign language. A professionally trained interpreter follows a specific code of ethics of which the utmost importance is to ensure confidentiality and impartiality. This bill will grant interpreters privileged communication and thus will protect the interpreter and the confidentiality of deaf people.

New Section 3 addresses the issue of family members as interpreters. Perhaps the best way I can address this is to share a brief anecdote. I am the child of deaf parents. They never viewed their deafness as a handicap, however the world did. I feel they were underemployed as a result of the communication barriers and because of the lack of qualified interpreters on occassion I was forced to bridge this gap. Mostly, I interpreted in the home assisting with people who came to the door or for telephone calls and many other non-essential types of interactions. Yes, maybe I was very familiar with their communication mode, however you have to realize I was a child and not trained to effectively communicate.

At 17 years old I had to sign for my parents in a very serious meeting with doctors, social workers, and so on. A room full of adults and professionals and myself. I had to tell my parents that my sister would die from cancer in a couple of weeks and there was nothing anybody could do. I did not know the seriousness of the situation until that day and became very emotional and as a result they had to stop the meeting.

Although now I am a certified professional and could effectively interpret for others impartially, to this day I could still not do the same for a family member. For many other reasons it is very unwise and unfair to expect family members to effectively fill the role of an interpreter.

To explain the history and rationale for this bill in five minutes is very difficult. In closing however, I would like to emphasize that I feel this bill is not asking for anything out of the ordinary but to just bring the state of Kansas up to date with the Federal law and the profession of interpreting. Thank you for allowing me to speak and I urge your support.

LEGISLATIVE TESTIMONY

Kansas Chamber of Commerce and Industry

500 Bank IV Tower One Townsite Plaza Topeka, KS 66603-3460 (913) 357-6321

A consolidation of the
Kansas State Chamber
of Commerce,
Associated Industries
of Kansas,
Kansas Retail Council

HB 2257

February 22, 1993

KANSAS CHAMBER OF COMMERCE AND INDUSTRY
Testimony Before the
House Subcommittee on Judiciary
by

Terry Leatherman
Executive Director
Kansas Industrial Council

Mr. Chairman and members of the Subcommittee:

My name is Terry Leatherman. I am the Executive Director of the Kansas Industrial Council, a division of the Kansas Chamber of Commerce and Industry. Thank you for the opportunity to explain why KCCI has concerns regarding HB 2257.

The Kansas Chamber of Commerce and Industry (KCCI) is a statewide organization dedicated to the promotion of economic growth and job creation within Kansas, and to the protection and support of the private competitive enterprise system.

KCCI is comprised of more than 3,000 businesses which includes 200 local and regional chambers of commerce and trade organizations which represent over 161,000 business men and women. The organization represents both large and small employers in Kansas, with 55% of KCCI's members having less than 25 employees, and 86% having less than 100 employees. KCCI receives no government funding.

The KCCI Board of Directors establishes policies through the work of hundreds of the organization's members who make up its various committees. These policies are the guiding principles of the organization and translate into views such as those expressed here.

The Kansas Chamber's principal objection to HB 2257 is in new Section 1(f), which includes employment situations in the area of state law requiring the hiring of qualified interpreters to assist individuals with hearing or speech impairments. If this accommodation is not provided by employers, new Section 4 of HB 2257 permits the aggrieved

individual to pursue a district court action, in addition to other remedies afforded by state law.

In objecting to this provision, KCCI is not suggesting that hearing and speech impaired individuals should not have access to interpreters in employment settings, or even that it is the responsibility of employers to provide the interpreter at their expense. Individuals with physical challenges deserve the opportunity to compete for employment. Providing accommodations levels the playing field, permitting the physically challenged to win, or lose, an employment opportunity on their skills and abilities.

However, KCCI contends hearing and speech impaired persons do not need the provisions in HB 2257 to compete in the employment arena. In 1991, the Kansas Legislature approved legislation to amend the Kansas Act Against Discrimination to grant physically challenged Kansans the rights granted under the federal Americans With Disabilities Act. In fact, the Kansas Act goes a step beyond the federal ADA by applying its provision to employers of four or more employees, rather than the 15 employee provisions in the ADA.

The amended Kansas Act certainly includes hearing and speech impairments in the definition of disability. The Kansas Act requires disabled individuals be hired for available employment if they are the most qualified applicant for a position, without regard to their disability. For qualified disabled individuals, employers also must provide reasonable accommodations to permit them to perform their job duties, unless the accommodations place an undue hardship on the employer. In addition, an enforcement mechanism is established for physically challenged Kansan to pursue to force employer compliance of the Kansas Act Against Discrimination.

By passing HB 2257, the Kansas Legislature would be establishing an additional protection for one component of the physically challenged population. Because KCCI feels the providing of an interpreter in employment situations for the hearing and speech impaired is an assured right, the Kansas Chamber would urge the Subcommittee to delete this provision of HB 2257.

Thank you for the opportunity to comment on HB 2257. I would be happy to answer any questions.

KANSAS ASSOCIATION OF SCHOOL BOARDS

1420 S.W. Arrowhead Rd, Topeka, Kansas 66604
913-273-3600

Testimony on H.B. 2257
before the
House Subcommittee on Judiciary

by

Norm Wilks, Director of Labor Relations
Kansas Association of School Boards

February 22, 1993

Mr. Chairman, Members of the Subcommittee:

On behalf of the members of the Kansas Association of School Boards, we wish to express our opposition to the passage of H.B. 2257.

Section 1(d) may require a qualified interpreter at any play, program, sporting event or other gathering sponsored by a school. There is not a clear definition of "undue burden or undue hardship" so we must address each issue on a case by case basis.

Section 1(f) creates the same situation with any employment activity.

Schools now provide interpreters where needed as a result of their compliance with special education laws and Americans With Disabilities Act. Schools will provide interpreters when needed by a student to participate in education activities and to employees when needed to meet the standards of responsible accommodation.

In our opinion, educational entities should be excluded from this legislation.

HOUSE JUDICIARY
Attachment #22
02-26-93

AIA Kansas
A Chapter of The American Institute of Architects

February 23, 1993

TO: Representative Carmody and Members of the Judiciary Subcommittee #2

FROM: Trudy Aron, Executive Director

RE: Support with Amendments of HB 2500

Good Afternoon Mr. Chairman and Members of the Subcommittee:

I am Trudy Aron, Executive Director, of the American Institute of Architects in Kansas. While I am here today to support HB 2500, we believe additional amendments that bring the Kansas statutes into alignment with the Federally-adopted act are needed.

First, we are generally pleased with the changes proposed in HB 2500. They clear up a lot of inconsistencies in the law and better define what is expected of building owners. We believe that when HB 2602 passed last year, Legislators thought they were adopting the federal ADA Act. However, the bill which passed was stricter than the federal act in several areas.

Our major concern is the definition of "public building" in the Kansas statute. Currently, Kansas defines "public building or facility as: any building, structure, recreational area, street, curbing or sidewalk and access thereto, which is used by the public, or in which persons with a disability may be employed, and which is constructed, purchased, leased or rented by the use of private funds." The only exemptions are single-family dwellings, duplexes, and governmental buildings (covered under a different section.) While Kansas law includes nearly all buildings, the federal ADA act exempts commercial facilities (like factories, warehouses, offices) where the public does not need access. It also exempts religious facilities, private clubs, etc.

Below are the modifications we believe will bring HB 2500 into alignment with the Federal ADA Act:

Section 3 (KSA 58-1301 (a)) requires existing "public buildings" to conform to Appendix A to 28 CFR part 36. This appendix is ADA Architectural Guidelines (ADAAG). These guidelines are for additions, alterations and new construction and are not intended to apply to existing buildings. Under ADA (and Section 7, KSA 58-1305 (b)(2)) existing public accommodations only have to "remove barriers" to the extent readily achievable. Conforming to the ADAAG is a stricter standard. Section 3 and Section 7 are inconsistent. Are barriers to be removed to the extent achievable or are they to conform with the stricter standards under ADAAG? We believe owners should have to remove barriers only at places of public accommodation since these are the buildings to which the public needs access.

Section 4, KSA 58-1301a, defines "disproportionality" - a term that is never used. The exact same text appears on page 22, including the four examples. To clean up the new language, the definition should be removed from 1301a.

In **Section 4**, page 8, definitions **(w) (1) and (2)**, religious entities and private clubs are not exempted, contrary to ADA. The Federal government did extensive research in enacting its

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regulations. Congress likewise in enacting ADA. There are good reasons to be consistent here. Both entities should be defined and deleted from (w)(1) and added to (w)(2). Churches, parochial schools, fraternities and sororities are exempted under ADA but are not under the Kansas statute. The Kansas law creates additional burdens on these non-profit entities which the federal act does not.

Section 7, page 16, adopts the ADA "barrier removal" requirement for public buildings but includes all buildings including commercial facilities. Existing commercial facilities are exempt under ADA since the public doesn't go there (factories, warehouses, offices, etc.) Under ADA, these commercial facilities are exempt from barrier removal unless a disabled person is hired and needs an accommodation. This inconsistency between the federal act and the Kansas law may place an undue hardship on Kansas businesses and could force firms to move out of Kansas. It certainly becomes a factor in encouraging new businesses to relocate in Kansas. A new business which occupies an existing facility would have to remove barriers in Kansas, but would not in states which adopt the federally-enacted ADA.

The changes outlined above attempt to make Kansas law consistent with the Federal act. While current Kansas law provides much more potential work for architects, we believe the modifications we have outlined are in the best interests of all concerned - building owners, businesses, design professionals and the disabled. In order for everyone to understand their obligations and opportunities under ADA, the Kansas statutes need to be clear and aid those responsibile for enforcement and interpretation. We believe this clarity will encourage full acceptance and compliance of the law. We urge you to consider our changes.

I'll try to answer any questions you may have.

KANSAS ASSOCIATION OF SCHOOL BOARDS

1420 S.W. Arrowhead Rd, Topeka, Kansas 66604
913-273-3600

Testimony on H.B. 2500
before the
House Judiciary Subcommittee #2
House Committee on Judiciary

by

Cindy Kelly, Deputy General Counsel
Kansas Association of School Boards

February 23, 1993

Mr. Chairman, Members of the Subcommittee:

Thank you for the opportunity to appear before your committee to speak in support of the concepts contained in H.B. 2500 on behalf of our member school districts and community colleges.

School districts and community colleges in the State of Kansas believe that their programs should be fully accessible to individuals with disabilities, and have attempted in good faith to comply with the requirements of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973 for almost two decades.

For many school districts, the ADA has created considerable confusion about what must be done with existing facilities to meet the ADA requirements. Under ADA public entities must make all programs and services readily accessible and usable by individuals with disabilities. If this can be accomplished without structural changes in facilities, such changes are not required. However, structural changes are required if program accessibility cannot be achieved through other means, unless the school can show that such changes would

fundamentally alter the service or result in undue financial and administrative burdens. This is the standard reiterated in Section 7 (a) of H.B. 2500. In Section 7 (b) the bill applies the "readily achievable" standard to public buildings and facilities. While the definition of public building does not include a public school, we believe that most people think of a school as a public building, and that this creates further confusion. Although school buildings are not included in the definition of public buildings, we believe this language creates unnecessary confusion over the standard to be applied. We therefore recommend that you amend Section 7 (b) to make it clear that these provisions do not apply to governmental buildings covered by Subsection (a). This could easily be accomplished by adding the words "other than governmental buildings and facilities subject to Subsection (a)," after the word facilities on page 15, line 41.

We also recommend that Section 2(c) be amended to make it clear that existing school buildings are subject only to the program accessibility standards of Section 7(a). This can be accomplished by inserting the words "shall meet the accessibility standards of K.S.A. 58-1305(a)" after the word buildings on page 2, line 9. We believe that these amendments are necessary to ensure that state law is not placing additional burdens on public school districts, and to clarify the standard to be applied.

With these amendments we ask you to recommend H.B. 2500 favorably for passage.

City of Lawrence
KANSAS

CITY COMMISSION
MAYOR
ROBERT C. SCHULTE
COMMISSIONERS
JOHN NALBANDIAN
SHIRLEY MARTIN-SMITH
BOB SCHUMM
ROBERT L. WALTERS

MIKE WILDGEN, CITY MANAGER

CITY OFFICES 6 EAST 6th
BOX 708 66044-0708 913-832-3000

February 23, 1993

House Judiciary Committee
House of Representatives
State Capitol Building
Topeka, KS 66612

RE: Comments on House Bill 2500

Dear Members:

House Bill 2500 proposes to amend the Kansas law regarding accessibility as it relates to the federal Americans with Disabilities Act of 1990 (ADA). The City of Lawrence favors the bill generally, as drafted. There are two specific issues we would like to address that have a significant impact on local governments. First, the City of Lawrence strongly supports the inclusion of the proposed language allowing either the Americans with Disabilities Act Accessibility Guidelines (ADAAG) or the Uniform Federal Accessibility Standards (UFAS) as the accessibility standard for construction or alterations of facilities by local governments. Second, the City of Lawrence respectfully requests that the Kansas Legislature clarify the definition of alteration, especially as it pertains to streets and the construction of curb ramps. Please find the recommended language below.

Accessibility Standard. Title II of the ADA allows state and local governments to use either the ADAAG or UFAS standard [28 CFR Part 35 §35.151(c)]. One significant difference between ADAAG and UFAS is the construction specifications for curb ramps. Both standards have established the same limits for slope, width, and length of ramps. ADAAG also requires a truncated dome texture and color contrast. UFAS does not specify texture or color.

1992 HB 2602 specified only the ADAAG for both government facilities and public accommodations. To the best of our knowledge, the City of Lawrence is the only community in the state which complied with the letter of 1992 HB 2602 by constructing curb ramps with color contrast and the truncated dome texture. The color concrete and dome texture **tripled the cost** of curb ramps. Lawrence's 1992 Overlay and Curb Repair Program originally included a bid $8,250 for curb ramp construction in compliance with the UFAS specifications. **An additional $16,250** was required for those ramps to be constructed with color contrast and truncated domes in compliance with 1992 HB 2602.

The cost of compliance significantly outweighs the benefit. Attorney General Opinion 92-106,

issued August 17, 1992, stated that the reference to 28 CFR Part 36 (ADAAG) in section 7 of the 1992 House Bill 2602 as the only standard was a technical error. HB 2500 would allow either standard and make state law congruent with the federal requirements. On December 21, 1992, the Architectural and Transportation Barriers Compliance Board issued proposed regulations for Title II governing state and local government facilities. The proposed regulations include no requirement for color contrast or truncated domes. Those sections have been reserved for additional study. In Lawrence, feedback from some individuals with disabilities has indicated the truncated dome texture actually make the ramps more difficult to use.

The City of Lawrence firmly believes that allowing local governments the option of either the ADAAG or UFAS standards will enhance our ability to improve accessibility in our communities. Cities cannot simply absorb the triple-cost of ramps complying with ADAAG. Ultimately, fewer ramps would be built and fewer barriers would be removed.

Alteration of streets. Section 58-1305(3)(A) of the proposed legislation states, "Newly constructed or altered streets, roads and highways must contain curb ramps or other sloped areas at any intersection having curbs or other barriers to entry from a street level pedestrian walkway." This language duplicates that of the existing Title II regulations [28 CFR Part 35 §35.151(e)(1)].

The City of Lawrence supports this provision. We respectfully request that the definition of "Alteration" be expanded to more closely follow the definition in ADAAG *and* characterize street resurfacing as normal maintenance, not an alteration affecting the usability of the facility. The following language is recommended:

> *K.S.A. 1992 Supp. 58-1301a(a) "Alteration" means a change in a governmental or public building or facility that affects or could affect the usability of the building or facility or any part thereof. Alterations include, but are not limited to, remodeling, renovation, rehabilitation, reconstruction, historic restoration, changes or rearrangement of structural parts or elements, or changes or rearrangement in the plan configuration of walls and full-height partitions. Normal maintenance, reroofing, painting or wallpapering, changes to mechanical and electrical systems, or street resurfacing or repair are not alterations unless they affect the usability of the building or facility.*

The first sentence is the same as that proposed in HB 2500. The remainder of the definition is directly from the definition of "alteration" in the ADAAG with the phrase "or street resurfacing or repair" added for clarification.

Existing federal regulations do not indicate that maintenance of infrastructure, such as resurfacing pavement, triggers the requirement to construct curb ramps. The section-by-section analysis in the proposed regulations for Title II seems to indicate clearly that the curb ramp construction requirement is triggered only when the curb face is disturbed by construction or alteration activity.

The City of Lawrence's transition plan and City Commission policy toward construction of curb

ramps is three-fold:

(1) Curb ramps are installed whenever a curb is disturbed by construction, alteration, or maintenance activity by or on the behalf of the City or any utility company working in the public right-of-way;

(2) Curb ramps are being constructed and reconstructed to provide a continuous accessible route throughout the central business district;

(3) Curb ramps are constructed where they are specifically requested when possible.

Lawrence's policies directly and aggressively address accessibility in our community.

The City of Lawrence is very concerned about a ruling by a U.S. District Court which ordered the City of Philadelphia to install curb ramps on all streets on which bids were let for resurfacing since January 26, 1992. Before this decision, municipalities understood that the curb ramp construction requirement was not triggered until the curb face was disturbed. A copy of a news article regarding this decision from Nations Cities Weekly, 2/15/93, is attached. This court decision may not be binding in our area and it may be overturned on appeal. However, the City of Lawrence requests the assistance of the Kansas Legislature in avoiding such a judicial decision by amending the proposed legislation with the "alteration" language above.

Resurfacing is as much a regular part of street maintenance as filling pot holes. Resurfacing does not touch or disturb the curb and should not trigger the curb ramp construction requirement. We believe such a requirement would have a number of negative consequences. First, it will promote the deterioration of infrastructure by reducing our ability to maintain roadways. Second, it would significantly hamper the ability of cities to improve accessibility by making the removal of barriers a function of road condition rather than need and usage.

The City of Lawrence endorses the goals of the ADA and state laws regarding accessibility. We are making every effort to comply with the letter and intent of the laws. We appreciate your consideration of these comments regarding House Bill 2500.

Respectfully,

Mike Wildgen
City Manager

MW:TB:tb

ATT

NATIONS CITIES WEEKLY
February 15, 1993

Street Resurfacing Triggers ADA Curb Ramp Requirement

by Doug Peterson

Any resurfacing work on a city street will trigger the immediate requirement to install curb ramps at adjacent intersections under a ruling by a U.S. District Court Judge under the Americans with Disabilities Act.

If this judgement is applied nationally cities and towns will face millions of dollars in immediate liabilities.

U.S. District Court Judge Harvey Bartle 3rd has ordered the City of Philadelphia to install curb ramps on all streets on which bids were let for resurfacing since January 26, 1992, the effective date of the Americans with Disabilities Act.

During the trial the City said that its practice regarding curb ramps under a transition plan was essential three-fold: (1) to install curb ramps whenever alterations are made on a curb (2) to install curb ramps in the Central Business District on an accelerated schedule and (3) to budget an annual amount with which to install curb ramps at other locations when specifically requested.

The City of Philadelphia has estimated that installation of curb ramps at all city intersections would encompass 80,000 curb ramps at a cost of $141 million, three times the city's total average annual capital budget.

In a footnote of the decision the judge says,"...the Court is aware of the heavy burden this will place on the city's limited resources.

"It is unfortunate that Congress, in enacting this type of legislation, often fails to provide the means of financing the obligations it imposes."

Beyond the declaration that resurfacing triggers the requirement for curb ramp installation the judge ruled that there is no "undue burden" defense for a city regarding curb ramps. If loss of the undue burden defense is more widely applied to other city facilities municipalities could face much larger and more immediate financial burdens than previously estimated under the ADA.

The city currently plans to appeal this ruling.

In his decision Judge Bartle said that, "The removal of architectural barriers to the disabled, and particularly the installation of curb ramps or slopes, was a major concern of Congress in passing the Americans with Disabilities Act," "Without the ability to cross streets, the opportunities afforded by the Americans with Disabilities Act are of little benefit." ■

Gehrt Savaq

STATE OF KANSAS

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Michael L. Johnston
Secretary of Transportation

Joan Finney
Governor of Kansas

TESTIMONY BEFORE
HOUSE JUDICIARY COMMITTEE
REGARDING H.B. 2500
AMERICANS WITH DISABILITIES ACT
UPDATE TO ACCESSIBILITY STANDARDS
FEBRUARY 23, 1993

Mr. Chairman and Committee Members:

Section 5 of H.B. 2500 amends K.S.A. 1992 Supp. 58-1303 to read that "all existing governmental and public buildings and facilities ...[are] to be readily accessible to and usable by individuals with a disability."

Section 5 can be interpreted to mean that all governmental buildings that have public access must be accessible to the disabled community. However, a literal reading of the Section does not reach this same interpretation. A literal reading of Section 5 leads to the conclusion that all governmental buildings, whether they have public access or not, need to be accessible. A literal reading of Section 5 causes Section 5 to contradict Section 7(a)(A)(i) of the same bill. Furthermore, a literal reading of Section 5 will greatly expand the coverage of Title II of the Americans With Disabilities Act which requires that all programs, services and activities of a governmental entity be accessible.[1]

In very round figures, approximately 300 buildings and facilities owned by the Kansas Department of Transportation would have to be made accessible. These 300 buildings are buildings that are not accessible to the public and in most instances are chemical and equipment storage facilities. It is impossible to say at this time what the total expenditure would be to make over 300 buildings accessible.

Section 5 of H.B. 2500 should be amended to read that only buildings with public access need to be accessible to individuals with a disability. In the alternative, governmental buildings and facilities

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[1]The language in Title II of the Americans with Disabilities Act and the ADA's regulations is very similar to the language in Section 7(a)(A)(i) of H.B. 2500.

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can be deleted from the requirements of Section 5, in that a governmental entity's programs, services and activities are required to be accessible under Section 7(a)(A)(i).

Under the language of Section 5 of H.B. 2500 it is possible that all governmental buildings and facilities could be required to be accessible, including buildings and facilities that do not have public access such as chemical storage facilities. If Section 5 would be interpreted to mean that all governmental buildings must be accessible the cost to KDOT and other governmental entities could be substantial.

THE LEAGUE
OF KANSAS
MUNICIPALITIES

Municipal Legislative Testimony

AN INSTRUMENTALITY OF KANSAS CITIES 112 W. 7TH TOPEKA, KS 66603 (913) 354-9565 FAX (913) 354-4186

TO: House Committee on Judiciary
FROM: Harry Herington, League Attorney
DATE: February 23, 1993
RE: Testimony Opposing HB 2500

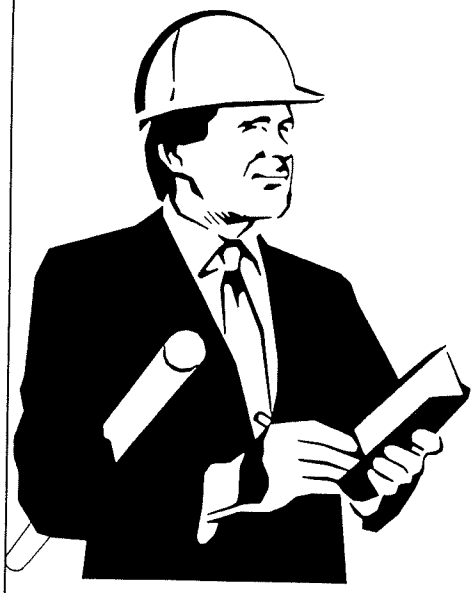
I appreciate the opportunity to appear on behalf of the League of Kansas Municipalities to express our opposition the passage of HB 2500 concerning accessibility standards for public buildings revisions. Although the league is still in the process of sorting out the overwhelming number of changes that this bill proposes, we have concluded that HB 2500 would be another of an ever-growing number of unfunded state mandates imposed on local governments. During the League of Kansas Municipalities annual conference last October, the League's Convention of Voting Delegates issued the following policy statement:

> **"We oppose the imposition of additional state-mandated functions or activities on local governments. State-mandated programs without state funding is contrary to the spirit of constitutional home rule. Any function or activity deemed of sufficient state-wide concern or priority to justify its required local performance should be fully financed by the state on a continuing basis."**

An appropriate example of an unfunded state imposed mandate occurred last session and concerned the Americans with Disabilities Act standards enforcement. The 1992 legislature enacted legislation requiring city building inspectors to enforce the federal ADA accessibility standards in all inspections of permitted public buildings. Interesting the federal ADA does **not** require such enforcement. Source of funding: property tax and other already strained revenue sources.

The league is not here today to oppose legislation that would make public buildings more easily accessible, but to request that the committee be cautious before they pass any legislation that could have a major financial impact on local government. The cities are still coping with the legislation that was passed last session on handicap accessibility and fear that compliance with additional requirements could put them in a financial nightmare.

Local Building Codes and Enforcement by Local Building Inspectors



by Don Moler

Editor's Note: The author is Senior Legal Counsel at the League of Kansas Municipalities.

Much confusion has been generated as a result of House Bill 2602, now codified at Chapter 208 of the 1992 Session Laws of Kansas. This confusion stems from whether local building inspectors are charged with enforcement of the Americans with Disabilities Act (ADA) building requirements as a result of this action by the Kansas state legislature. Clearly, HB 2602 incorporates those building standards required under the Federal ADA of 1990. It is also clear from K.S.A. Supp. 58-1304, as amended by House Bill 2602, that the responsibility for enforcement of K.S.A. 58-1301:58-1309 and 58-1311, as amended, falls to the building inspector or other agency or person designated by the municipality in which the building or facility is located for all buildings which are not owned by a governmental entity (federal, state, county, school district, etc.).

Duty to Inspect Permitted Buildings

This legislation places a special mandate on local building inspectors. It requires building inspectors who issue building permits, renovation permits and/or occupancy permits to enforce the standards adopted by House Bill 2602. These standards are taken directly from the ADA. Thus, the local official responsible for enforcement of K.S.A. 58-1301 *et seq.*, as amended by House Bill 2602, has a duty to ensure that building permits and occupancy permits issued for construction of new "public buildings" are in accordance with the Americans With Disabilities Act Accessibility Guidelines (ADAAG). This applies to all new construction for which first occupancy is scheduled to begin after January 26, 1993. The regulations also require enforcement of the ADAAG standards on all public buildings which are being renovated within the jurisdiction.

No Duty to Inspect Non-Permitted Buildings

Further responsibility of local building officials was limited in Attorney General Opinion 92-106. Specifically, the Attorney General was asked "Does K.S.A. 58-1304, as amended, impose any duty upon local public officials to investigate a complaint regarding barriers in 'public buildings' which deny accessibility to individuals with disabilities if no one has made application for a permit for any alteration or construction of the building?" The Attorney General responded that "[L]ocal public building code officials are not required to investigate complaints or do random checks on buildings to see that they are accessible. Even though they are responsible for the enforcement of the provisions found at K.S.A. 58-1301 through 58-1309, their only means of enforcement is to deny an application for a building permit for the construction or renovation of the building." All complaints about the inaccessibility of non-permitted buildings should be addressed to the Kansas Commission on Civil Rights at (913) 296-3206.

Summary

In summary, House Bill 2602, now codified at Chapter 208 at the 1992 Session Laws of Kansas, imposes a duty on local building officials who issue building and occupancy permits to enforce ADAAG standards for all buildings within their jurisdiction designed for first occupancy after January 26, 1993 and for other buildings and structures for which a permit is requested for alteration of an existing structure. This requirement does not extend to local building officials the responsibility of enforcing these regulations on other units of government which may have buildings or structures located within the municipality. Each unit of government is charged by House Bill 2602 with ensuring its own compliance with the ADAAG standards in governmental structures.

It should be stressed that House Bill 2602 places no duty on those jurisdictions which do not issue building or occupancy permits. Only those jurisdic-tions which issue building and oc-cupancy permits are affected by this legislation.

Questions regarding this information should be directed to the attention of Mary Jane Stattelman, Assistant Attorney General, at (913) 296-2215.

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tions Officers and Advisors (NATOA) Legislative Conference; Place: Washington, D Contact: Renee Winsky (202) 626-3061.

- March 6-9, 1993—Congressional City Conference; Place: Washington Hilton Hotel, Washington, DC; Contact: Diane Ferring (202) 626-3105.
- April 26-27, 1993—National Association of Telecommunications Officers and Advisors (NATOA) Regional Conference; Place: Covington, Ky.; Contact: Renee Winsky (202) 626-3061.
- April 26-29, 1993—USTTA National Rural Tourism Development Conference and NASDA Third Annual National Conference on Tourism Development; Place: Rushmore Plaza Civic Center and Rushmore Plaza Holiday Inn, Rapid City, South Dakota; Contact: Denise M. Boismans (202) 898-1302.
- July 1, 1993 - James C. Howland Award for Urban Enrichment Deadline; Contact: Thom McCloud (202) 626-3120.
- September 8-11, 1993—National Association of Telecommunications Officers and Advisors (NATOA) Annual Conference; Place: Orlando, Fla; Contact: Renee Winsky (202) 626-3061.
- September 14-18, 1993—11th Annual Local Government Professionals Conference; Place: TBA.

the court to enter an injunction to st a test burn which EPA req s the facility to conduct prior to its becoming fully operational. If the facility is enjoined, municipal waste combustion facilities across the country will be at risk, as will the many municipal waste disposal plans that rely on those facilities

Ypsilanti wins round against G.M.

A Michigan County Circuit Court barred General Motors from closing a plant employing 2500 workers last week when it ruled in favor of the City of Ypsilanti. Even though G.M. is losing about $300 million annually at the plant, the court held that the corporation must abide by its promise to keep the plant open through the late 1990's in return for $250 million

Street Resurfacing Triggers ADA Curb Ramp Requirement

by Doug Peterson

Any resurfacing work on a city street will trigger the immediate requirement to install curb ramps at adjacent intersections under a ruling by a U.S. District Court Judge under the Americans with Disabilities Act.

If this judgement is applied nationally cities and towns will face millions of dollars in immediate liabilities.

U.S. District Court Judge Harvey Bartle 3rd has ordered the City of Philadelphia to install curb ramps on all streets on which bids were let for resurfacing since January 26, 1992, the effective date of the Americans with Disabilities Act.

During the trial the City said that its practice regarding curb ramps under a transition plan was essential three-fold: (1) to install curb ramps whenever alterations are made on a curb (2) to install curb ramps in the Central Business District on an accelerated schedule and (3) to budget an annual amount with which to install curb ramps at other locations when specifically requested.

The City of Philadelphia has estimated that installation of curb ramps at all city intersections would encompass 80,000 curb ramps at a cost of $141 million, three times the city's total average annual capital budget.

In a footnote of the decision the judge says,"...the Court is aware of the heavy burden this will place on the city's limited resources.

"It is unfortunate that Congress, in enacting this type of legislation, often fails to provide the means of financing the obligations it imposes."

Beyond the declaration that resurfacing triggers the requirement for curb ramp installation the judge ruled that there is no "undue burden" defense for a city regarding curb ramps. If loss of the undue burden defense is more widely applied to other city facilities municipalities could face much larger and more immediate financial burdens than previously estimated under the ADA.

The city currently plans to appeal this ruling.

In his decision Judge Bartle said that, "The removal of architectural barriers to the disabled, and particularly the installation of curb ramps or slopes, was a major concern of Congress in passing the Americans with Disabilities Act," "Without the ability to cross streets, the opportunities afforded by the Americans with Disabilities Act are of little benefit." ■

connection, audiences cities of S e, Atlant Miami.

White House cuts

President Bill Clint week announced cuts i salaries, and perks White House. The expected to reduce staff White House to a level cent below the Bush House, are intended to l groundwork for the ec recovery plan the Pre intends to unveil Wednesday night, whe ton is expected to a Americans to make sac He also ordered his cab eliminate 100,000 j their agencies. In ad he ordered $9 billion i in travel, administr costs, and consulting ov next four years by his c agencies.

Administration considerir more than $110 billion ir individual and corporate increases

The White House b office is considering $7 lion in individual inco increases over the n years from an increase top tax rate from 31 to cent, increasing the a tive minimum tax, and ing a surtax on millio The administration is ering increases in the t porate tax rate, an inc alternative minimum rate tax, and cappin deduction for executive pensation deductions million annually. Some new revenue is expected offset by new corporat incentives, includin investment tax credit an geted capital gains tax c

Coyne introduces small is idb bill

Rep. William Coyne (I joined by a majority o House tax-writing comm

Session of 1993

2/23/93

HOUSE BILL No. 2500

By Committee on Judiciary

2-17

AN ACT concerning individuals with a disability; relating to accessibility standards for buildings and parking spaces; amending K.S.A. 1992 Supp. 8-1,128, 31-150, 58-1301, 58-1301a, 58-1303, 58-1304, 58-1305, 58-1306, 58-1307, 58-1308, 58-1309, 58-1310a, 58-1311, 79-32,175, 79-32,176 and 79-32,177 and repealing the existing sections; also repealing K.S.A. 1992 Supp. 8-1,128a, 58-1316, 58-1317, 58-1318, 58-1319, 58-1320, 58-1321, 58-1322, 58-1323 and 58-1324.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 1992 Supp. 8-1,128 is hereby amended to read as follows: 8-1,128. (a) Notwithstanding the provisions of K.S.A. 8-2003, and amendments thereto, all designated accessible parking spaces shall be clearly marked by vertically mounted signs bearing the international symbol of access. Such signs shall be displayed with the bottom of the sign ~~not less than~~ *between* 32 *and* 52 inches above the surface of the ~~roadway~~ *parking space*.

(b) ~~As of January 26, 1992, any~~ *Any* owner of private property available for *parking by the* public ~~use establishing a new parking space or relocating an existing parking space for persons with a disability~~, shall ~~conform~~ *ensure that such parking conforms* to the following federal regulation: ~~Section 4.6 of appendix A to~~ *28 CFR* part 36; nondiscrimination on the basis of disability by public accommodations and *in* commercial facilities, ~~28 CFR part 36~~ *appendix A, section 4.1.2, accessible sites and exterior facilities: New construction*, as required by the Americans with disabilities act of 1990, 42 USCA 12101 *et seq*.

Sec. 2. K.S.A. 1992 Supp. 31-150 is hereby amended to read as follows: 31-150. (a) Except as otherwise provided in subsection (b), the construction of school buildings shall comply with the requirements of the 1985 edition of the uniform building code, volume I, and the 1985 edition of the uniform mechanical code, of the international conference of building officials. All electric wiring shall conform to requirements of the 1984 issue of the national electric code of the national fire protection association. Minimum plumbing requirements shall meet the 1985 edition of the uniform plumbing

code issued by the international association of plumbing and mechanical officials.

(b) The construction of mobile, modular, portable or relocatable school buildings shall conform to the requirements of the 1985 edition of the life safety code as adopted by the national fire protection association. Minimum plumbing requirements shall meet the 1985 edition of the uniform plumbing code issued by the international association of plumbing and mechanical officials.

(c) ~~The~~ *All existing school buildings* [*and the design and* construction of all *new, additions to and alterations of* school buildings shall conform to the provisions for making buildings and facilities accessible to, and usable by, ~~persons~~ *individuals* with a disability, as required by K.S.A. 58-1301 through 58-1311, and amendments thereto.

(d) No contract shall be let for the construction of any school building, and it shall be illegal to pay out any public funds for the construction of a school building until the plans for such building shall: (1) Bear the seal of an architect or a professional engineer licensed by the state board of technical professions of the state of Kansas certifying that the plans meet the applicable requirements of this act; and (2) be submitted to the state board of education for approval as to compliance with such requirements.

(e) The provisions of subsections (c) and (d) ~~of this section~~ shall not apply to any building or structure operated or used for any purpose by, or located upon the land of any institution under the control and supervision of the state board of regents.

(f) The relocation of school buildings to which the provisions of subsection (b) apply shall not be construed to be construction or reconstruction under the provisions, or for the purposes, of this section.

(g) The *design and* construction ~~or reconstruction~~ of any *new, addition to or alteration of* school ~~building~~ *buildings and* to which the provisions of this section were applicable prior to ~~January 26, 1992~~ *July 1, 1992*, shall be governed by the provisions of this section which were in effect on the date the contract for such *new* construction ~~or reconstruction~~, *addition or alteration* was entered into.

(h) The state fire marshal shall adopt rules and regulations specifying those subsequent editions of the codes enumerated in subsections (a) and (b) which the state fire marshal has determined provide protection equivalent to those editions specified herein. Compliance with any subsequent edition specified by such rules and regulations shall be considered compliance with the edition of the code specified by this section.

shall comply with the provisions of K.S.A. 58-1305a, and amendments thereto. The

Sec. 3. K.S.A. 1992 Supp. 58-1301 is hereby amended to read as follows: 58-1301. (a) Except as provided in K.S.A. 58-1307, and amendments thereto, all *existing governmental and public buildings and facilities, and the design and construction of any new, additions to, and alterations of governmental and* public buildings and facilities in this state, ~~and additions thereto, and all governmental buildings and facilities in this state, and additions thereto,~~ shall conform to the following ~~federal~~ regulations: ~~Nondiscrimination in state and local government services, 28 CFR Part 35, and nondiscrimination on the basis of disability by public accommodations and commercial facilities, 28 CFR part 36,~~ as required by the Americans With Disabilities Act of 1990, 42 USCA 12101 *et seq.*, ~~enacted on July 26, 1990. Such standards may be modified by rules and regulations adopted by the secretary of administration in accordance with the provisions of K.S.A. 77-415 et seq., and amendments thereto.~~:

(1) For existing governmental buildings and facilities, and the design and construction of any new, additions to, and alterations of governmental buildings and facilities, the provisions of K.S.A. 58-1305, and amendments thereto.

(2) For all existing public buildings and facilities, and the design and construction of any new, additions to and alterations of public buildings and facilities, the provisions of K.S.A. 58-1305, and amendments thereto, and appendix A to 28 CFR part 36.

(b) Qualified historic buildings and facilities shall conform to the regulations in subsection (a)(1) or (a)(2), or the provisions of K.S.A. 58-1305 or 58-1307, and amendments thereto.

(c) Any *existing governmental or* public building or facility ~~or any governmental building or facility, or any addition to any such building or facility~~, *or the design and construction of any new, additions to, or alterations of governmental or public buildings or facilities*, to which the provisions of this section were applicable prior to ~~January 26, 1992~~ *July 1, 1992* shall be governed by the provisions of this section which were in effect on the date the contract for the construction ~~or renovation of such public building or facility~~ or *of any new, addition to or alteration of* such governmental *or public* building or facility, ~~or addition thereto,~~ was entered into.

~~(b)~~ A *(d) Any existing, new, addition to or alteration of a governmental or public* building or facility for which a standard has been waived or modified pursuant to K.S.A. 58-1307, and amendments thereto, shall be deemed to conform to the standards established pursuant to this section if such *governmental or public* building or facility conforms to all such standards which have not been waived

the provisions of K.S.A. 58-1305, and amendments thereto. (3) For

or modified and to any modified standard approved for such *governmental or public* building or facility pursuant to K.S.A. 58-1307, and amendments thereto.

Sec. 4. K.S.A. 1992 Supp. 58-1301a is hereby amended to read as follows: 58-1301a. As used in K.S.A. 58-1301 ~~to 58-1309, inclusive~~ *through 58-1311*, and amendments thereto:

(a) "Alteration" means a change in a governmental or public building or facility that affects or could affect the usability of the building or facility or any part thereof.

(b) "Auxiliary aids and services" includes qualified interpreters, notetakers, computer-aided transcription services, written materials, telephone handset amplifiers, assistive listening devices, assistive listening systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications devices for deaf persons, TDD's, video text displays, or other effective methods of making aurally delivered materials available to individuals with hearing impairments; qualified readers, taped texts, audio recordings, brailled materials, large-print materials, or other effective methods of making visually delivered materials available to individuals with visual impairments; acquisition or modification of equipment or devices; and other similar services and action.

(c) "Commerce" means travel, trade, traffic, commerce, transportation or communication among the several states; between any foreign country or any territory or possession and any state; or between points in the same state but through another state or foreign country.

(d) "Commercial facility" means a building or facility whose operations will affect commerce; or that are intended for nonresidential use by a private entity; but are not buildings or facilities covered or expressly exempted from coverage under the Fair Housing Act of 1968, as amended, 42 U.S.C. 3601 through 3631; aircraft; or railroad locomotives, railroad freight cars, railroad cabooses, commuter or intercity passenger rail cars, including coaches, dining cars, sleeping cars, lounge cars, and food service cars, any other railroad cars described in section 242 of the Americans with Disabilities Act of 1990 or covered under title II of such act, or railroad rights-of-way. "Rail" and "railroad" have the meaning given the term railroad in section 202(e) of the Federal Railroad Safety Act of 1970, 45 U.S.C. 431(e).

(e) "Current illegal use of drugs" means illegal use of drugs that occurred recently enough to justify a reasonable belief that a person's drug use is current or that continuing use is a real and ongoing problem.

Alterations include, but are not limited to, remodeling, renovation, rehabilitation, reconstruction, historic restoration, changes or rearrangement of structural parts or elements, or changes or rearrangement in the plan configuaration of walls and full height partitions. Normal maintenance, reroofing, painting or wallpapering, changes to mechanical and electrical systems, or street resurfacing or repair are not alterations unless they affect the usability of the building or facility.

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(f) "Disability" means, with respect to an individual, a physical or mental impairment that substantially limits one or more of the major life activities of such individual, a record of such an impairment or being regarded as having such an impairment. "Disability" does not include transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders; compulsive gambling, kleptomania, or pyromania; or psychoactive substance use disorders resulting from current illegal use of drugs.

(g) "Disproportionality" means alterations made to provide an accessible path of travel to an altered area will be deemed disproportionate to the overall alteration of an existing public building or facility when the cost exceeds 20% of the cost of the alteration to the primary function area of an existing public building or facility. Costs that may be counted as expenditures required to provide an accessible path of travel may include costs associated with:

(1) Providing an accessible entrance and an accessible route to the altered area, for example, the cost of widening doorways or installing ramps;

(2) making restrooms accessible, such as installing grab bars, enlarging toilet stalls, insulating pipes or installing accessible faucet controls;

(3) providing accessible telephones, such as relocating the telephone to an accessible height, installing amplification devices, or installing a telecommunications device for a deaf person, TDD; and

(4) relocating an inaccessible drinking fountain.

reletter remaining subsections accordingly

(h) "Drug" means a controlled substance, as defined in schedules I through V of section 202 of the controlled substances act, 21 U.S.C. 812.

(i) "Facility" means all or any portion of governmental or public buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots or other real or personal property, including the site where the building, property, structure or equipment is located.

~~(a)~~ *(j)* "Governmental building or facility" means: ~~(1) Any building, structure, recreational area, street, curbing or sidewalk, and access thereto, which is used by the public, or in which persons with a disability may be employed, and which is constructed, purchased, leased or rented in whole or in part by moneys appropriated by the state or any political subdivision thereof and, to the extent not required otherwise by federal law or regulations or not beyond the power of the state to regulate, all buildings and structures used by the public which are con-~~

~~structed, purchased, leased or rented in whole or in part by use of federal funds; or~~

~~(2) any entrance to or accommodation in any building, structure or recreational area described in paragraph (1) of this subsection, which is available for use by the public or employees, including bathrooms, toilet stalls, dining areas, drinking fountains, phone booths and lodging rooms or quarters~~ *any state or local government building or facility; or any department, agency, city, county, special purpose district or other instrumentality of a state or local government.*

(k) "Has a record of such an impairment" means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(l) "Is regarded as having an impairment" means has a physical or mental impairment that does not substantially limit major life activities but that is treated by a private entity as constituting such a limitation; has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or has none of the impairments defined by "physical or mental impairment" in this section but is treated by a private entity as having such an impairment.

~~(b)~~ *(m)* "~~Person~~ *Individual* with a disability" ~~includes any person having a physical handicap due to any nonambulatory, semiambulatory, sight, hearing or any disability of incoordination or aging~~ *means a person who has a disability; but does not include an individual who is currently engaging in the illegal use of drugs, when the governmental entity or person acts on the basis of such use.*

(n) "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.

(o) "Municipality" means any city or county of this state.

(p) A "path of travel" includes a continuous, unobstructed way of pedestrian passage by means of which the altered area may be approached, entered and exited, and which connects the altered area with an exterior approach, including sidewalks, streets and parking areas, an entrance to the facility and other parts of the facility. An accessible path of travel may consist of walks and sidewalks, curb ramps and other interior and exterior pedestrian ramps; clear-floor paths through lobbies, corridors, rooms and other improved areas; parking access aisles; elevators and lifts; or a combination of these elements. For the purpose of this act, the term "path of travel" also includes the restrooms, telephones and drinking fountains serving

the altered area.

(q) "Person" means an individual, partnership, corporation or other association of individuals.

(r) (1) "Physical or mental impairment" means any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or any mental or psychological disorder such as mental retardation, organic grain syndrome, emotional or mental illness and specific learning disabilities;

(2) "Physical or mental impairment": (A) Includes, but is not limited to, such contagious and noncontagious diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease, whether symptomatic or asymptomatic, tuberculosis, drug addiction and alcoholism; and (B) does not include homosexuality or bisexuality.

(s) "Place of public accommodation" means a building or facility, operated by a private entity, whose operations affect commerce and fall within at least one of the following categories:

(1) An inn, hotel, motel or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of the establishment as the residence of the proprietor;

(2) a restaurant, bar or other establishment serving food or drink;

(3) a motion picture house, theater, concert hall, stadium or other place of exhibition or entertainment;

(4) an auditorium, convention center, lecture hall or other place of public gathering;

(5) a bakery, grocery store, clothing store, hardware store, shopping center or other sales or rental establishment;

(6) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital or other service establishment;

(7) a terminal, depot or other station used for specified public transportation;

(8) a museum, library, gallery or other place of public display or collection;

(9) a park, zoo, amusement park or other place of recreation;

(10) a nursery, elementary, secondary, undergraduate, post-graduate private school or other place of education;

(11) a day care center, senior citizen center, homeless shelter, food bank, adoption agency or other social service center establishment; and

(12) a gymnasium, health spa, bowling alley, golf course or other place of exercise or recreation.

(t) A "primary function" is a major activity for which the public building or facility is intended. Areas that contain a primary function are those in which the activities of the entity using the facility are carried out. Mechanical rooms, boiler rooms, supply storage rooms, employee lounges or locker rooms, janitorial closets, entrances, corridors and restrooms are generally not areas containing a primary function.

(u) "Professional office of a health care provider" means a location where a governmental entity or person regulated by a state to provide professional services related to the physical or mental health of an individual makes such services available to the public. The governmental or public building or facility that houses a professional office of a health care provider only includes floor levels housing by at least one health care provider, or any floor level designed or intended for use by at least one health care provider.

(v) "Public accommodation" means a person that owns, leases, leases to, or operates a place of public accommodation.

~~(c)~~ *(w)* (1) "Public building or facility" means: ~~(A) Any building, structure, recreational area, street, curbing or sidewalk, and access thereto, which is used by the public, or in which persons with a disability may be employed, and which is constructed, purchased, leased or rented by the use of private funds; or~~

~~(B) any entrance to or accommodation in any building, structure, or area described in paragraph (1) of this subsection which is available for use by the public or employees, including bathrooms, toilet stalls, dining areas, drinking fountains, phone booths and lodging rooms or quarters~~ *any public accommodation; commercial facility; common use area, as defined in the fair housing act; religious entity, or private club located in this state.*

(2) "Public building or facility" does not include any private single-family dwelling ~~or~~, duplex ~~or any entrance thereto or accommodation therein~~, *condominium, cooperative or multifamily dwelling, which are subject to provisions in the Fair Housing Act of 1968, as amended, 42 U.S.C. 3601 through 3631 et seq. or K.S.A. 44-1001 et seq., and amendments thereto; any establishment located*

or

within a building or facility that contains not more than five rooms for rent or hire and is actually occupied by the proprietor of such establishment as the residence of such proprietor.

~~(d) "Renovate" means an alteration or a change in a building or facility that affects or could affect the usability of the building or any part thereof.~~

~~(1) Alterations include, but are not limited to, remodeling, renovation, rehabilitation, reconstruction, historic restoration, changes or rearrangements in structural parts or elements, and changes or rearrangement in the plan configuration of walls and full-height partitions. Normal maintenance, reroofing, painting or wallpapering, asbestos removal or changes to mechanical and electrical systems are not alterations unless they affect the usability of the building or facility.~~

~~(2) An alteration that affects or could affect the usability of or access to an area of a facility that contains a primary function shall be made so as to ensure that, to the maximum extent feasible, the path of travel to the altered area and the restrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, unless the cost and scope of such alterations is disproportionate to the cost of the overall alteration.~~

~~(e) A "primary function" is a major activity for which the facility is intended. Areas that contain a primary function are those in which the activities of the entity using the facility are carried out. Mechanical rooms, boiler rooms, supply storage rooms, employee lounges or locker rooms, janitorial closets, entrances, corridors and restrooms are generally not areas containing a primary function.~~

~~(f) The phrase "to the maximum extent feasible," as used in this section, applies to the occasional case where the nature of an existing facility makes it virtually impossible to comply fully with applicable accessibility standards through a planned alteration. In these circumstances, the alteration shall provide the maximum physical accessibility feasible. Any altered features of the facility that can be made accessible shall be made accessible. If providing accessibility in conformance with this section to individuals with certain disabilities such as those who use wheelchairs would not be feasible, the facility shall be made accessible to persons with other types of disabilities such as those who use crutches, those who have impaired vision or hearing, or those who have other impairments.~~

~~(g) (1) A "path of travel" includes a continuous, unobstructed way of pedestrian passage by means of which the altered area may be approached, entered, and exited, and which connects the altered area with an exterior approach, including sidewalks, streets, and parking areas, an entrance to the facility, and other parts of the facility. An accessible path of travel may consist of walks and sidewalks, curb ramps and other interior and exterior pedestrian ramps; clear floor paths through lobbies, corridors, rooms, and other improved areas; parking access aisles; elevators and lifts; or a combination of these elements. For the purpose of this act, the term path of travel also includes the restrooms, telephones and drinking fountains serving the altered area.~~

~~(2) Alterations made to provide an accessible path of travel to the altered area will be deemed disproportionate to the overall alteration when the cost exceeds 20% of the cost of the alteration to the primary function area. Costs that may be counted as expenditures required to provide an accessible path of travel may include cost associated with:~~

~~(A) Providing an accessible entrance and an accessible route to the altered area, for example, the cost of widening doorways or installing ramps;~~

~~(B) making restrooms accessible, such as installing grab bars, enlarging toilet stalls, insulating pipes or installing accessible faucet controls;~~

~~(C) providing accessible telephones, such as relocating the telephone to an accessible height, installing amplification devices, or installing a telecommunications device for deaf persons; and~~

~~(D) relocating an inaccessible drinking fountain.~~

~~(h) For purposes of this act, a~~ *(x) A qualified* historic building or facility is ~~one~~ *a "historic property" either* listed in, or eligible for listing in, the national register of historic places under the national preservation act, 16 U.S.C. 470 *et seq.*, or one that is designated as historic under state or local law.

(y) "Readily achievable" means easily accomplishable and able to be carried out without much difficulty or expense. In determining whether an action is readily achievable, factors to be considered include:

(1) The nature and cost of the action needed under this subsection;

(2) the overall financial resources of the site or sites involved in the action; the number of persons employed at the site; the effect

on expenses and resources; legitimate safety requirements that are necessary for safe operation, including crime prevention measures; or the impact otherwise of the action upon the operation of the site;

(3) the geographic separateness, and the administrative or fiscal relationship of the site or sites in question to any parent corporation or entity;

(4) if applicable, the overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of such corporation's or entity's employees; the number, type and location of such corporation's or entity's facilities; and

(5) if applicable, the type of operation or operations of any parent corporation or entity, including the composition, structure and functions of the workforce of the parent corporation or entity.

(z) "Shopping center or shopping mall" means a public building or facility housing five or more sales or rental establishments; or a series of public buildings or facilities on a common site, connected by a common pedestrian access route above or below the ground floor, that is either under common ownership or common control or developed either as one project or as a series of related projects, housing five or more sales or rental establishments. Places of public accommodation of the types listed in paragraph (5) of subsection (s) of the definition of "place of public accommodation" in this section are considered sales or rental establishments. The public building or facility housing a "shopping center or shopping mall" only includes floor level housing at least one sales or rental establishment, or any floor level designed or intended for use by at least one sales or rental establishment.

(aa) "Structurally impracticable" is a term applied to new construction for rare and unusual circumstances where unique characteristics of terrain make accessibility unusually difficult.

(bb) "Technically infeasible" means, with respect to an alteration of a public building or a facility, that it has little likelihood of being accomplished because existing structural conditions would require removing or altering a load-bearing member which is an essential part of the structural frame; or because other existing physical or site constraints prohibit modification or addition of elements, spaces or features which are in full and strict compliance with the minimum requirements for new construction and which are necessary to provide accessibility.

(cc) The phrase "to the maximum extent feasible," as used in this act, applies to the occasional case where the nature of an existing governmental or public building or facility makes it virtually im-

When the term "readily achievable" is used in regard to public buildings and facilities, such public buildings and facilities shall not include commercial facilities.

possible to comply fully with applicable accessibility standards through a planned alteration of the existing governmental or public building or facility. In these circumstances, the alteration shall provide the maximum physical accessibility feasible. Any altered features of the existing governmental or public building or facility that can be made accessible shall be made accessible. If providing accessibility in conformance with this act to individuals with certain disabilities such as those who use wheelchairs would not be feasible, the existing governmental or public building or facility shall be made accessible to individuals with other types of disabilities such as those who use crutches, those who have impaired vision or hearing, or those who have other impairments.

Sec. 5. K.S.A. 1992 Supp. 58-1303 is hereby amended to read as follows: 58-1303. ~~It~~ *This act* is intended to prohibit discrimination on the basis of disability ~~by public entities and public accommodations. All~~ *in all governmental and public buildings and facilities. All existing governmental and public buildings and facilities, and the design and construction of any new, additions to, and alterations of governmental and public* buildings and facilities covered by this act are ~~to be designed, constructed and altered~~ to be readily accessible to and usable by ~~persons~~ *individuals* with a disability.

buildings and facilities that provide services, programs and activities

Sec. 6. K.S.A. 1992 Supp. 58-1304 is hereby amended to read as follows: 58-1304. ~~(a)~~ The *attorney general of the state of Kansas shall oversee the* responsibility for enforcement of ~~K.S.A. 58-1301 to 58-1309, inclusive, and 58-1311, and amendments thereto, shall be as follows~~ *this act by the person, agency or governing body listed as follows*:

~~(1)~~ *(a)* For all ~~school building construction or renovation~~ *existing school buildings, and the design and construction of any new, additions to or alterations of school buildings*, the state board of education, by plan approval as required by K.S.A. 31-150, and amendments thereto;

~~(2)~~ *(b)* for all ~~construction or renovation~~ *existing buildings and facilities, and the design and construction of any new, additions to or alterations of buildings and facilities* for which federal, state, *county, city* or private funds are utilized on state property, the secretary of administration;

~~(3)~~ *(c)* for all ~~construction or renovation~~ *existing buildings and facilities, and the design and construction of any new, additions to or alterations of governmental buildings and facilities* where funds of a county, municipality or other political subdivision are utilized, the governing body thereof or an agency thereof designated by the

governing body;

~~(4)~~ *(d)* for ~~all other construction or renovation of~~ *the design and construction of all other new, additions to or alterations of public* buildings or facilities which are subject to the provisions of ~~K.S.A. 58-1301 to 58-1309, inclusive, and amendments thereto~~ *this act*, the building inspector or other agency or person designated by the municipality in which the *public* building or facility is located.

~~(b) The attorney general of the state of Kansas shall oversee the enforcement of this act by the persons listed in paragraphs (1), (2), (3) and (4) of subsection (a).~~

Sec. 7. K.S.A. 1992 Supp. 58-1305 is hereby amended to read as follows: 58-1305. (a) (1) Existing ~~public~~ *governmental* buildings ~~or~~ *and* facilities shall ~~remove architectural barriers where such removal is readily achievable as further defined in 28 CFR part 36.~~

~~(2) New and altered public buildings or facilities shall be designed and constructed to be readily accessible to and usable by individuals as further defined in 28 CFR part 36.~~

~~(b) (1) Existing governmental buildings or facilities shall conform to the provisions set forth in 28 CFR Part 35 except where it would result in a fundamental alteration in the nature of the program offered in such building or facility or in undue financial and administrative burdens.~~

~~(2) New and altered governmental buildings or facilities shall be designed and constructed to be readily accessible to and usable by individuals as set forth in 28 CFR Part 35.~~

~~(c) Historic buildings or facilities shall conform to the provisions set forth in subsections (d) through (g) of K.S.A. 58-1307, and amendments thereto, where conformance with provisions set forth in 28 CFR Part 35 or 28 CFR part 36 would threaten or destroy the historical significance of the building or facility.~~

~~(d) The design, construction or alteration of public and governmental buildings or facilities shall be done in conformance with the Americans with disabilities act accessibility guidelines for buildings and facilities, appendix A to 28 CFR part 36, except that the elevator exemption contained at section 4.1.3(5) and section 4.1.6(i)(j) shall not apply to governmental buildings or facilities.~~ *conform to the following provisions:*

(A) A governmental entity shall operate each service, program, or activity so that the service, program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities. This paragraph does not:

(i) Necessarily require a governmental entity to make each of its existing buildings and facilities accessible to and usable by individuals with disabilities;

(ii) require a governmental entity to take any action that would threaten or destroy the historic significance of a governmental qualified historic building or facility; or

(iii) require a governmental entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program or activity or in undue financial and administrative burdens. In those circumstances when personnel of the governmental entity believe that the proposed action would fundamentally alter the service, program or activity or would result in undue financial and administrative burdens, a governmental entity has the burden of proving that compliance with this section would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of a governmental entity or such person's designee after considering all resources available for use in the funding and operation of the service, program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, a governmental entity shall take any other action that would not result in such an alteration or such burdens that would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the governmental entity.

(B) A governmental entity may comply with the requirements of this act through such means as redesign of equipment, reassignment of services to accessible buildings or facilities, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing governmental buildings and facilities and construction of new governmental buildings and facilities, use of accessible rolling stock or other conveyances, or any other methods that result in making such entity's services, programs or activities readily accessible to and usable by individuals with disabilities. A governmental entity is not required to make structural changes in existing governmental buildings and facilities where other methods are effective in achieving compliance with this section. A governmental entity, in making alterations to existing governmental buildings and facilities, shall meet the accessibility requirements of this act. In choosing among available methods for meeting the requirements of this act, a governmental entity shall give priority to those methods that offer services, programs and activities to qualified individuals with disabilities in the most integrated setting

appropriate.

(2) The design and construction of any new, additions to and alterations of governmental buildings and facilities shall be as follows:

(A) Each governmental building or facility or part of a governmental building or facility constructed by, on behalf of, or for the use of a governmental entity shall be designed and constructed in such manner that the governmental building or facility or part of the governmental building or facility is readily accessible to and usable by individuals with disabilities, if the construction was commenced after July 1, 1993.

(B) Each governmental building or facility or part of a governmental building or facility altered by, on behalf of, or for the use of a governmental entity in a manner that affects or could affect the usability of the governmental building or facility or part of the governmental building or facility, to the maximum extent feasible, shall be altered in such manner that the altered portion of the governmental building or facility is readily accessible to and usable by individuals with disabilities, if the alteration was commenced after July 1, 1993.

(3) (A) Newly constructed or altered streets, roads and highways must contain curb ramps or other sloped areas at any intersection having curbs or other barriers to entry from a street level pedestrian walkway.

(B) Newly constructed or altered street level pedestrian walkways must contain curb ramps or other sloped areas at intersections to streets, roads or highways.

(4) Design and construction of any new, additions to and alterations of governmental buildings and facilities in conformance with the uniform federal accessibility standards, Appendix A to 41 CFR part 101-19.6 or with the Americans with Disabilities Act accessibility guidelines for buildings and facilities, Appendix A to 28 CFR part 36, shall be deemed to comply with the requirements of this act with respect to those governmental buildings and facilities, except that the elevator exemption contained at section 4.1.3(5) and section 4.1.6(1)(j) of Americans with Disabilities Act accessibility guidelines shall not apply. Departures from particular requirements of either standard by the use of other methods shall be permitted when it is clearly evident that equivalent access to the governmental building or facility or part of the governmental building or facility is thereby provided.

(b) (1) Existing public buildings and facilities , other than governmental buildings and facilities subject to subsection (a), *shall conform to the following provisions:*

(A) All persons shall take those steps that may be necessary to