Approved: 1/21/11
Date

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Lance Kinzer at 3:30 p.m. on January 12, 2011, in Room 346-S of the Capitol.

All members were present.

Committee staff present:
Jill Wolters, Office of the Revisor of Statutes
Matt Sterling, Office of the Revisor of Statutes
Tamera Lawrence, Office of the Revisor of Statutes
Lauren Douglass, Kansas Legislative Research Department
Sue VonFeldt, Committee Assistant

Conferees appearing before the Committee:
Corey Peterson, Associated General Contractors of Kansas
Nancy J. Strouse, Kansas Judicial Council

Others attending:
See attached list.

Chairman Kinzer welcomed all the new members for the 2011 Session and provided a brief overview of the Committee Rules and some insight on expectations from the Judiciary Committee.

Chairman Kinzer proposed the Committee adopt the following requests for bill introductions without objection unless a specific request for a motion/vote is made.

Representative Patton requested a bill to amend the Open Records Act that would allow email addresses and cell phone numbers to not be subject to publication unless used for political or lobby issues.

Representative Colloton requested a bill to cover, under the Kansas Tort Claims Act, ultrasound technologists who assist doctors at charity clinics.

Corey Peterson, Associated General Contractors of Kansas, requested a bill concerning civil procedure, relating to remote claim liens on commercial property; establishing a state construction registry; amending K.S.A. 60-1103, 60-1110 and 60-111 and repealing the existing sections. (Attachment 1)

Nancy Strouse, Kansas Judicial Council, presented the following request for bills : (Attachment 2)

1. A bill proposing amendments to the Rules and Regulations Filing Act relating to "exempt" rules and agency guidance documents.

2. A bill proposing amendments to the Kansas Power of Attorney Act intended to prevent financial exploitation of persons who execute durable powers of attorney.

3. A bill amending the Uniform Trust Code to add a new amendment drafted and approved by the Uniform Law Commissioners, which clarifies when a trustee has an insurable interest in the life of the settlor of a trust.

4. A bill based on a Uniform Probate Code provision that will revoke the inheritance rights of divorced spouses.

Lauren Douglass, House Judiciary Committee member from the Kansas Legislative Research Department, presented a summary of the Special Committee on the Judiciary Interim study assignment resulting in the following conclusions and recommendations: (Attachment 3)

- Recommend, by consensus, to request the Senate Public Health and Welfare Committee provide a status report during the 2011 Legislative Session to a joint meeting of the House and Senate Judiciary Committees on the newly enacted legislation (2010 **HB 2323**) to determine if additional recommendations are needed relating to criminal background checks on individuals and entities associated with adult care home facilities.

Minutes of the House Judiciary Committee at 3:30 p.m. on January 12, 2010, in Room 346-S of the Capitol.

- Recommend the Kansas Judicial Council's approach to an apology law, 2010 **SB 374**, as
- introduced, be adopted.

- Recommend introduction of a House bill on renewal of all the Kansas Open Records Act exceptions scheduled for expiration in 2011, with the additional recommendation that the language in KSA 12-5611 needs to clarify what types of agency actions are covered and should look at penalty provisions for breach of confidentiality in KSA 44-1132, 75-457, and 75-723.

  The committee proposed legislation of one House bill for renewal of all the Kansas Open Records Act exceptions scheduled for expiration in 2011.

The next meeting is scheduled for January 18, 2011.

The meeting was adjourned at 4:20 p.m.

JUDICIARY COMMITTEE GUEST LIST

DATE: 1-12-2011

NAME	REPRESENTING
Corey Peterson	AGC of Kansas
Nancy Strouse	Judicial Council
Patrick Vogelsberg	Kearney and Associates.

Contact: Corey Peterson
Executive Vice President
Associated General Contractors of Kansas
785-266-4015
cpeterson@agcks.org

Requested for introduction as a Committee Bill

AN ACT concerning civil procedure; relating to remote claim liens on commercial property; establishing the state construction registry; amending K.S.A. 60-1103, 60-1110 and 60-1111 and repealing the existing sections.

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

New Section 1. As used in sections 1, 2, 3, 4 and 5, and amendments thereto:

(a) ''Authorized person'' means any individual authorized by an original contractor, subcontractor or remote claimant to act on their behalf.

(b) ''Construction'' means furnishing labor, equipment, materials or supplies for the improvement of a new or pre-existing structure which is not constructed for use as a single-family residence or multi-family residence of four units or less. ''Construction'' does not include highways, roads, bridges, dams or turnpikes.

(c) "Commencement of physical construction" means the first delivery to the construction site of any equipment, materials or supplies to be incorporated into the construction project or when ground is first broken on the construction site, whichever occurs first.

(d) ''Notice of commencement'' means a notice filed by an original contractor with the state construction registry providing the information required to be given pursuant to section 2, and amendments thereto.

(e) ''Notice of furnishing'' means a notice from a subcontractor or remote claimant that is filed within 21 days of the furnishing of labor, materials, equipment or supplies pursuant to section 3, and amendments thereto.

(f) ''Original contractor'' means any contractor who has a contract directly with the owner. ''Original contractor'' may include more than one contractor and be referred to as a general contractor.

(g) ''Owner'' shall include the trustee, agent or spouse of the owner.

(h) ''Remote claimant'' means a subcontractor to a subcontractor, also referred to as a sub-subcontractor, as well as persons who supply materials to subcontractors. Remote claimants have no contract directly with the original contractor.

(i) ''Secretary'' means the secretary of state.

(j) ''State construction registry'' means an electronic web-based system created pursuant to section 4, and amendments thereto, for the purposes of filing and maintaining notifications by original contractors, subcontractors and remote claimants required pursuant to sections 2 and 3, and amendments thereto.

(k) "Subcontractor" means a subcontractor or supplier who has a contract directly with an original contractor.

New Sec. 2. (a) Prior to commencement of physical construction at the project site, any original contractor shall file a notice of commencement with the state construction registry created pursuant to section 4, and amendments thereto. The purpose of the notice of commencement is to notify other persons who are working on the project, including, but not limited to subcontractors or remote claimants that the project has started and to give information concerning the name and address of the owner, the original contractor, and the description of the project.

(b) The notice of commencement shall include the following:

(1) The name and address of the owner of the project contracting for the construction or improvement.

(2) The name and address of any original contractor.

(3) The legal description of the real property or the street address, city, state, county and zip code of the real property on which the construction or improvement is to be made.

(4) A brief description of the construction or improvement to be performed on the property.

(5) The date of the contract between an owner and an original contractor for the construction or improvement.

(6) The name and address of the person preparing the notice of commencement.

(7) The following statement:

''To remote claimants and subcontractors: Take notice that labor or work is about to begin on or equipment, materials or supplies are about to be furnished for an improvement to the real property described in this notice. Any subcontractor or remote claimant may preserve such claimant's full

lien rights by filing a notice of furnishing with the State Construction Registry, within 21 days of furnishing labor, equipment, materials or supplies to this project.''

(c) The notice of commencement shall be deemed sufficient if filed in the form and manner prescribed by the secretary of state.

New Sec. 3. (a) If any original contractor has filed a notice of commencement with the State Construction Registry pursuant to section 2, and amendments thereto, concerning a project for which a subcontractor or remote claimant has furnished labor, equipment, materials or supplies, such subcontractor or remote claimant may file a notice of furnishing with the State Construction Registry within 21 days the date of furnishing of labor, materials, equipment or supplies.

(b) In no event shall the aggregate amount of any liens filed by a remote claimant exceed the net amount due by the original contractor to the subcontractor to whom the remote claimant has supplied labor, equipment, materials or supplies unless the remote claimant has filed a notice of furnishing with the State Construction Registry within 21 days of the date of furnishing of labor, materials, equipment or supplies.

(c) The notice of furnishing shall include the following:

(1) The name and address of persons with whom the subcontractor or remote claimant has contracted concerning the project at the time of filing.

(2) The name, address, telephone number, fax number and e-mail address of the subcontractor or-remote claimant.

(3) A brief description of the construction or improvement to be performed, or equipment, materials or supplies being provided by the subcontractor or remote claimant on the project.

(4) The unique project number assigned by the State Construction Registry.

(d) The notice of furnishing shall be deemed sufficient if filed in the form and manner prescribed by the secretary of state.

(e) One notice of furnishing is required for each project for each subcontractor or remote claimant where such subcontractor or remote claimant has furnished labor, equipment, materials or supplies.

(f) Nothing in this act shall expand or create any additional rights of a person to claim a lien pursuant to K.S.A. 60-1103, and amendments thereto, or to file a claim under a bond furnished pursuant to K.S.A 60-1110 or K.S.A. 60-1111, and amendments thereto.

(g) With the information included in the notice of furnishing, the original contractor may take protective measures by either making direct payments or payments by joint check to a remote claimant to ensure that the remote claimant is paid.

New Sec. 4. (a) The secretary shall implement and maintain the State Construction Registry. When any provision of this act requires any notice to be filed with the State Construction Registry, the notice shall be filed in the form and manner prescribed by the secretary.

(b) A notice of commencement shall contain the information prescribed in section 2, and amendments thereto.

(c) A notice of furnishing shall contain the information prescribed in section 3, and amendments thereto.

(d) Any notice filed with the State Construction Registry shall be executed by an authorized person. The fact that a person's signature appears on such notice shall be prima facie evidence that such person is authorized to execute the notice on behalf of the original contractor, subcontractor or remote claimant and that the notice is subscribed by the person as true, under penalty of perjury.

(e) Upon receipt of any notice, and upon tender of the required fees, the secretary shall certify that the notice has been filed in the office of secretary of state by endorsing upon the notice the word ''filed'' and the date and hour of its filing. This endorsement is the ''filing date'' of the notice and is conclusive of the date and time of its filing in the absence of actual fraud. The secretary shall thereupon record the endorsed notice in the state construction registry and assign a unique project number.

(f) The secretary shall adopt rules and regulations prescribing the form and manner of filing any notice required to be filed with the State Construction Registry and fixing the fees to be charged and collected under this section.

(g) The secretary of state shall remit all moneys received from fees and charges under this section, and amendments thereto, to the state treasurer in accordance with the provisions of K.S.A. 75-4215, and amendments thereto. Upon receipt of each such remittance, the state treasurer shall deposit the entire amount in the state treasury to the credit of the information and services fee fund of the secretary of state.

Sec. 5. The provisions of sections 1 through 4, and amendments thereto, shall apply to projects that commence physical construction work at the project site on or after July 1, 2012.

Sec. 6. K.S.A. 60-1103 is hereby amended to read as follows: 60-1103. (a) *Procedure.* Any ~~supplier~~ *remote claimant* or subcontractor, *as defined in section 1, and amendments thereto*, or other person furnishing labor, equipment, material or supplies, used or consumed at the site of the property subject to the lien, under an agreement with the contractor, subcontractor or owner contractor may obtain a lien for the amount due in the same manner and to the same extent as the original contractor except that:

(1) The lien statement must state the name of the contractor and be filed within three months after the date supplies, material or equipment was last furnished or labor performed by the claimant;

(2) if a warning statement is required to be given pursuant to K.S.A. 60-1103a, and amendments thereto, there shall be attached to the lien statement the affidavit of the supplier or subcontractor that such warning statement was properly given;

(3) a notice of intent to perform, if required pursuant to K.S.A. 60-1103b, and amendments thereto, must have been filed as provided by that section; *and*

(b) If a notice of furnishing has not been filed as provided for in section 3 by a remote claimant as defined in section 1 and amendments thereto the aggregate amount of any liens filed by a remote claimant may not exceed the net amount due from the original contractor under the terms of the subcontract with the subcontractor to whom the remote claimant has supplied labor, equipment, materials or supplies.

(~~b~~ *c*) Owner contractor is defined as any person, firm or corporation who:

(1) Is the fee title owner of the real estate subject to the lien; and

(2) enters into contracts with more than one person, firm or corporation for labor, equipment, material or supplies used or consumed for the improvement of such real property.

(~~c~~ *d*) *Recording and notice.* When a lien is filed pursuant to this section, the clerk of the district court shall enter the filing in the general index. The claimant shall (1) cause a copy of the lien statement to be served personally upon any one owner, any holder of a recorded equitable interest and any party obligated to pay the lien in the manner provided by K.S.A. 60-304, and amendments thereto, for the service of summons within the state, or by K.S.A. 60-308, and amendments thereto, for service outside of the state, (2) mail a copy of the lien statement to any one owner of the property, any holder of a recorded equitable interest and to any party obligated to pay

the same by restricted mail or (3) if the address of any one owner or such party is unknown and cannot be ascertained with reasonable diligence, post a copy of the lien statement in a conspicuous place on the premises. The provisions of this subsection requiring that the claimant serve a copy of the lien statement shall be deemed to have been complied with, if it is proven that the person to be served actually received a copy of the lien statement. No action to foreclose any lien may proceed or be entered against residential real property in this state unless the holder of a recorded equitable interest was served with notice in accordance with the provisions of this subsection.

(~~d~~ *e*) *Rights and liability of owner.* The owner of the real property shall not become liable for a greater amount than the owner has contracted to pay the original contractor, except for any payments to the contractor made:

(1) Prior to the expiration of the three-month period for filing lien claims, if no warning statement is required by K.S.A. 60-1103a, and amendments thereto; or

(2) Subsequent to the date the owner received the warning statement, if a warning statement is required by K.S.A. 60-1103a, and amendments thereto, the owner may discharge any lien filed under this section which the contractor fails to discharge and credit such payment against the amount due the contractor.

(~~e~~ *f*) Notwithstanding subsection (a)(1), a lien for the furnishing of labor, equipment, materials or supplies on property other than residential property may be claimed pursuant to this section, and amendments thereto, within five months only if the claimant has filed a notice of extension within three months since last furnishing labor, equipment, materials or supplies to the job site, *or has filed a notice of furnishing in accordance with new section 3.*The notice of extension notice shall be filed in the office of the clerk of the district court of the county where such property is located and shall be mailed by certified and regular mail to the general contractor or construction manager and a copy to the owner by regular mail, if known. The notice of extension shall be deemed sufficient if in substantial compliance with the form set forth by the judicial council.

Sec. 7. K.S.A. 60-1110 is hereby amended to read as follows: 60-1110.

(a) The contractor or owner may execute a bond to the state of Kansas for the use of all persons in whose favor liens might accrue by virtue of this act, conditioned for the payment of all claims which might be the basis of liens in a sum not less than the contract price, or to any person claiming a lien which is disputed by the owner or contractor, conditioned for the payment of such

claim in the amount thereof. Any such bond shall have good and sufficient sureties, be approved by a judge of the district court and filed with the clerk of the district court. When bond is approved and filed, no lien for the labor, equipment, material or supplies under contract, or claim described or referred to in the bond shall attach under this act, and if when such bond is filed liens have already been filed, such liens are discharged. Suit may be brought on such bond by any person interested but no such suit shall name as defendant any person who is neither a principal or surety on such bond, nor contractually liable for the payment of the claim.

(b) If a notice of furnishing has not been filed as provided for in section 3 by a remote claimant as defined in section 1 and amendments thereto, making a claim under the bond, the aggregate amount of the bond claims made by the remote claimant may not exceed the net amount due by the original contractor under the terms of the subcontract with the subcontractor to whom the remote claimant has supplied labor, equipment, materials or supplies.

Sec. *8*. K.S.A. 60-1111 is hereby amended to read as follows: 60-1111. (a) *Bond by contractor.* Except as provided in this section, whenever any public official, under the laws of the state, enters into contract in any sum exceeding $100,000 with any person or persons for the purpose of making any public improvements, or constructing any public building or making repairs on the same, such officer shall take, from the party contracted with, a bond to the state of Kansas with good and sufficient sureties in a sum not less than the sum total in the contract, conditioned that such contractor or the subcontractor of such contractor shall pay all indebtedness incurred for labor furnished, materials, equipment or supplies, used or consumed in connection with or in or about the construction of such public building or in making such public improvements. A contract which requires a contractor or subcontractor to obtain a payment bond or any other bond shall not require that such bond be obtained from a specific surety, agent, broker or producer. A public official entering into a contract which requires a contractor or subcontractor to obtain a payment bond or any other bond shall not require that such bond be obtained from a specific surety, agent, broker or producer.

(b) *Filing and limitations.* The bond required under subsection (a) shall be filed with the clerk of the district court of the county in which such public improvement is to be made. When such bond is filed, no lien shall attach under this article. Any liens which have been filed prior to the filing of such bond shall be discharged. Any person to whom there is due any sum for labor or material

furnished, as stated in subsection (a), or such person's assigns, may bring an action on such bond for the recovery of such indebtedness but no action shall be brought on such bond after six months from the completion of such public improvements or public buildings.

(c) In any case of a contract for construction, repairs or improvements for the state or a state agency under K.S.A. 75-3739 or 75-3741, and amendments thereto, a certificate of deposit payable to the state may be accepted in accordance with and subject to K.S.A. 60-1112, and amendments thereto. When such certificate of deposit is so accepted, no lien shall attach under this article. Any liens which have been filed prior to the acceptance of such certificate of deposit shall be discharged. Any person to whom there is due any sum for labor furnished, materials, equipment or supplies used or consumed in connection with or for such contract for construction, repairs or improvements shall make a claim therefor with the director of purchases under K.S.A. 60-1112, and amendments thereto.

(d) If a notice of furnishing has not been filed as provided for in section 3 by a remote claimant as defined in section 1 and amendments thereto, making a claim under the bond, the aggregate amount of the bond claims made by the remote claimant may not exceed the net amount due by the original contractor under the terms of the subcontract with the subcontractor to whom the remote claimant has supplied labor, equipment, materials or supplies.

Sec. 9. K.S.A. 60-1103, 60-1110 and 60-1111 are hereby repealed.

Sec. 10. This act shall take effect and be in force from and after July 1, 2012, and its publication in the statute book.

KANSAS JUDICIAL COUNCIL

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MEMORANDUM

TO: **House Judiciary Committee**
FROM: **Kansas Judicial Council – Nancy J. Strouse**
DATE: **January 12, 2011**
RE: **2011 Judicial Council Bill Requests**

The Judicial Council respectfully requests introduction of the following bills:

- A bill proposing amendments to the Rules and Regulations Filing Act relating to "exempt" rules and agency guidance documents.
- A bill proposing amendments to the Kansas Power of Attorney Act intended to prevent financial exploitation of persons who execute durable powers of attorney.
- A bill amending the Uniform Trust Code to add a new amendment drafted and approved by the Uniform Law Commissioners which clarifies when a trustee has an insurable interest in the life of the settlor of a trust.
- A bill based on a Uniform Probate Code provision that will revoke the inheritance rights of divorced spouses.

House Judiciary
Date 1-12-11
Attachment # 2

Approved by the Judicial Council December 3, 2010

November 19, 2010

REPORT OF THE JUDICIAL COUNCIL ADMINISTRATIVE PROCEDURE ADVISORY COMMITTEE ON "EXEMPT" RULES AND REGULATIONS AND GUIDANCE DOCUMENTS

BACKGROUND

In 2009, the Judicial Council's Administrative Procedure Advisory Committee conducted a study of the Rules and Regulations Filing Act, K.S.A. 77-415 *et seq.* The Committee recommended a number of amendments to improve public access to and notice of the rulemaking process and to give the Secretary of State's office more flexibility in the filing and publication of rules and regulations. See 2010 H. Sub for SB 213. However, at the time the Committee finalized the proposed legislation, the issue of "exempt" rules and regulations remained on the Committee's agenda for further study. During the 2010 session, a provision relating to guidance documents was deleted from the Committee's proposed legislation, so that issue was also placed on the Committee's agenda.

COMMITTEE MEMBERSHIP

The members of the Administrative Procedure Advisory Committee are:

Carol L. Foreman, Chair, Topeka; former Deputy Secretary of the Department of Administration

Yvonne Anderson, Topeka; General Counsel for the Kansas Department of Health and Environment

Martha Coffman, Lawrence; Chief Advisory Counsel for the Kansas Corporation Commission

Tracy T. Diel, Topeka; Director of the Office of Administrative Hearings

James G. Flaherty, Ottawa; practicing attorney

Jack Glaves, Wichita; practicing attorney

Hon. Steve Leben, Fairway; Kansas Court of Appeals Judge

Prof. Richard E. Levy, Lawrence; Professor at the University of Kansas School of Law

Camille A. Nohe, Topeka; Assistant Attorney General

Hon. Eric Rosen, Topeka; Kansas Supreme Court Justice
Steve A. Schwarm, Topeka; practicing attorney
John S. Seeber, Wichita; practicing attorney
Mark W. Stafford, Topeka; practicing attorney

Two additional persons with rulemaking expertise also served on a temporary basis during the study of rulemaking statutes:

Rep. Janice Pauls, Hutchinson; State Representative from the 102nd District and ranking Democrat on the Joint Committee on Rules and Regulations
Diane Minear, Tonganoxie; Legal Counsel for the Secretary of State

METHOD OF STUDY

The Administrative Procedure Advisory Committee held several meetings, solicited input from state agencies, and circulated drafts of proposed amendments to state agency legal counsel for comment. The Committee also invited Representative Melvin Neufeld to participate during the study because of his interest in 2010 H. Sub for SB 213 and experience with legislative oversight of the rulemaking process.

COMMITTEE RECOMMENDATION

Exempt rules and regulations: the problem

Current Kansas law defines "rule and regulation" to mean "a standard, statement of policy or general order . . . of general application and having the effect of law, issued or adopted by a state agency to implement or interpret legislation enforced or administered by such state agency or to govern the organization or procedure of such state agency." See K.S.A. 77-415(d)(1) (as amended by L. 2010, Ch. 95, Sec. 1). The statute then provides a laundry list of rules and regulations which are not rules and regulations for purposes of the act – in other words, "exempt" rules and regulations. See K.S.A. 77-415(d)(2). The Committee found that the

laundry list of "exempt" rules and regulations in K.S.A. 77-415(d)(2) actually contains two different categories of rules: 1) agency actions, such as policy statements and orders, that are not rules and regulations at all, and 2) specific types of rules and regulations that are subject to only a limited rulemaking process. However, the Act treats both of these categories in the same manner.

The Committee also found the Rules and Regulations Filing Act to be unclear as to what process is required to adopt an "exempt" rule and regulation. K.S.A. 77-421a provides that "exempt" rules and regulations "shall be adopted in the manner prescribed by K.S.A. 77-421 and amendments thereto after notice has been given and a hearing held in the manner prescribed by K.S.A. 77-421 and amendments thereto." The Committee believes this provision can be interpreted in two different ways. One possible interpretation of the statute is that any exempt rule and regulation listed in K.S.A. 77-415(d)(2) must be adopted using the process set out by K.S.A. 77-421. Another possible interpretation is that K.S.A. 77-421 must be followed only if an agency wants the exempt rule and regulation to be an actual rule and regulation, in other words, to have the force and effect of law. The committee was concerned that, under either interpretation, agency actions that are not rules and regulations (such as adjudicatory orders) might be required to go through procedures that were unnecessary and inappropriate.

The Committee solicited input from state agencies about how they interpret and apply K.S.A. 77-415 and 77-421a, and whether they currently adopt "exempt" rules and regulations. The responses the Committee received indicated that the current statutes have created considerable uncertainty and that agencies understand and apply the statutes in various ways. The responses also indicated that few agencies promulgate "exempt" rules and regulations in reliance on a specific exception in K.S.A. 77-415.

The Solution: Recommended Amendments

The Committee recommends amending K.S.A. 77-415 to clarify and simplify the definition of rule and regulation and eliminate the long list of kinds of agency action excluded from the definition of rules and regulations contained in K.S.A. 77-415(d)(2). The Committee

also recommends repealing K.S.A. 77-421a relating to an abbreviated process for the "exempt" rules and regulations listed in K.S.A. 77-415(d)(2). A redline version showing the specific amendments can be found at pages 7-10 of this report. In drafting the proposed amendments, the Committee's primary goals were to resolve the confusion surrounding exempt rules and regulations, to clarify the terminology used in the statutes, and to encourage consistency in agency procedure and practice.

The central premise of the Committee's recommendation is that, except for a few specific exemptions, only agency rules and regulations that comply with the procedures of the Rules and Regulations Filing Act can have binding legal effect. This premise is expressly stated in new subsection K.S.A. 77-415(a)(1). New subsections K.S.A. 77-415(a)(2)(A) through (D) specify the extent to which agencies may continue to articulate policy through actions that are not rules and regulations, including orders following adjudications, personnel and other internal policies, use of forms, and publication of information and guidance to the public, while specifying that internal policies, forms, and information or guidance may not bind the public. These provisions correspond to some exclusions from the definition of rules and regulations under current law.

After receiving comments from the State Board of Regents, State Board of Education, and Department of Corrections, the Committee also included exemptions for certain policies relating to public educational institutions and certain rules and orders relating to correctional institutions. See new subsections K.S.A. 77-415(a)(2)(E) and (F). Again, these provisions correspond to exclusions under current law.

New subsection K.S.A. 77-415(a)(2)(G) provides that, if an agency's organic statutes provide some other procedure for adopting rules and regulations or other policies, those provisions apply instead of the Rules and Regulations Filing Act.

The definitions (which used to be subsections) have been consolidated as numbered paragraphs in subsection (b). The definition of rules and regulations contained in new K.S.A. 77-415(b)(4) has been amended so that it is relatively short and includes any policy with binding legal effects. The definition of person contained in new K.S.A. 77-415(b)(3) has been amended

to include a person, individual or any other legal or commercial entity.

The Committee's recommended amendments would eliminate most of the specific exclusions for particular kinds of "exempt" rules and regulations. Along with eliminating the concept of "exempt" rules and regulations, the Committee recommends repealing K.S.A. 77-421a. The Committee found that statute has proven confusing in its application, as agency comments revealed that different agencies interpret the statute differently. In addition, the provision appeared to have little, if any, actual impact on agency practice.

Finally, the Committee recommends repealing K.S.A. 77-438 and placing its contents at the beginning of new K.S.A. 77-415(a). This change is technical and not substantive.

Guidance documents

The Committee also recommends that a new guidance document provision be added to the Rules and Regulations Filing Act. See proposed new section at page 11 of this report. The guidance document provision is designed to encourage agencies to advise the public of their current opinions and approaches by using guidance documents (also often called interpretive rules or policy statements). A guidance document, in contrast to a rule, lacks the force of law and is not binding. The section recognizes the agencies' need to use such documents to guide both agency employees and the public. The statutes and regulations an agency implements often require interpretation or entail discretion in their application, and the public has an interest in knowing the agency's position. Increasing public knowledge reduces unintentional violations and lowers transaction costs. For example, a company may find that an agency has a guidance document and that the company can reasonably comply with the document's interpretation of a statute or regulation. In that case, the company may proceed based on the guidance document rather than engaging in extensive legal consultations, regulatory proceedings, or even litigation.

This section strengthens agencies' abilities to fulfill these legitimate objectives by explicitly excusing them from having to comply with formal rulemaking procedures before issuing nonbinding statements. Meanwhile, the section incorporates safeguards to ensure that agencies will not use guidance documents in a manner that would undermine the public's interest

in administrative openness and accountability. The section also encourages broad public accessibility to guidance documents through agency websites.

This section is based, in part, upon section 311 of the Revised Model State Administrative Procedure Act (2010). The above comments are based, in part, upon the Model Act comments to section 311.

K.S.A. 77-415. Citation of act; general provisions; definitions.

(a) K.S.A. 77-415 through 77-437, and amendments thereto, shall be known and may be cited as the Kansas rules and regulations filing act.

(1) Unless otherwise provided by statute or constitutional provision each rule and regulation issued or adopted by a state agency must comply with the requirements of the Kansas rules and regulations filing act. Except as provided in this section, any standard, requirement or other policy of general application may be given binding legal effect only if it has complied with the requirements of the Kansas rules and regulations filing act.

(2) Notwithstanding the provisions of this section:

(A) An agency may bind parties, establish policies, and interpret statutes or regulations by order in an adjudication pursuant to procedures provided by law; provided, however, that no non-party to an adjudication may be adversely affected by an order unless the order is readily available to the public.

(B) Statements of agency policy directed to agency personnel relating to the performance of their duties or the internal management or organization of the agency may be treated as binding within the agency, but such statements may not be relied on to bind the general public.

(C) Agencies may provide forms, the content or substantive requirements of which are prescribed by rule and regulation or statute; provided, however, that no form may give rise to any legal rights or duties or be treated as authority for any standard, requirement or policy reflected therein.

(D) Agencies may provide guidance or information to the public describing agency policies or statutory or regulatory requirements; provided, however, that no guidance or information may give rise to any legal rights or duties or be treated as authority for any standard, requirement or policy reflected therein.

(E) Policies relating to the curriculum of public educational institutions or to the administration, conduct, discipline, or graduation of students from such institutions, as well as parking and traffic regulations of state educational institutions under the control and supervision of the state board of regents shall not be subject to the Kansas rules and regulations filing act.

(F) Rules and regulations relating to the emergency or security procedures of a correctional institution, as defined in subsection (d) of K.S.A. 75-5202, and amendments thereto, and orders issued by the secretary of corrections or wardens of correctional institutions under K.S.A. 75-5256, and amendments thereto, shall not be subject to the Kansas rules and regulations filing act.

(G) When a statute authorizing an agency to issue rules and regulations or take other action specifies the procedures for doing so, those procedures shall apply instead of the procedures in the Kansas rules and regulations filing act.

(b) As used in ~~K.S.A. 77-415 through 77-437, and amendments thereto~~ the Kansas rules and regulations filing act, unless the context clearly requires otherwise:

~~(a)~~ (1) "Board" means the state rules and regulations board established under the provisions of K.S.A. 77-423, and amendments thereto.

~~(b)~~ (2) "Environmental rule and regulation" means:
~~(1)~~ (A) A rule and regulation adopted by the secretary of agriculture, the secretary of health and environment or the state corporation commission, which has as a primary purpose the protection of the environment; or
~~(2)~~ (B) a rule and regulation adopted by the secretary of wildlife and parks concerning threatened or endangered species of wildlife as defined in K.S.A. 32-958, and amendments thereto.

~~(c)~~ (3) "Person" means a person, individual, firm, association, organization, partnership, business trust, corporation, ~~or~~ company, or any other legal or commercial entity.

~~(d) (1)~~ (4) "Rule and regulation," "rule," and "regulation" mean a standard, requirement or other policy of general application, including amendments or revocations thereof, issued or adopted by a state agency to implement or interpret legislation, that has the force and effect of law. ~~and words of like effect mean a standard, statement of policy or general order, including amendments or revocations thereof, of general application and having the effect of law, issued or adopted by a state agency to implement or interpret legislation enforced or administered by such state agency or to govern the organization or procedure of such state agency. Every rule and regulation adopted by a state agency to govern its enforcement or administration of legislation shall be adopted by the state agency and filed as a rule and regulation as provided in this act. The fact that a statement of policy or an interpretation of a statute is made in the decision of a case or in a state agency decision upon or disposition of a particular matter as applied to a specific set of facts does not render the same a rule and regulation within the meaning of the foregoing definition, nor shall it constitute specific adoption thereof by the state agency so as to be required to be filed.~~
~~(2) A rule and regulation as herein defined shall not include any rule and regulation which:~~
~~(A) Relates to the internal management or organization of the agency and does not affect private rights or interest;~~
~~(B) is an order directed to specifically named persons or to a group which does not constitute a general class and the order is served on the person or persons to whom it is directed by appropriate means. The fact that the named person serves a group of unnamed persons who will be affected does not make such an order a rule and regulation;~~
~~(C) relates to the use of highways and is made known to the public by means of signs or signals;~~
~~(D) relates to the construction and maintenance of highways or bridges or the laying out or relocation of a highway other than bidding procedures or the management and regulation of rest areas;~~
~~(E) relates to the curriculum of public educational institutions or to the administration, conduct, discipline, or graduation of students from such institutions or relates to parking and traffic regulations of state educational institutions under the control and supervision of the state board of regents;~~

~~(F) relates to the emergency or security procedures of a correctional institution, as defined in subsection (d) of K.S.A. 75-5202, and amendments thereto;~~
~~(G) relates to the use of facilities by public libraries;~~
~~(H) relates to military or naval affairs other than the use of armories;~~
~~(I) relates to the form and content of reports, records or accounts of state, county or municipal officers, institutions, or agencies;~~
~~(J) relates to expenditures by state agencies for the purchase of materials, equipment, or supplies by or for state agencies, or for the printing or duplicating of materials for state agencies;~~
~~(K) establishes personnel standards, job classifications, or job ranges for state employees who are in the classified civil service;~~
~~(L) fixes or approves rates, prices, or charges, or rates, joint rates, fares, tolls, charges, rules, regulations, classifications or schedules of common carriers or public utilities subject to the jurisdiction of the state corporation commission, except when a statute specifically requires the same to be fixed by rule and regulation;~~
~~(M) determines the valuation of securities held by insurance companies;~~
~~(N) is a statistical plan relating to the administration of rate regulation laws applicable to casualty insurance or to fire and allied lines insurance;~~
~~(O) is a form, the content or substantive requirements of which are prescribed by rule and regulation or statute;~~
~~(P) is a pamphlet or other explanatory material not intended or designed as interpretation of legislation enforced or adopted by a state agency but is merely informational in nature;~~
~~(Q) establishes seasons and fixes bag, creel, possession, size or length limits for the taking or possession of wildlife, if such seasons and limits are made known to the public by other means; or~~
~~(R) establishes records retention and disposition schedules for any or all state agencies.~~
~~(e)~~ (5) "Rulemaking" shall have the meaning ascribed to it in K.S.A. 77-602, and amendments thereto.

~~(f)~~ (6) "Small employer" means any person, firm, corporation, partnership or association that employs not more than 50 employees, the majority of whom are employed within this state.

~~(g)~~ (7) "State agency" means any officer, department, bureau, division, board, authority, agency, commission or institution of this state, except the judicial and legislative branches, which is authorized by law to promulgate rules and regulations concerning the administration, enforcement or interpretation of any law of this state.

~~K.S.A. 77-421a. Procedure for adoption of rules and regulations not subject to 77-415 et seq.; exception.~~
~~Whenever any officer, department, bureau, division, board, authority, agency, commission or institution of this state, except the judicial and the legislative branches, is authorized by law to promulgate rules and regulations concerning the administration, enforcement or interpretation of any law of this state, and such rules and regulations are exempt from the requirements of K.S.A. 77-415 *et seq.*, and amendments thereto, by virtue of the definition of "rule or regulation" in~~

~~subsection (e) of K.S.A. 77-415, and amendments thereto, such rules and regulations shall be adopted in the manner prescribed by K.S.A. 77-421, and amendments thereto, after notice has been given and a hearing held in the manner prescribed by K.S.A. 77-421, and amendments thereto. This section shall not apply to orders issued by directors of correctional institutions under K.S.A. 75-5256, and amendments thereto.~~

~~77-438. Citation of act. K.S.A. 77-415 to 77-437, inclusive, and acts amendatory thereof or supplemental thereto shall be known and may be cited as the rules and regulations filing act.~~

New section to be included in the rules and regulations filing act:

(a) A state agency may issue a guidance document without following the procedures set forth in this act for the adoption of rules and regulations. "Guidance document" means a record of general applicability, designated by an agency as a guidance document, that lacks the force of law but states the agency's current approach to, or interpretation of, law, or general statements of policy that describe how and when the agency will exercise discretionary functions.

(b) A guidance document may contain binding instructions to state agency staff members except officers who preside in adjudicatory proceedings.

(c) If a state agency proposes to act in an adjudication at variance with a position expressed in a guidance document, it shall provide a reasonable explanation for the variance. If an affected person in an adjudication may have reasonably relied on the agency's position, the explanation must include a reasonable justification for the agency's conclusion that the need for the variance outweighs the affected person's reliance interests.

(d) Each state agency shall maintain an index of all of its currently effective guidance documents, publish the index on its website, make all guidance documents available to the public, and file the index in the manner prescribed by the secretary of state.

(e) A guidance document may be considered by a presiding officer or agency head in an agency adjudication but it does not bind any party, the presiding officer or the agency head.

58-651

Chapter 58.--PERSONAL AND REAL PROPERTY
Article 6.--POWERS AND LETTERS OF ATTORNEY

58-651. Definitions. As used in the Kansas power of attorney act:

(a) "Attorney in fact" means an individual, corporation or other legal entity appointed to act as agent of a principal in a written power of attorney.

(b) "Court" means the district court.

(c) "Disabled" means a person who is wholly or partially disabled as defined in K.S.A. 77-201, and amendments thereto, or a similar law of the place having jurisdiction of the person whose capacity is in question.

(d) "Durable power of attorney" means a written power of attorney in which the authority of the attorney in fact does not terminate in the event the principal becomes disabled or in the event of later uncertainty as to whether the principal is dead or alive and which complies with subsection (a) of K.S.A. 58-652, and amendments thereto, or is durable under the laws of any of the following places:

(1) The law of the place where executed;

(2) the law of the place of the residence of the principal when executed; or

(3) the law of a place designated in the written power of attorney if that place has a reasonable relationship to the purpose of the instrument.

(e) "Legal representative" means a decedent's personal representative, a guardian or a conservator.

(f) "Nondurable power of attorney" means a written power of attorney which does not meet the requirements of a durable power of attorney.

(g) "Person" means an adult individual, corporation or other legal entity.

(h) "Personal representative" means a legal representative as defined in K.S.A. 59-102, and amendments thereto.

(i) "Power of attorney" means a written power of attorney, either durable or nondurable.

(j) "Principal's family" means the principal's parent, grandparent, uncle, aunt, brother, sister, son, daughter, grandson, granddaughter and their descendants, whether of the whole blood or the half blood, or by adoption, and the principal's spouse, spouse's parent, stepparent and stepchild.

(k) "Third person" means any individual, corporation or legal entity that acts on a request from, contracts with, relies on or otherwise deals with an attorney in fact pursuant to authority granted by a principal in a power of attorney and includes a partnership, either general or limited, governmental agency, financial institution, issuer of securities, transfer agent, securities or commodities broker, real estate broker, title insurance company, insurance company, benefit plan, legal representative, custodian or trustee.

Chapter 58: Personal and Real Property
Article 6: Powers and Letters of Attorney

Statute 58-652: Effectiveness of power of attorney; recording; revocation; attorney in fact.

(a) The authority granted by a principal to an attorney in fact in a written power of attorney is not terminated in the event the principal becomes wholly or partially disabled or in the event of later uncertainty as to whether the principal is dead or alive if:

(1) The power of attorney is denominated a "durable power of attorney;"

(2) The power of attorney includes a provision that states in substance one of the following:

(A) "This is a durable power of attorney and the authority of my attorney in fact shall not terminate if I become disabled or in the event of later uncertainty as to whether I am dead or alive"; or

(B) "This is a durable power of attorney and the authority of my attorney in fact, when effective, shall not terminate or be void or voidable if I am or become disabled or in the event of later uncertainty as to whether I am dead or alive";

(3) The durable power of attorney:

(A) ~~(3) the power of attorney~~ Is signed by the principal, and dated and acknowledged in the manner prescribed by K.S.A. 53-501 et seq., and amendments thereto. If the principal is physically unable to sign the power of attorney but otherwise competent and conscious, the power of attorney may be signed by an adult designee of the principal in the presence of the principal and at the specific direction of the principal expressed in the presence of a notary public. The designee shall sign the principal's name to the power of attorney in the presence of a notary public, following which the document shall be acknowledged in the manner prescribed by K.S.A. 53-501 et seq., and amendments thereto, to the same extent and effect as if physically signed by the principal~~.~~; and

(B) Before the durable power of attorney becomes effective, is signed and dated by the attorney in fact before a notary public acknowledging that the attorney in fact or successor attorney in fact is the person identified in the durable power of attorney as an attorney in fact for the principal, that he or she has read the "Notice to Person Accepting the Appointment as Attorney in Fact," and that he or she understands and acknowledges the legal responsibilities imposed upon him or her as attorney in fact;

(4) The durable power of attorney contains the following warning statement to the principal at the beginning of the durable power of attorney, in not less than 14-point boldface type, or a reasonable equivalent thereof:

"Notice to Person Executing Durable Power of Attorney.

A durable power of attorney is an important legal document. You should read this durable power of attorney carefully. When effective, this durable power of attorney will give your attorney in fact the right to deal with property that you now own or might acquire in the future. If you do not understand the durable power of attorney, or any provision of it, you should ask your attorney to explain it to you prior to signing the document"; and

(5) The durable power of attorney contains the following notice statement to the attorney in fact at the conclusion of the durable power of attorney, in not less than 12-point type, or a reasonable equivalent thereof:

"Notice to Person Accepting the Appointment as Attorney in Fact.

A person who is appointed an attorney in fact under a durable power of attorney has no duty to exercise the authority conferred in the power of attorney, unless the attorney in fact has agreed expressly in writing to act for the principal in such circumstances. By acting or agreeing to act as the attorney in fact under this durable power of attorney you assume the fiduciary and other legal responsibilities of an agent. This relationship will continue until you resign or the durable power of attorney is revoked or terminated. Your responsibilities include:

1. The legal duty to act according to the instructions from the principal, or, where there are no instructions, solely in the best interests of the principal, avoiding conflcts of interest that would impair your ability to act in the principal's best interests.

2. Keeping the principal's funds and property separate and distinct from any funds or assets you own or control, unless otherwise permitted by law.

3. Keeping a record of all receipts, disbursements and transactions made on behalf of the principal.

4. Disclosing your identity as an attorney in fact whenever you act for the principal.

You may not use the principal's assets to benefit yourself or make gifts to yourself or anyone else unless the principal has specifically granted you that authority in the durable power of attorney. If you have been granted that authority, you must act according to the instructions of the principal or, where there are no such instructions, in the principal's best interests. Failure to do so may result in criminal prosecution under the laws of the State of Kansas. In addition to criminal prosecution, you may also be sued in civil court.

You may resign by giving written notice to the principal and to any co-attorney in fact, successor attorney in fact, or the principal's guardian if one has been appointed.

If there is anything about this document or your responsibilities that you do not understand, you should seek legal advice before accepting the appointment."

(b) All acts done by an attorney in fact pursuant to a durable power of attorney shall inure to the benefit of and bind the principal and the principal's successors in interest, notwithstanding any disability of the principal. Any acts done by the attorney in fact not strictly for the benefit of the principal or the principal's estate are in violation of the power of attorney, unless such acts are otherwise specifically provided for in the power of attorney, and may result in prosecution under the criminal laws of the State of Kansas.

(c) (1) A power of attorney does not have to be recorded to be valid and binding between the principal and attorney in fact or between the principal and third persons.

(2) A power of attorney may be recorded in the same manner as a conveyance of land is recorded. A certified copy of a recorded power of attorney may be admitted into evidence.

(3) If a power of attorney is recorded any revocation of that power of attorney must be recorded in the same manner for the revocation to be effective. If a power of attorney is not recorded it may be revoked by a recorded revocation or in any other appropriate manner.

(4) If a power of attorney requires notice of revocation be given to named persons, those persons may continue to rely on the authority set forth in the power of attorney until such notice is received.

(d) A person who is appointed an attorney in fact under a durable power of attorney has no duty to exercise the authority conferred in the power of attorney, unless the attorney in fact has agreed expressly in writing to act for the principal in such circumstances. An agreement to act on behalf of the principal is enforceable against the attorney in fact as a fiduciary without regard to whether there is any consideration to support a contractual obligation to do so. Acting for the principal in one or more transactions does not obligate an attorney in fact to act for the principal in subsequent transactions.

(e) The grant of power or authority conferred by a power of attorney in which any principal shall vest any power or authority in an attorney in fact, if such writing expressly so provides, shall be effective only upon: (1) A specified future date; (2) the occurrence of a specified future event; or (3) the existence of a specified condition which may occur in the future. In the absence of actual knowledge to the contrary, any person to whom such writing is presented shall be entitled to rely on an affidavit, executed by the attorney in fact, setting forth that such event has occurred or condition exists.

Chapter 58: Personal And Real Property
Article 6: Powers And Letters Of Attorney

Statute 58-656: Duties of attorney in fact; relation of attorney in fact to court-appointed fiduciary; death of principal. (a) An attorney in fact who ~~elects~~ agrees to act under a power of attorney is under a duty to act in the interest of the principal and to avoid conflicts of interest that impair the ability of the attorney in fact so to act. A person who is appointed an attorney in fact under a power of attorney who undertakes to exercise the authority conferred in the power of attorney, has a fiduciary obligation to exercise the powers conferred in the best interests of the principal, and to avoid self-dealing and conflicts of interest, as in the case of a trustee with respect to the trustee's beneficiary or beneficiaries. ~~The attorney in fact shall keep a record of receipts, disbursements and transactions made on behalf of the principal and shall not comingle funds or assets of the principal with the funds or assets of the attorney in fact.~~ In the absence of explicit authorization, the attorney in fact shall exercise a high degree of care in maintaining, without modification, any estate plan which the principal may have in place, including, but not limited to, arrangements made by the principal for disposition of assets at death through beneficiary designations, ownership by joint tenancy or tenancy by the entirety, trust arrangements or by will or codicil. Unless otherwise provided in the power of attorney or in a separate agreement between the principal and attorney in fact, an attorney in fact who ~~elects~~ agrees to act shall exercise the authority granted in a power of attorney with that degree of care that would be observed by a prudent person dealing with the property and conducting the affairs of another, except that all investments made on or after July 1, 2003, shall be in accordance with the provisions of the Kansas uniform prudent investor act, K.S.A. 58-24a01 et seq., and amendments thereto. If the attorney in fact has special skills or was appointed attorney in fact on the basis of representations of special skills or expertise, the attorney in fact has a duty to use those skills in the principal's behalf.

(b) On matters undertaken or to be undertaken in the principal's behalf and to the extent reasonably possible under the circumstances, an attorney in fact has a duty to keep in regular contact with the principal, to communicate with the principal and to obtain and follow the instructions of the principal.

(c) If, following execution of a durable power of attorney, a court of the principal's domicile appoints a conservator, guardian of the estate or other fiduciary charged with the management of all of the principal's property or all of the principal's property except specified exclusions, the attorney in fact is accountable to the fiduciary as well as to the principal. The fiduciary has the same power to revoke or amend the durable power of attorney that the principal would have had if the principal were not an adult with an impairment in need of a guardian or conservator or both as defined by subsection (a) of K.S.A. 59-3051, and amendments thereto.

(d) A principal may nominate by a power of attorney, a guardian or conservator, or both, for consideration by the court. If a petition to appoint a guardian or conservator, or both, is filed, the court shall make the appointment in accordance with the principal's

most recent nomination in the power of attorney, so long as the individual nominated is a fit and proper person.

(e) An attorney in fact shall exercise authority granted by the principal in accordance with the instrument setting forth the power of attorney, any modification made therein by the principal or the principal's legal representative or a court, and the oral and written instructions of the principal, or the written instructions of the principal's legal representative or a court.

(f) An attorney in fact may be instructed in a power of attorney that the authority granted shall not be exercised until, or shall terminate on, the happening of a future event, condition or contingency, as determined in a manner prescribed in the instrument.

(g) On the death of the principal, the attorney in fact shall follow the instructions of the court, if any, having jurisdiction over the estate of the principal, or any part thereof, and shall communicate with and be accountable to the principal's personal representative, or if none, the principal's successors. The attorney in fact shall promptly deliver to and put in the possession and control of the principal's personal representative or successors, any property of the principal and copies of any records of the attorney in fact relating to transactions undertaken in the principal's behalf that are deemed by the personal representative or the court to be necessary or helpful in the administration of the decedent's estate.

(h) If an attorney in fact has a property or contract interest in the subject of the power of attorney or the authority of the attorney in fact is otherwise coupled with an interest in a person other than the principal, this section does not impose any duties on the attorney in fact that would conflict or be inconsistent with that interest.

(i) The attorney in fact must maintain adequate records of receipts, disbursements and transactions made on behalf of the principal and must not commingle funds or assets of the principal with funds or assets of the attorney in fact.

(j) (1) Failure to maintain adequate records is negligently failing to maintain such records as are necessary to disclose fully the nature of the receipts, disbursements and transactions made by the attorney in fact on behalf of the principal. Such records of receipts, disbursements and transactions must be maintained by the attorney in fact for five years after the date on which such receipt, disbursement or transaction occurs.

(2) An attorney in fact who fails to maintain adequate records, as defined in paragraph (1), may be liable for all costs, fees and expenses, including reasonable attorney fees, incurred in acquiring or reproducing such records of receipts, disbursements or transactions.

(3) If the attorney in fact is found to have commingled funds or assets of the principal with the funds or assets of the attorney in fact, the attorney in fact shall be liable to

restore such funds or assets to the principal, and shall be liable for all costs of recovering those funds or assets, including reasonable attorney fees.

Chapter 58.--PERSONAL AND REAL PROPERTY
Article 6.--POWERS AND LETTERS OF ATTORNEY

58-664. Effect of repealed statutes on existing powers of attorney. (a) The repeal of the uniform durable power of attorney act, K.S.A. 58-610 through 58-617 and the repeal of K.S.A. 58-601 and 58-602, shall not affect the validity of powers of attorney created under those sections, the validity of the acts and transactions of attorneys in fact under authority granted in powers of attorney executed under those sections, or the duties of attorneys in fact under powers of attorney executed under those sections.

(b) Powers of attorney created and fully executed by the principal prior to July 1, 2011, shall be governed by the laws in existence at the time such powers of attorney were created and fully executed.

Approved by the Judicial Council December 3, 2010

MEMORANDUM

TO: **Kansas Judicial Council**

FROM: **Probate Law Advisory Committee**

DATE: **December 3, 2010**

RE: **Proposed Amendment to Kansas Uniform Trust Code**

Since 2005 when the *Chawla ex rel Giesinger v. Transamerica Occidential Life Insurance Co.*, WL 405405 (E.D. Va. 2005) aff'd in part, vac'd in part, 440 F.3d 639 (4th Cir. 2006) case was first decided, the Probate Law Advisory Committee (PLAC) has had an interest in the case.

The PLAC initially considered studying the holding in the case and preparing a proposed amendment in response to it. However, before that study was underway, the PLAC became aware that the Uniform Law Commissioners were studying the issue and decided to wait for their proposal.

At the annual meeting of the National Conference of Commissioners on Uniform State Laws held in July 2010 in Chicago, the Insurable Interest Amendment to the Uniform Trust Code was approved. The approved text was revised by the ULC's Style Committee and is in final form.

The PLAC has reviewed the proposed amendment and recommends it be adopted in Kansas. A copy of the proposed amendment is attached to this memorandum at page 2 and the Uniform Law Commission's Comments are attached at pages 3 through 8.

SECTION 1. INSURABLE INTEREST OF TRUSTEE.

(a) In this section, "settlor" means a person that executes a trust instrument. The term includes a person for which a fiduciary or agent is acting.

(b) A trustee of a trust has an insurable interest in the life of an individual insured under a life insurance policy that is owned by the trustee of the trust acting in a fiduciary capacity or that designates the trust itself as the owner if, on the date the policy is issued:

(1) the insured is:

(A) a settlor of the trust; or

(B) an individual in whom a settlor of the trust has, or would have had if living at the time the policy was issued, an insurable interest; and

(2) the life insurance proceeds are primarily for the benefit of one or more trust beneficiaries that have:

(A) an insurable interest in the life of the insured; or

(B) a substantial interest engendered by love and affection in the continuation of the life of the insured and, if not already included under subparagraph (A), who are:

(i) related within the third degree or closer, as measured by the civil law system of determining degrees of relation, either by blood or law, to the insured; or

(ii) stepchildren of the insured.

Uniform Law Commission's Comment

Every state requires, either as a matter of statutory or common law, that a purchaser of life insurance on another individual have an insurable interest in the life of the insured. See generally Robert H. Jerry, II & Douglas R. Richmond, Understanding Insurance Law, §§ 40, 43 (LexisNexis Publishing, 4 ed., 2007), at 273-77, 293-98. The definition of insurable interest became a matter of widespread concern among trust and estate planners after *Chawla ex rel Giesinger v. Transamerica Occidental Life Insurance Co.*, 2005 WL 405405 (E.D. Va. 2005), aff'd in part, vac'd in part, 440 F.3d 639 (4th Cir. 2006), where a Virginia federal district court applying Maryland law held that a trust did not have an insurable interest in the life of the insured who was the settlor and the creator of the trust. This portion of the district court's decision was subsequently vacated by the Fourth Circuit when holding that the district court's decision should be affirmed on other grounds, but the appellate decision did not question or criticize the district court's insurable interest analysis. The Maryland legislature subsequently enacted a statute in the state's insurance code clarifying the circumstances when a trustee or trust has an insurable interest in another's life, and several other states have enacted various forms of statutory clarification designed to address the "*Chawla* problem." During this process, the American College of Trust and Estate Counsel, among others, expressed the opinion that it would be best if a uniform approach could be fashioned in resolving the matter.

Consequently, the Uniform Law Commission, after studying the issue, decided to clarify the issue with respect to the Uniform Trust Code (UTC) and established a drafting committee for that purpose. The drafting committee, consisting of knowledgeable Conference members, was assisted by representatives from the American Bar Association, the American College of Trust and Estate Counsel, and the American Council of Life Insurers, consumer advocates, and other interested parties. This amendment resulted from their efforts and is designed to be inserted at the end of Article 1 of the UTC as Section 113. In keeping with the charge to the committee, the purpose of the amendment is to clarify when, for purposes of the Code, a trustee has an insurable interest in an individual whose life is to be the subject of an insurance policy to fund the trust. Clarification of this area of law that was subjected to uncertainty by the *Chawla* decision will provide a reliable basis upon which trust and estate planning practitioners may draft trust instruments that involve the eventual payment of expected death benefits.

It should be noted that the entire amendment is placed in brackets to indicate that each state should consider whether it is needed or its adoption would be appropriate. In some states *Chawla* may not present serious problems under pre-existing insurable interest law because it may be clear that a trustee already has an appropriate insurable interest for estate planning purposes. In other states, *Chawla* would present problems but, as indicated above, the state may have already addressed the issue so that the amendment may not be needed. Currently there are at least ten states that have enacted legislation on the subject (Delaware, Florida, Illinois, Georgia, Maine, Maryland, Minnesota, South Dakota, Virginia, and Washington). In those states that do need to respond to *Chawla* (plus those that may want to revisit the matter) the amendment offers a reasonable solution that has the support of many in the estate planning field, as well as the life insurance industry.

With regard to language of the amendment, subsection (a) provides that the term "settlor" is limited to a person who *executes* the trust instrument. This is narrower than the UTC definition of "settlor," which, in addition to the person who executes the trust instrument, would include a person who merely contributes property to the trust. See UTC Section 103(15). As explained in the comment to Section 103(15), the broader definition serves a useful purpose in connection with the UTC generally; however, none of those situations relates to the issue of whose life should properly be the subject of a life insurance policy that is used to fund a trust. Moreover, to use the broader definition would needlessly complicate the issue of whose life should be the subject of insurance because it would be rare, if ever, that a life insurance policy used to fund a trust for estate planning purposes would be on the life of someone other than the settlor signing the trust or someone in whose life that settlor would have an insurable interest.
Because there are situations in which a trust instrument will be executed by a fiduciary or agent for the creator of the trust, subsection (a) also makes clear that in such circumstances the fiduciary or agent is deemed to be the equivalent of the settlor.

Subsection (b) carries forward the widely approved rule that the time at which insurable interest in a life insurance policy is determined is the date the policy is issued, otherwise understood as the inception of the policy. Thus, if on the date the policy is issued the trustee has an insurable interest in the individual whose life is insured, the policy is not subject to being declared void for lack of such an interest. Under the reasoning that an individual has an unlimited insurable interest in his or her own life, subsection (b) provides that a trustee has an insurable interest in the settlor's own life. If an individual, as settlor, has created a trust to hold a life insurance policy on his or her own life, has funded that trust with the policy or with money to pay its premiums, and has selected the trustee of the trust, it follows that the trustee should have the same insurable interest that the settlor has in his or her own life. Similarly, recognizing that an individual may purchase insurance on the life of anyone in whom that individual has an insurable interest up to, generally speaking, the amount of that interest, subsection (b) provides that the trustee has an insurable interest in an individual in whom the settlor has, or would have had if living at the time the policy was issued, an insurable interest.

Moreover, paragraph (1) of subsection (b) addresses the *Chawla* issue by referring to the jurisdiction's insurance code or other law regarding insurable interest as a separate, independent source of law for determining whether a trustee has an insurable interest in the life of an individual on whose life the trust has purchased insurance. This means that the trustee would be entitled to apply for and purchase an insurance policy not only on the life of a settlor but also on the life of any other individual in whom the settlor has an insurable interest, e.g., the spouse or children of the settlor, in the enacting jurisdiction. Exactly whose lives may be insured depends on the law of the enacting jurisdiction. In short, the amendment does not change the enacting jurisdiction's pre-existing law of insurable interest.

Paragraph (2) of subsection (b) addresses a somewhat different issue, although it also references the insurable interest law of the enacting jurisdiction. It is designed to ensure that irrevocable life insurance trusts (ILITs) are created to serve *bona fide* estate planning purposes by restricting who may be a beneficiary of insurance proceeds from a policy purchased to fund an ILIT. It establishes the requirement that the proceeds of such a life insurance policy used to

fund the trust be payable primarily to certain types of trust beneficiaries. As to the latter, paragraph (2) contains bracketed language designed to provide states with a choice with regard to who those beneficiaries might be.

One choice may be exercised by deleting all the brackets, and all the language contained within the brackets, in paragraph (2) of subsection (b). By doing so, the class of beneficiaries for whom the insurance proceeds must primarily benefit is limited to those who, in the enacting state, have an insurable interest in the life of the settlor. Depending on the law of the jurisdiction, this could mean that only those individuals traditionally recognized as having an insurable interest, such as spouses and their children, would qualify, or it could mean that additional family members, such as siblings, grandchildren, grandparents, and perhaps others, have an insurable interest in the life of the settlor. In some other jurisdictions, the law may not be clear on this point. In these jurisdictions, estate planners generally may be concerned that strictly tying the class of beneficiaries to the state's insurable interest law might unduly restrict their ability to provide appropriate legal services to their clients. To help alleviate this concern, an alternative is offered to clarify the law in these jurisdictions. To exercise this choice, the enacting jurisdiction need only remove the brackets while retaining the language contained therein, thereby adopting the language as part of the amendment.

Removing the brackets and retaining the bracketed language in paragraph (2) of subsection (b) clarifies and broadens to a limited extent the class of individuals for whom the insurance must primarily benefit. By including anyone who is related to the settlor or other insured by blood or law within the third degree, the amendment makes clear that not only parents and their children would fall in the required beneficiary category, but also that siblings, grandparents, grandchildren, great-grandparents, great-grandchildren, aunts, uncles, nephews, and nieces would also qualify. Lineal consanguinity, to use the more technical term for relation by blood, is the relationship between individuals when one directly descends from the other. Each generation in this direct line constitutes a degree. Collateral consanguinity refers to the relationship between individuals who descend from a common ancestor but not from each other. The civil law method of calculating degree of collateral consanguinity, which is used in most states, counts the number of generations from one individual, e.g., the insured, up to the common ancestor and then down to the other individual. See 1 RESTATEMENT (THIRD) OF PROPERTY (Wills and Other Donative Transfers) § 2.4 cmt. *k* (1999).

The following table identifies the relatives of an insured within three degrees of lineal and collateral consanguinity using the civil law method, with each row representing a generation.

			Great-Grandparents (3)
		Grandparents (2)	
	Parents (1)	Aunts and Uncles (3)	
INSURED	Sisters and Brothers (2)		
Children (1)	Nieces and Nephews (3)		
Grandchildren (2)			
Great- Grandchildren (3)			

The reference in subparagraph (B)(i) to relation by "law"–if that term is interpreted to have the same legal meaning as the term "affinity"–may extend the category of beneficiaries that must be primarily benefited to in-laws. If that is the case, degrees of relationship by law or affinity should be computed in the same manner as degrees of relationship by consanguinity. See State v. Hooper, 140 Kan. 481, 37 P.2d 52 (1934)(explaining, for example, that a husband has the same relation, by affinity, to his wife's blood relatives as she has to them by consanguinity, and vice versa). This would mean that a son- or daughter-in-law of the insured would be related in the first degree and a brother- or sister-in-law of the insured would be related in the second degree. A father- or mother-in-law would be related to the insured in the first degree, whereas an

aunt- or uncle-in-law would be related to the insured in the third degree. See State v. Allen, 304 N.W.2d 203, at 207 (Iowa 1981)(listing authorities on how to compute degrees of relation).

At the very least, the term "law" should be interpreted to include the relation between spouses and the relation between an adoptive parent and adopted child, if they were not already included under subparagraph (A). Additionally, in case there is any doubt as to whether an adopted grandchild, i.e., a child adopted by an insured's child, is sufficiently related to the insured, as a biological grandchild might be, to have an insurable interest under subparagraph (A), the reference in (B)(i) may ensure that the adopted grandchild falls within the required category of beneficiaries. This is because the adopted grandchild arguably would, at the very least, be related by affinity to the insured in the second degree, just as a biological child of the insured's child would be related by blood in the second degree to the insured. In other words, the adopted grandchild would be treated in the same manner as a biological grandchild for purposes of the amendment.

Stepchildren, who may not otherwise have an insurable interest in the life of the settlor or other insured under subparagraph (A) or who may not be included under subparagraph (B)(i), depending on the interpretation given to the term "law," are specifically included in subparagraph (B)(ii) to ensure that they occupy the same status as any other child of the settlor, biological or adopted.

The reason for the modifying language "if not already included under subparagraph (A)" found in subparagraph (B) of paragraph (2) of subsection (b) is to make it clear that there is no negative implication with regard to anyone related within the third degree to the insured and who would be included by virtue of the adopting jurisdiction's insurable interest law referred to in subparagraph (A). In other words, some of the people, but not all, included under subparagraph (A) will be related to the person whose life is insured within the third degree and the modifying language is designed to make it clear that subparagraph (B)(i) merely adds any others so related. The same reasoning applies to stepchildren. The adopting jurisdiction may already include them under its insurable interest law referred to in subparagraph (A). If not, however, subparagraph (B)(ii) makes sure they are included in the category of people for whom the insurance policy proceeds must primarily benefit.

Although estate planners expressed concern were a jurisdiction to delete subparagraph (B) because they felt doing so would unduly limit their ability to serve their clients' needs, there was a general consensus that including those identified in subparagraph (B) should suffice for the great majority of estate plans. Thus, estate planners strongly support the adoption of the language in subparagraph (B).

It should also be noted that, regardless of the decision relating to the choices presented by the bracketed language in paragraph (2) of subsection (b), the test concerning whether the beneficiaries designated in paragraph (2) are the primary beneficiaries of the policy proceeds takes place at the inception of the life insurance policy, i.e., when the policy is issued. The fact that there may be contingent trust beneficiaries or that the proceeds would be payable to different beneficiaries based on subsequent events or conditions is not relevant to the determination. One need only identify those trust beneficiaries that would receive the policy proceeds were the

insured life to expire immediately after the policy is issued and the trust were to terminate at the same time. Among these beneficiaries, the proceeds must be payable primarily to those specified in paragraph (2) of subsection (b). If that is so, the condition is satisfied and may not be challenged thereafter or on the basis that subsequent events might change who would receive the proceeds.

As for the term "primarily," it will often be the case that one is able to calculate that more than fifty percent of the policy proceeds will be payable to the required class of beneficiaries under paragraph (2), but this may not always be the situation. For example, if the purpose of the trust is to provide a lifetime benefit to a spouse or funds for children to obtain an education, the amount may be indeterminate. This, however, does not mean that the policy proceeds are not primarily for the benefit of these individuals if upon the inception of the policy they are the people who will immediately and mainly benefit from the trust, even though there are others not designated in paragraph (2) who may also benefit concurrently or benefit subsequently upon the satisfaction of some condition in the future. In short, the term is intended to be applied in a common sense manner rather than in a hyper-technical manner that would require that a precise dollar amount be payable to certain beneficiaries.

Finally, the amendment is drafted as it would appear in the UTC were it to be part of the Code when the latter is enacted or as it would appear as an amendment to a previously enacted version of the Code. In either case, since Section 1106 of the UTC, as originally drafted, already deals with the applicability of the UTC to trusts existing at the time of enactment, there may be no need to address that issue in this amendment. However, if an issue should arise regarding which trusts *and* life insurance policies are subject to the amendment, the following language may be helpful in resolving that issue:

> This section applies to any trust existing before, on, or after the effective date of this section, regardless of the effective date of the governing instrument under which the trust was created, but only as to a life insurance policy that is in force and for which an insured is alive on or after the effective date of this section.

Approved by the Judicial Council December 3, 2010

MEMORANDUM

TO: **Kansas Judicial Council**

FROM: **Randy M. Hearrell**

DATE: **December 3, 2010**

RE: **Proposed Legislation Revoking Inheritance Rights of Divorced Spouses**

Attached are the following:

Page #	Description
1	Memorandum from Wichita attorney Kent A. Meyerhoff summarizing information he presented to the Probate Law Advisory Committee.
4	Memorandum titled "Inheritance Rights of Ex-Spouses Should Automatically be Revoked upon Divorce" prepared as a result of Kansas Bar Association's consideration of the issue.
7	Proposed legislation.

Memorandum

To: Kansas Judicial Council

From: Kent A. Meyerhoff, Attorney
Fleeson, Gooing, Coulson & Kitch, L.L.C.

Date: November 23, 2010

Re: Revoking Inheritance Rights of Divorced Spouses

This memorandum summarizes information that I presented to the Probate Law Advisory Committee of the Kansas Judicial Council on Friday, November 19, 2010.

The attached memorandum titled "Inheritance Rights of Ex-Spouses Should Automatically Be Revoked Upon Divorce," which presents a hypothetical about Joe and Mary, was originally prepared in connection with a presentation I made to the Probate Committee of the Wichita Bar Association. After that presentation, the Executive Committee of the Real Estate, Probate & Trust Law Section of the Kansas Bar Association discussed the issue and referred it to a subcommittee chaired by Dan Peare, an attorney with the Hinkle Elkouri firm, for consideration. Mr. Peare and I drafted the attached proposed statute as a result of that KBA subcommittee's work.

One of the first estate administration matters I remember working on as a young attorney involved a case in which we represented the surviving children of a decedent. The decedent had divorced her husband some time prior to her death. In the divorce decree, each party was granted ownership of his/her own life insurance policies and retirement accounts. However, the decedent had never followed through with actually changing the beneficiary designations on her life insurance policies or IRA. Upon her death, they still named her ex-husband as the beneficiary. I was surprised to discover that under Kansas law, because the beneficiary designations were never changed, the ex-husband, and not the decedent's surviving children (who were named as the contingent beneficiaries), would receive the proceeds from both the life insurance policies and IRA. It was quite clear to everyone involved that the decedent would not have intended her ex-spouse to inherit the life insurance proceeds or IRA. However, because the beneficiary designations had never been changed, he did.

Since the current Kansas Probate Code was adopted in 1939, K.S.A. 59-610 has provided that a provision in a Will for a spouse is automatically revoked if the spouses divorce after the Will is executed. However, this statute applies only to Wills. It does not apply to revocable trusts or to property passing other than pursuant to the terms of a Will. Today, more and more people are using Will substitutes, such as revocable trusts, or are placing "pay on death" or

"transfer on death" designations on most of their property so that the property does not pass by Will. This means K.S.A. 59-610 does not apply. As discussed in the attached memorandum, Kansas should adopt a new, broader law that automatically revokes any inheritance rights in favor of an ex-spouse upon divorce. This should apply to trusts, life insurance policies, annuities, IRAs, and transfer on death and pay on death designations. It also should automatically convert joint tenancy property to tenants in common in the event of a divorce.

The Kansas Legislature took a small step in the right direction in 1996, when it amended K.S.A. 60-1610 to require that divorce decrees provide for any changes in beneficiary designation on: (i) any insurance or annuity policy that is owned by a spouse, or, in the case of a group life policy, under which a spouse is a covered person; (ii) any trust under which one spouse is the grantor or holds a power of appointment over all or part of the trust assets that may be exercised in favor of the other; or (iii) any transfer on death or payable on death account under which one or both spouses are owner or beneficiary. However, this statute goes on to provide that "Nothing in this section shall relieve the parties of the obligation to effectuate any change in beneficiary designation by the filing of such change with the insurer or issuer in accordance with the terms of such policy." It is not entirely clear what this sentence means, but it appears that although these issues are to be addressed in the divorce decree, it may still be up to the parties to take steps to carry out the provisions of the divorce decree by executing a new beneficiary designation. In fact, in Cincinnati Life Insurance Company v. Palmer, 32 Kan. App.2d 160, 94 P.3d 729 (2004), the Kansas Court of Appeals held that although the divorce decree incorporated a property settlement agreement that provided that each spouse was to retain his or her own life insurance policy, because the husband had not changed the beneficiary designation on the policy prior to his death (and because the divorce decree had not specifically revoked or changed the beneficiary designation), his ex-spouse, who was still named as the beneficiary, was entitled to the entire death benefit.

A better solution would be to provide for automatic revocation of any inheritance rights of an ex-spouse upon entry of a divorce decree or annulment, as has been done in many other states, including those that have adopted some version of the Uniform Probate Code. If someone desired to continue to name an ex-spouse as a beneficiary of a life insurance policy or other property (which would almost certainly occur only in a small minority of situations), such designation could be reconfirmed in writing following the divorce.

Three of our neighboring states have some form of automatic beneficiary revocation upon divorce. Oklahoma law provides that if, after entering into a written contract in which a beneficiary is designated or provision is made for the payment of any death benefit, the party who has the right to designate such beneficiary divorces the named beneficiary, all provisions in the contract in favor of the former spouse are revoked. Colorado has adopted a version of the Uniform Probate Code, which not only revokes provisions for a former spouse, but also for family members of the former spouse. Missouri's statute also revokes provisions for an ex-spouse and family members of the ex-spouse.

The attached proposed statute is based on the Uniform Probate Code provision, with a few minor modifications for Kansas law. The proposed statute not only revokes inheritance rights of an ex-spouse, but it also revokes rights of relatives of such ex-spouse, because those relatives are often named as alternate takers under trust documents or beneficiary designations. An exception is made in the attached proposed statute for employee benefit or retirement plans governed by ERISA. The United States Supreme Court, in Egelhoff v. Egelhoff, 532 U.S. 141 (2001) held that ERISA preempted a state statute that automatically revoked a beneficiary designation in favor of an ex-spouse upon divorce. Therefore the attached draft statute specifically excepts property subject to federal law preemption from its application, so it should not run afoul of the Egelhoff decision. Finally, the attached statute provides protection for innocent third party purchasers who purchase property without notice of the divorce, and for third parties such as insurance companies or banks who pay out funds based on a beneficiary designation without notice of the divorce.

In summary, the change proposed by the attached statute would ensure that whether someone does their estate planning using a Will, a trust, beneficiary designation, or joint tenancy, there will be consistent results in the event of a divorce, and the likely intent of the parties will be carried out without further affirmative action required on the part of the divorced spouses.

Inheritance Rights of Ex-Spouses Should Automatically Be Revoked Upon Divorce

Joe and Mary have been married for 20 years. They own a variety of property, including real estate, stocks, motor vehicles, and bank accounts. They also each own IRAs and life insurance policies. Some of their bank accounts are titled in Joe's name with pay on death designations in favor of Mary; some bank accounts are titled in Mary's name with pay on death designations in favor of Joe; their life insurance policies name each other as primary beneficiary, as do their IRAs; and, they each have established a revocable trust as their primary estate planning vehicle, to which they transferred their real estate, stocks and other investment accounts. Their trusts provide that upon the death of the first of them to die, all property in such deceased spouse's trust passes to the survivor, outright and free of trust.

At a high school reunion, Joe runs into an old flame and they renew their romantic relationship. As a result, Joe and Mary divorce. Mary is in an automobile accident one week after the divorce becomes final and dies. Although the divorce decree awarded Mary ownership of her life insurance policy, her bank accounts, her IRA, and an investment account owned by her trust, Mary had not changed the beneficiary designations on the life insurance, bank accounts, or IRA, and she had not made any changes to her trust. All of these still named Joe as beneficiary. Despite the divorce, under current Kansas law Joe stands to inherit everything Mary owned, even though it is highly unlikely that this is what Mary would have intended.

The result would have been slightly different if Joe and Mary had used Wills instead of trusts. K.S.A. 59-610 specifically provides that a provision in a Will for a spouse is automatically revoked if the spouses divorce after the Will was signed. However, K.S.A. 59-610 does not apply to non-probate assets. Although revocable trusts are "Will substitutes," and although K.S.A. 58a-112, which is part of the Kansas Uniform Trust Code, provides that the rules of construction that apply to Wills also apply to trusts, it is doubtful that this is enough to extend the reach of K.S.A. 59-610 to Mary's trust. Therefore, all of the property awarded to Mary in the divorce likely will pass to Joe.

To avoid this result, Kansas should consider enacting a statute that would automatically revoke the beneficiary designations for Joe under Mary's life insurance policies, bank accounts, and IRAs and his beneficial interest under Mary's revocable trust. In 1996, the Kansas legislature took a small step in this direction when it amended K.S.A. 60-1610 to require that divorce decrees provide for any changes in beneficiary designation on: (i) any insurance or annuity policy that is owned by a spouse, or, in the case of a group life policy, under which a spouse is a covered person; (ii) any trust under which one spouse is the grantor or holds a power of appointment over all or part of the trust assets that may be exercised in favor of the other; or (iii) any transfer on death or payable on death account under which one or both spouses are owner or beneficiary. However, this statute goes on to provide that "Nothing in this section shall relieve the parties of the obligation to effectuate any change in beneficiary designation by the filing of such change with the insurer or issuer in accordance with the terms of such policy." It

is not entirely clear what this sentence means, but it appears that although these issues are to be addressed in the divorce decree, it may still be up to the parties to take steps to carry out the provisions of the divorce decree by executing a new beneficiary designation. In fact, in Cincinnati Life Insurance Company v. Palmer, 32 Kan. App.2d 160, 94 P.3d 729 (2004), the Kansas Court of Appeals held that although the divorce decree incorporated a property settlement agreement that provided that each spouse was to retain his or her own life insurance policy, because the husband had not changed the beneficiary designation on the policy prior to his death (and because the divorce decree had not specifically revoked or changed the beneficiary designation), his ex-spouse, who was still named as the beneficiary, was entitled to the entire death benefit.

A better solution would be to provide for automatic revocation of any inheritance rights of an ex-spouse upon entry of a divorce decree or annulment, as has been done in many other states, including those that have adopted some version of the Uniform Probate Code. If someone desired to continue to name an ex-spouse as a beneficiary of a life insurance policy or other property (which would almost certainly occur only in a small minority of situations), such designation could be reconfirmed in writing following the divorce.

Three of our neighboring states have some form of automatic beneficiary revocation upon divorce. Oklahoma law provides that if, after entering into a written contract in which a beneficiary is designated or provision is made for the payment of any death benefit, the party who has the right to designate such beneficiary divorces the named beneficiary, all provisions in the contract in favor of the former spouse are revoked. Colorado has adopted a version of the Uniform Probate Code, which not only revokes provisions for a former spouse, but also for family members of the former spouse. Missouri's statute also revokes provisions for an ex-spouse and family members of the ex-spouse.

In implementing an automatic revocation of beneficiary designations in favor of ex-spouses, an exception would have to be made for employee benefit or retirement plans governed by ERISA. The United States Supreme Court, in Egelhoff v. Egelhoff, 532 U.S. 141 (2001) held that ERISA preempted a state statute that automatically revoked a beneficiary designation in favor of an ex-spouse upon divorce. However, so long as the statute specifically excepts ERISA plans from its application, it should not run afoul of the Egelhoff decision.

The Real Estate, Probate and Trust Committee of the Kansas Bar Association recommends that Kansas adopt a modified version of the Uniform Probate Code provision that automatically revokes the rights of ex-spouses to inherit from one another, whether such inheritance is by non-probate transfers, testamentary transfers, or testamentary substitute transfers (such as revocable trusts). This would undoubtedly be consistent with the intent of most people who have gone through a divorce or annulment and would avoid situations where an ex-spouse inadvertently becomes entitled to receive property because someone forgot to change a beneficiary designation or was prevented from doing so. Furthermore, to ensure that the automatic revocation rule is applied

consistently, K.S.A. 60-1610 should be amended to remove the requirement that divorce decrees provide for the automatic revocation of beneficiary designations. Rather, the Kansas Probate Code and the Kansas Uniform Trust Code should contain broad provisions automatically revoking such designations by operation of law, with an exception for property rights preempted by federal law. A proposed version of the law is attached as Exhibit A.

2011 _____B No. _____

Section [58a-602b; 59-610b]. Revocation of Probate and Nonprobate Transfers by Divorce; No Revocation by other Change of Circumstances.

(a) [Definitions.] In this section:

(1) "Disposition or appointment of property" includes a transfer of an item of property or any other benefit to a beneficiary designated in a governing instrument.

(2) "Divorce or annulment" means any divorce or annulment, or any dissolution or declaration of invalidity of a marriage, that would exclude the spouse as a surviving spouse. A decree of separation that does not terminate the status of husband and wife is not a divorce for purposes of this section.

(3) "Divorced individual" includes an individual whose marriage has been annulled.

(4) "Governing instrument" means a document executed by the divorced individual before the divorce or annulment of his [or her] marriage to his [or her] former spouse.

(5) "Relative of the divorced individual's former spouse" means an individual who is related to the divorced individual's former spouse by blood, adoption, or affinity and who, after the divorce or annulment, is not related to the divorced individual by blood, adoption, or affinity.

(6) "Revocable," with respect to a disposition, appointment, provision, or nomination, means one under which the divorced individual, at the time of the divorce or annulment, was alone empowered, by law or under the governing instrument, to cancel the designation in favor of his [or her] former spouse or former spouse's relative, whether or not the divorced individual was then empowered to designate himself [or herself] in place of his [or her] former spouse or in place of his [or her] former spouse's relative and whether or not the divorced individual then had the capacity to exercise the power.

(7) "Surviving spouse" does not include (i) An individual who is divorced from the decedent or whose marriage to the decedent has been annulled unless, by virtue of a subsequent marriage, he [or she] is married to the decedent at the time of death. A decree of separation that does not terminate the status of husband and wife is not a divorce for purposes of

this section; (ii) an individual who obtains or consents to a final decree or judgment of divorce from the decedent or an annulment of their marriage, which decree or judgment is not recognized as valid in this State, unless subsequently they participate in a marriage ceremony purporting to marry each to the other; (iii) an individual who, following an invalid decree or judgment of divorce or annulment obtained by the decedent, participates in a marriage ceremony with a third individual; or (iv) an individual who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights.

(b) [Revocation Upon Divorce.] Except as provided by the express terms of a governing instrument, a Court Order, or a contract relating to the division of the marital estate made between the divorced individuals before or after the marriage, divorce, or annulment, the divorce or annulment of a marriage:

(1) revokes any revocable (i) disposition or appointment of property made by a divorced individual to his [or her] former spouse in a governing instrument and any disposition or appointment created by law or in a governing instrument to a relative of the divorced individual's former spouse, (ii) provision in a governing instrument conferring a general or nongeneral power of appointment on the divorced individual's former spouse or on a relative of the divorced individual's former spouse, and (iii) nomination in a governing instrument, nominating a divorced individual's former spouse or a relative of the divorced individual's former spouse to serve in any fiduciary or representative capacity, including a personal representative, executor, trustee, conservator, agent, or guardian; and

(2) severs the interests of the former spouses in property held by them at the time of the divorce or annulment as joint tenants with the right of survivorship transforming the interests of the former spouses into equal tenancies in common.

(c) [Effect of Severance.] A severance under subsection (b)(2) does not affect any third-party interest in property acquired for value and in good faith reliance on an apparent title by survivorship in the survivor of the former spouses unless a writing declaring the severance has been noted, registered, filed, or recorded in records appropriate to the kind and location of the property which are relied upon, in the ordinary course of transactions involving such property, as evidence of ownership.

(d) [Effect of Revocation.] Provisions of a governing instrument are given effect as if the former spouse and relatives of the former spouse disclaimed all provisions revoked by this section or, in the case of a revoked nomination in a fiduciary or representative capacity, as if the former spouse and relatives of the former spouse died immediately before the divorce or annulment.

~~(e) [Revival if Divorce Nullified.] Provisions revoked solely by this section are revived by the divorced individual's remarriage to the former spouse or by a nullification of the divorce or annulment.~~

~~(f)~~ (e) [No Revocation for Other Change of Circumstances.] No change of circumstances other than as described in this section and in Section 59-610 effects a revocation.

~~(g)~~ (f) [Protection of Payors and Other Third Parties.]

(1) A payor or other third party is not liable for having made a payment or transferred an item of property or any other benefit to a beneficiary designated in a governing instrument affected by a divorce, annulment, or remarriage, or for having taken any other action in good faith reliance on the validity of the governing instrument, before the payor or other third party received written notice of the divorce, annulment, or remarriage. A payor or other third party is liable for a payment made or other action taken after the payor or other third party received written notice of a claimed forfeiture or revocation under this section.

(2) Written notice of the divorce, annulment, or remarriage under subsection (g)(1) must be mailed to the payor's or other third party's main office or home by registered or certified mail, return receipt requested, or served upon the payor or other third party in the same manner as a summons in a civil action. Upon receipt of written notice of the divorce, annulment, or remarriage, a payor or other third party may pay any amount owed or transfer or deposit any item of property held by it to or with the court having jurisdiction of the probate proceedings relating to the decedent's estate or, if no proceedings have been commenced, to or with the court having jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence. The court shall hold the funds or item of property and, upon its determination under this section, shall order disbursement or transfer in accordance with the determination. Payments, transfers, or deposits made to or with the court discharge the payor or other third party from all claims for the value of amounts paid to or items of property transferred to or deposited with the Court.

~~(h)~~ (g) [Protection of Bona Fide Purchasers; Personal Liability of Recipient.]

(1) A person who purchases property from a former spouse, relative of a former spouse, or any other person for value and without notice, or who receives from a former spouse, relative of a former spouse, or any other person a payment or other item of property in partial or full satisfaction of a legally enforceable obligation, is neither obligated under

this section to return the payment, item of property, or benefit nor is liable under this section for the amount of the payment or the value of the item of property or benefit. But a former spouse, relative of a former spouse, or other person who, not for value, received a payment, item of property, or any other benefit to which that person is not entitled under this section is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who is entitled to it under this section.

(2) If this section or any part of this section is preempted by federal law with respect to a payment, an item of property, or any other benefit covered by this section, a former spouse, relative of the former spouse, or any other person who, not for value, received a payment, item of property, or any other benefit to which that person is not entitled under this section is obligated to return that payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who would have been entitled to it were this section or part of this section not preempted

~~(i)~~ **(h)** [Severability.] If this section is preempted by federal law with respect to any property item, then this section shall not apply to such item of property preempted by federal law but shall apply in all other circumstances.

Report of the Special Committee on Judiciary to the 2011 Kansas Legislature

CHAIRPERSON: Senator Thomas C. "Tim" Owens

VICE-CHAIRPERSON: Representative Lance Kinzer

OTHER MEMBERS: Senators David Haley and Dwayne Umbarger; and Representatives Sydney Carlin, J. David Crum, Aaron Jack, Melody McCray-Miller, and Scott Schwab

STUDY TOPICS

- **Criminal Background Checks for Potential Employees of Adult Care Homes.** Study whether state agencies or adult care home facilities requesting a criminal history background check should receive a complete or a redacted criminal history report from the Kansas Bureau of Investigation and whether the report should include juvenile adjudications or non-prohibited offenses. Review when a criminal history background check reveals information that would disqualify an applicant from employment or licensure, whether the pending employee or requesting adult care home facility should receive notification of the reasons for the denial of the employment or licensure. Also, study whether the current differences in the procedure and type of criminal record check information provided to child care facilities and adult care facilities is justified.

- **2010 SB 374 - The Apology Bill.** Review 2010 SB 374 which would make inadmissible in any claim or civil action by or on behalf of a patient alleging an adverse outcome of medical care, any statements expressing regret, a mistake, error, sympathy, or apology by a health care provider or employee.

- **Kansas Open Records Act.** In accordance with KSA 2009 Supp. 45-229, conduct any statutorily required legislative review of existing exceptions to the Kansas Open Records Act that are scheduled for expiration in the coming year.

December 2010

Special Committee on Judiciary

Final Report

Conclusions and Recommendations

The Committee agreed to:

- Recommend, by consensus, to request the Senate Public Health and Welfare Committee provide a status report during the 2011 Legislative Session to a joint meeting of the House and Senate Judiciary Committees on the newly enacted legislation (2010 HB 2323) to determine if additional recommendations are needed relating to criminal background checks on individuals and entities associated with adult care home facilities;
- Recommend the Kansas Judicial Council's approach to an apology law, 2010 SB 374, as introduced, be adopted; and
- Recommend introduction of a House bill on renewal of all of the Kansas Open Records Act exceptions scheduled for expiration in 2011, with the additional recommendation that the language in KSA 12-5611 needs to clarify what types of agency actions are covered and should look at penalty provisions for breach of confidentiality in KSA 44-1132, 75-457, and 75-723.

Proposed Legislation: One House bill on renewal of all of the Kansas Open Records Act exceptions scheduled for expiration in 2011.

Background

Pursuant to KSA 46-1205, the Legislative Coordinating Council (LCC) appointed nine members of the Legislature to serve as members of the Special Committee on Judiciary. The LCC assigned the Special Committee on Judiciary three study topics: criminal background checks for potential employees of adult care homes; the "apology" bill; and the Kansas Open Records Act exceptions scheduled to expire in 2011. The LCC granted the Special Committee on Judiciary two days in which to complete the studies.

Committee Activities

The Special Committee on Judiciary met on September 13 and October 25. Items discussed by the 2010 Special Committee on Judiciary relating to its charge by the LCC are reviewed in the following material, along with the Committee's conclusions and recommendations to the 2011 Legislature.

September 13

Staff from the Office of the Revisor of Statutes briefed the Committee on the Kansas Open Records Act (KORA) exceptions scheduled for expiration in 2011 as required by KSA 45-229. KSA 45-229 provides that any new exceptions or substantial amendment to an exception to the KORA shall expire five years after creation or amendment, unless the Legislature acts to continue the exception. In the year prior to the expiration the Revisor of Statutes is required to certify the language and citation of each exception to the Speaker of the House of Representatives and the President of the Senate.

The LCC requested that the Committee conduct a review of 28 existing exceptions to determine if any statutory exceptions are unnecessary and may be discontinued. The statutes under review are as follows: KSA 1-501; 9-513c; 9-1303; 12-4516a; 12-5358; 12-5611; 22-4906; 22-4909; 38-1692; 38-2310; 38-2311; 38-2326; 39-970; 40-2,118; 40-4913; 44-1132; 60-3333; 65-525; 65-5117; 65-6016; 65-6017; 65-6154; 71-218; 74-7508; 75-457; 75-712c; 75-723; and 75-7c06. The Committee decided to wait until the final meeting to make any formal recommendations regarding the Kansas Open Records Act.

The hearing regarding criminal background checks for potential employees of adult care homes opened with Representative Bob Bethell providing background information on the development and intent of previous legislation concerning criminal background checks for potential employees of adult care facilities. The 2009 Legislative Session introduced HB 2323, which added felony theft to the list of prohibited crimes in KSA 39-970. The bill initiated discussion on several points and the topic was then referred to the Special Committee on Judiciary for a review during the Interim. The Committee was charged to determine whether state agencies or adult care home facilities requesting criminal background checks should receive a complete or redacted criminal history report; if juvenile adjudications or non-prohibited offenses should be included in the reports; if individuals should be notified of reasons for disqualification; and whether current procedures and differences between adult and child care facility reports are justified.

Staff from the Kansas Legislative Research Department (KLRD), provided the Committee with a review of 2010 HB 2323 and answered clarifying questions from the Committee. Staff from the Office of the Revisor of Statutes briefed the Committee on the current statutes requiring criminal background checks. Staff also provided the Committee with various samples of statutory language regarding criminal background checks in current statutes illustrating progression of changes in language. The Committee discussed the possibility of rewriting the statute for clarification.

The Committee heard from six individuals who wished to provide information to the Committee on this topic. Leslie Moore, Information Services Division Manager, Kansas Bureau of Investigation (KBI), testified regarding criminal history checks for HB 2323, especially how criminal history records are redacted and the purpose of the criminal history record check fee. Ms. Moore provided examples of criminal history record checks on both the federal and state levels.

Joseph Kroll, Director, Bureau of Child Care and Health Facilities, Department of Health and Environment (KDHE), testified regarding the criminal history requirements for adult care homes, home health agencies, and child care facilities. Mr. Kroll provided KDHE's current practice regarding the reporting of information to various agencies and the reporting differences between adult care facilities and child care facilities.

Cindy Luxem, President, Kansas Health Care Association/Kansas Center for Assisted Living, testified before the Committee, indicating the current practice of receiving complete criminal histories appears to work well for adult care facilities. Ms. Luxem stressed the importance of facilities receiving requested information in a timely manner, since potential employees are allowed to work on probation until the report is received. She provided a summary of various states requirements regarding criminal background checks and the process used to obtain them.

Debra Zehr, President, Kansas Association of Homes and Services for the Aging, appeared before the Committee, indicating while individual privacy rights are important, complete criminal history reports protect the vulnerable clients in

their care. Ms. Zehr stated facilities need to be informed of all convictions that would preclude them from employment, and recommended the Committee review current requirements across all care facilities for uniformity.

JoAnn Corpstein, Chief Counsel, Kansas Department on Aging, provided the Committee information on the criminal histories KDHE provides to adult care facilities and home health care agencies as provided by statue. KDHE may also provide requesting agencies with a redacted report if an applicant has a juvenile conviction for theft. This allows entities to make informed hiring decisions.

Following discussion, the Committee requested additional information and agreed to revisit the topic at the final meeting of the Committee.

October 25

Staff from the KLRD briefed the Committee on 2010 SB 374, as introduced and 2010 Sub. for SB 374. In 2009, at the request of a representative of the Sisters of Charity of Leavenworth Health System (Sisters of Charity), Senator Jim Barnett introduced SB 32, which was based on a Colorado statute. The bill would have prohibited a court in civil actions from admitting oral or written statements or notations, affirmations, gestures, conduct, or benevolent acts expressing apology, fault, sympathy, or condolence made by a health care provider relating to the unanticipated outcome of medical care as evidence of an admission of liability. Included in this prohibition were waivers of charges for medical care. The bill had a hearing in the Senate Judiciary Committee and subsequently was referred to the Judicial Council for study.

The Judicial Council's Advisory Committee (Advisory Committee) considered similar laws from other states, relevant academic and law review articles, and the testimony submitted to the Senate Judiciary Committee and found it did not support the approach taken by SB 32. Specifically, the Advisory Committee agreed that the statements or expressions of fault should not be excluded and the law should apply more broadly than just to health care providers. Further, the Advisory Committee discussed the approaches taken by other states to determine whether a mixed statement of apology and liability is inadmissible, and adopted Hawaii's stance. Its statute provides that exclusion is not required when an apology or other statement acknowledging or implying fault is part of a statement or gesture that is inadmissible. (Haw. Rev. Stat. § 626-1, Rule 409.5.) This provision gives trial court judges discretion on that issue.

In the 2010 Legislative Session, SB 374, which was based on the Hawaii statute, was introduced as recommended by the Advisory Committee. It would have provided that evidence of statements or gestures that express apology, sympathy, commiseration, or condolence concerning the consequences of an event in which the declarant was a participant is not admissible to prove liability for any claim growing out of the event. The language described above, giving judges discretion to determine the admissibility of mixed statements, also was included in the bill.

In the Senate Judiciary Committee, a representative of the Sisters of Charity proposed alternative language based on a South Carolina law, S.C. Code Ann. § 19-1-190, which was ultimately adopted. The substitute bill would have created the Kansas Adverse Medical Outcome Transparency Act, making inadmissible, in any claim or civil action brought by or on behalf of a patient alleging an adverse outcome of medical care, any and all statements, activities, waivers of charges for medical care, or other conduct expressing benevolence, regret, mistake, error, sympathy, apology, commiseration, condolence, compassion, or a general sense of benevolence made by a health care provider or a provider's employee or agent. Further, pursuant to the substitute, such statements or conduct would

not constitute an admission of liability or an admission against interest.

Finally, the substitute would have allowed a defendant in a medical malpractice action to waive, in writing, the inadmissibility of such statements. The Senate Committee of the Whole rereferred the substitute bill to the Judiciary Committee, where no further action was taken during the 2010 Legislative Session. The topic was referred for study to the Special Committee on Judiciary.

The Committee heard testimony from proponents of 2010 SB 374, as introduced, proponents of 2010 Sub. for SB 374, and an opponent of 2010 Sub. for SB 374.

Nick Badgerow testified on behalf of the Judicial Council Civil Code Advisory Committee in support of 2010 SB 374, as introduced, and reviewed the development of SB 374 following a request to study the issue by the Legislature. He advised the Committee that the Judicial Council Civil Code Advisory Committee is comprised of plaintiff and defense attorneys who practice in the field, trial judges, appellate judges, and law professors. He further stated that the Judicial Council has no client in this issue. Mr. Badgerow indicated he had two specific concerns regarding Sub. for SB 374. The first would exclude, among other things, statements of mistake or error. The second concern is Sub. for SB 374 limits the exclusion to statements or actions by a "health care provider, employee or agent of a health care provider." It is the opinion of the Advisory Committee that the original SB 374 is a superior approach to an apology statute in Kansas by fairly meeting the objective of creating an apology law without limiting the immunity to health care providers or extending it to admission of fault.

Gary White testified on behalf of the Kansas Association for Justice in support of SB 374, as introduced in 2010. Mr. White indicated the Association does not oppose changing the rules of evidence relating to apologies as long as such changes are fair and equitable to all parties. Sub. for SB 374 skews the results of evidence, favors one party, permits concealment of truthful evidence, or allows negligent or intentional acts to be hidden from a jury.

Mitzi McFatrich, Executive Director, Kansas Advocates for Better Care, testified in support of 2010 SB 374, as introduced. Ms. McFatrich represents the people in long-term care who, often times, do not have an abundance of financial resources. Ms. McFatrich stated it is unfair to deprive a person of the opportunity to seek redress through the courts because an apology has been offered, including one that contains fault. Allowing a health care provider to be shielded from a lawsuit because of an apology is an over protection of health care workers.

Joseph Molina testified on behalf of the Kansas Bar Association (KBA) indicating the KBA supports 2010 SB 374, as introduced. Mr. Molina indicted the KBA Legislative Committee conducted a detailed review of both SB 374 and Sub. for SB 374, and determined the recommendations forwarded by the Kansas Judicial Council should be supported.

Ed Barker testified on behalf of the Sisters of Charity in support of Sub. for SB 374. He detailed the request for an apology law in Kansas, and the subsequent alternate version which became Sub. for SB 374. The intention of Sub. for SB 374 is to codify public policy allowing expressions of apology or compassion without fear of it being used as evidence of liability when a patient experiences an adverse medical outcome. He argued that SB 374, as introduced had a chilling effect on speech because there is no protection upon which doctors can rely. Doctors will not need to wait for legal counsel to advise them before they can freely express compassion to their patients. Sub. for SB 374 is a simple, common sense tort reform policy which would reduce health care costs by lowering litigation.

Douglas Wojcieszak, a disclosure training consultant for Sorry Works, appeared in support of Sub. for SB 374 stating disclosure can be an

alternative solution to the medical malpractice crisis. Mr. Wojcieszak said apologies for medical errors reduce anger in patients and families which leads to a reduction in medical malpractice lawsuits and associated litigation expenses. In response to questioning by a Committee member, Mr. Wojcieszak stated legislation is not necessary to effectuate a policy to make a person feel whole and to focus on customer service.

Dr. Barry Solomon, citizen, testified in support of Sub. for SB 374, stating that for health care professionals, the standard procedure is to never talk to anyone without representation and to call their insurer or attorney first. Sub. for SB 374 would change that mindset.

Shelly Koltnow, Vice-president of Corporate Responsibility, Via Christi, spoke in favor of Sub. for SB 374 stating it would encourage open and honest dialogue between physicians, other health care providers, and their patients when an adverse event occurs. Medical mistakes do happen and an expression of apology, sympathy, compassion, or a benevolent act should not be used as evidence of negligence or wrongdoing in a subsequent malpractice claim. Sub. for SB 374 would be one way to address the rising costs of healthcare by lowering civil malpractice and could facilitate transparency between patients and providers.

Dan Morin, Kansas Medical Society, testified in support of Sub. for SB 374, stating unanticipated, adverse medical outcomes happen. As a result, healthcare providers are reluctant to express concern or sympathy for fear such statements will be used against them later in a civil suit. Sub. for SB 374 would foster better communication between healthcare providers and patients while reducing the number of medical liability claims files.

Written testimony in support of Sub. for SB 374 was submitted by William Sneed, University of Kansas Hospital Authority; and Deborah Stern, Kansas Hospital Association.

Gregory Dennis, Executive Vice-president, Kansas Veterinary Medical Association, appeared and requested that the Committee consider adding veterinarians to the apology bill. Mr. Dennis indicated veterinarians would benefit from the same protection.

Bob Harvey spoke on behalf of the American Association of Retired Persons (AARP), indicating AARP is not opposed to SB 374, but is opposed to Sub. for SB 374. Any efforts to address medical malpractice concerns should begin with a patient-centered focus on reducing errors and promoting fair compensation.

Conclusions and Recommendations

The Committee agreed to:

- Recommend, by consensus, to request the Senate Public Health and Welfare Committee provide a status report during the 2011 Legislative Session to a joint meeting of the House and Senate Judiciary Committees on the newly enacted legislation (2010 HB 2323) to determine if additional recommendations are needed relating to criminal background checks on individuals and entities associated with adult care home facilities;
- Recommend the Kansas Judicial Council's approach to an apology law, 2010 SB 374, as introduced, be adopted; and
- Recommend introduction of a House bill on renewal of all of the Kansas Open Records Act exceptions scheduled for expiration in 2011, with the additional recommendation that the language in KSA 12-5611 needs to clarify what types of agency actions are covered and should look at penalty provisions for breach of confidentiality in KSA 44-1132, 75-457, and 75-723.