

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The Chairman called the meeting to order at 9:33 A.M. on February 21, 2011, in Room 548-S of the Capitol.

All members were present, except Senator Donovan, who was excused

Committee staff present:

Lauren Douglass, Kansas Legislative Research Department  
Robert Allison-Gallimore, Kansas Legislative Research Department  
Jason Thompson, Office of Revisor of Statutes  
Tamera Lawrence, Office of Revisor of Statutes  
Theresa Kiernan, Committee Assistant

Others attending:

See attached list.

The Chairman opened the hearings on **SB 176 -- Making lawful presence in the United States a specific consideration in determining conditions of release for a person charged with a crime.**

Jason Thompson, Staff Revisor, reviewed the bill.

Senator King, who had requested introduction of **SB 176** at the request of an Overland Park police detective, stated that the bill would make lawful presence in the country a factor of consideration when determining whether to release a person charged with a crime. He added that a person's immigration status weighs heavily in the flight risk of that person.

Senator Vratil asked, "If a person does not have his birth certificate or passport in his or her possession when arrested, how does a person prove lawful presence at the first hearing. If a person does not possess either of those items at the time of arrest, is the first hearing continued or is bail set at a higher amount?" Senator King responded, "Lawful presence would be just one more factor to consider."

Senator Schodorf asked, "Will the bill give the magistrate more latitude to set higher bail?" Senator King responded, "Yes."

Senator Schodorf asked, "If a person is found not to be lawfully present, will ICE be notified?" Senator King responded, "The first step is to notify ICE. What happens after that is up to ICE."

Senator Kelly noted that the fiscal note states the bill would have no fiscal effect, but is that true for counties. She noted that if the accused cannot afford the amount of bail that is set, or if bail were denied, the county would incur costs.

Senator Vratil asked, "Could the magistrate consider lawful status under current law? Is not unlawful presence a crime and therefor it could be considered under current law?" Senator King stated, "The bill would resolve any doubt that it could be considered."

Written testimony in support of **SB 176** was submitted by Shane Rolf, Kansas Professional Bail Bonds Association (Attachment 1).

No testimony in opposition to **SB 176** was offered.

The Chairman called the committee's attention to the fiscal note for **SB 176**.

The Chairman closed the hearings on **SB 176**.

**Committee Action:**

Senator King moved, Senator Lynn seconded, that **SB 176** be passed. The motion was adopted.

The Chairman turned the committee's attention to **SB 9 -- Code of civil procedure; updates and technical amendments.**

## CONTINUATION SHEET

The minutes of the Judiciary Committee at 10:30 a.m. on February 21, 2011, in Room 548-S of the Capitol.

Jason Thompson, Staff Revisor, reminded the committee that **SB 9** was introduced as a clean up measure to legislation enacted in 2010 that brought the Kansas code of civil procedure in conformance with the federal rules. Mr. Thompson distributed and explained a proposed amendment, which would amend K.S.A. 60-228a (Attachment 2).

Senator Vratil moved, Senator Bruce seconded, that the amendment as proposed in the balloon distributed by Mr. Thompson be adopted. The motion passed.

Senator Vratil moved, Senator Umbarger seconded, that **SB 9** be passed as amended. The motion was adopted.

The Chairman turned the committee's attention to **SB 63 -- Amending the crime of sexual exploitation of a child.**

Jason Thompson, Staff Revisor, reviewed the bill. He noted that a violation of subsection (a)(1) as proposed in **SB 63** would be a severity level 5 felony. Currently, a violation of subsection (a)(1) is a severity level 7 felony.

Senator Haley inquired if there had been a revised prison bed impact statement and fiscal note. The Chairman noted he had not received any revisions.

Senator Bruce moved, Senator Pilcher-Cook seconded, that **SB 63** be passed. The motion was adopted.

The Chairman turned the committee's attention to **SB 73 -- Amending criminal discovery statute to prohibit release of child pornography evidence to the defense.**

Jason Thompson, Staff Revisor, reviewed the bill. He stated that the bill would prohibit the reproduction of pornographic images of children during criminal discovery. He also reminded the committee of an amendment proposed by the Office of the Attorney General, which relates to the location at which materials may viewed, inspected or examined by the defendant, the defendant's attorney or person testifying for the defendant as an expert witness (Attachment 3).

Senator King suggested that BIDS should review its contractual requirements for persons who qualify as a computer forensic expert. Under the current requirements, there is only one person in the state who is qualified.

Christopher Joseph, Kansas Association of Criminal Defense Lawyers, stated the problem is not just a matter of contractual requirements imposed by BIDS. He stated there is simply only one person in the state of Kansas who has the qualifications to be a computer forensic expert. He added that there are only 20 to 30 computer forensic experts in the country.

The Chairman turned the committee's attention to fiscal information provided by BIDS (Attachment 4).

Senator Vratil stated that BIDS is currently under-funded and he does not want to do anything that would make that situation worse.

Senator King directed the following question to Kyle Smith, Office of the Attorney General, "Is it possible that a law enforcement officer could "walk the evidence" to the expert witness and remain while the expert examines the evidence?"

Mr. Smith responded, "That is an option."

Senator Kelly moved, Senator Vratil seconded, that **SB 73** be tabled. The motion was adopted.

The Chairman turned the committee's attention to **SB 79 -- Debt setoff; collection assessment fee.**

Jason Thompson, Staff Revisor, reviewed the bill.

CONTINUATION SHEET

The minutes of the Judiciary Committee at 10:30 a.m. on February 21, 2011, in Room 548-S of the Capitol.

The Chairman turned the committee's attention to information relating debt collections for, and collection assessment fees paid by, District Courts, which was provided by Kent E. Olson, Division of Accounts and Reports, Dept. of Administration (Attachment 5).

Senator Lynn moved, Senator Vratil seconded, that **SB 79** be passed. The motion was adopted.

The Chairman turned the committee's attention to **SB 83 -- Judges and justices; employment of retirants.**

Jason Thompson, Staff Revisor, reviewed the bill.

The Chairman recognized Helen Pedigo, Special Counsel to the Chief Justice of the Kansas Supreme Court, to respond to questions previously raised by the committee. Ms. Pedigo stated that **SB 83** creates no problems regarding KPERS and is in compliance with the requirements of the Federal Internal Revenue Code (Attachment 6).

Senator Vratil moved, Senator Haley seconded, that **SB 83** be passed. The motion was adopted.

The Chairman turned the committee's attention to **SB 96 -- Business entities; resident agents; articles of incorporation and certificates of good standing.**

Jason Thompson, Staff Revisor, reviewed the bill. Mr. Thompson also reminded the committee that the Secretary of State had requested the effective date of **SB 96** be delayed until July 1, 2012.

Senator Vratil raised concerns with the provisions of **SB 96** relating to certificates of good standing and the enforceability of the bill.

Senator Vratil moved, Senator Kelly seconded, that **SB 96** be tabled. The motion was adopted.

The Chairman turned the committee's attention to **SB 104 -- Kansas tort claims act; charitable health care providers.**

Jason Thompson, Staff Revisor, reviewed the bill.

Senator Haley moved, Senator King seconded, that **SB 104** be passed. The motion was adopted.

Meeting adjourned at 10:29 A.M. The next meeting is scheduled for February 22, 2011.

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: MON. Feb. 21, 2011

NAME	REPRESENTING
Patrick Vogelzberg	KODAA
Claudia Larkin	Murphy, Inc.
Shawn McDermott	Miller, Inc.
Kevin Berni	KPBBA
Chris Joseph	"
Nancy Skouse	Judicial Council
Paje Rauthier	Hein Law Firm
Helen Pedigo	Court
Sarah Fertig	KSC
Diane Minear	KS Sec. of State
Marie Monreal	KIDOC
Jimmy Rex	KCSL
Maranda Blank	KW
Paige Haas	WU
Jeff Bollenberg	State Farm

# Kansas Professional Bail Bond Association, Inc.

## TESTIMONY REGARDING SB 176

Chairman Owens, members of the committee, my name is Shane Rolf and I am on the executive board of the Kansas Professional Bail Bonds Association. I thank you for allowing me to submit written testimony in support of SB176.

As informed observers of the pre-trial portion of the criminal justice system, we agree wholeheartedly with the intent of this bill. Too often we have witnessed situations wherein defendants who are not legally present are granted PR bonds only to be released to I.C.E. for deportation action. Sometimes these defendants secure their release from Immigration and appear as ordered. However, all too often, these defendants are actually deported and never seen again [or seen several years later after having once again illegally entered the United States and once again crossed paths with law enforcement]. In the meantime, the case and any victims therein are left to languish.

Many of the other factors the Courts are supposed to consider are of minimal value when dealing with illegal aliens. For example, prior criminal history and prior incidents of failure to appear - two of the most critical factors in determining future court appearance - are often meaningless as relates to illegal aliens (because prior criminal history may have occurred in another country). Adding a requirement that the Court consider legal presence will help to counter this inherent problem.

However, a requirement that the Court consider legal presence is not the same as a prohibition against granting illegal aliens more lenient, and ineffectual, forms of release such as Personal Recognizance. Further, since there is no formal definition of residency associated with 22-2802, a curious dichotomy can be created wherein a defendant is considered a Kansas resident with no *discernable* criminal history and still be an illegal alien with a violent criminal history in his country of origin.

Over the years, we have witnessed the Courts fashion these discretionary features of bond to their own purposes, often ignoring what appear to be clear dictates of the statute. For example, Johnson County's rubric for evaluating ORCD eligibility specifically considers only "prior non-traffic bond forfeitures," when the statute prohibits this type of release for defendants who have any "history of failure to appear for any court appearance." Similarly, Shawnee County has adopted very lenient local rules that allow certain defendants to be released on PR bonds if they meet a series of conditions, such as a current telephone bill and a job in Shawnee County for at least 3 months<sup>1</sup>. Thus leaving the phone company and a short-term employer to be the arbiters of who qualifies for lenient release.

Therefore, we agree with the intent and purpose of the bill - presumably, to insure that illegal immigrants charged with crimes are present to answer to those crimes. However, we question whether

<sup>1</sup> To be fair, Shawnee County restricts this type of Automatic Bond Schedule release if a defendant has a detainer from Federal authorities, presumably, this would include an ICE hold. However, not all illegal aliens have a detainer from ICE.

the simple insertion of a requirement that the Court consider legal presence is sufficient to accomplish this goal, particularly given certain Courts' and certain Judges' propensity and desire to utilize

government-run and taxpayer-financed programs, to attempt to secure appearance, rather than the tried and true method of traditional bail.

Although I am not physically available today, other members present and can answer any questions you may have. Thank you again for your consideration of SB176.

## SENATE BILL No. 9

By Committee on Judiciary

1-13

1 AN ACT concerning the code of civil procedure; amending K.S.A. 20-  
2 3017 and 60-2003 and K.S.A. 2010 Supp. 38-2305, 60-203, 60-206,  
3 60-209, 60-211, 60-214, 60-226, 60-235, 60-249, 60-260, 60-270, 60-  
4 310, 60-460 and 65-4902 and repealing the existing sections; also  
5 repealing K.S.A. 2010 Supp. 38-2305a.

60-228a,

6  
7 *Be it enacted by the Legislature of the State of Kansas:*

8 Section 1. K.S.A. 20-3017 is hereby amended to read as follows: 20-  
9 3017. Within ~~twenty (20)~~ 30 days after the date the notice of appeal has  
10 been served on the appellee in any case appealed to the court of appeals,  
11 any party to such case may file a motion with the clerk of the court of  
12 appeals, requesting that such case be transferred to the supreme court for  
13 review and final determination by such court. Such motion shall be made  
14 in the manner and form prescribed by rules of the supreme court, and it  
15 shall allege the existence of one (1) or more of the conditions described in  
16 subsection (a) of K.S.A. 20-3016, *and amendments thereto*. The clerk of  
17 the court of appeals promptly shall submit any motion made pursuant to  
18 this section to the supreme court. The supreme court shall consider such  
19 motion and may accept the case for review and final determination or  
20 may decline jurisdiction and order that the case be determined by the  
21 court of appeals. A party's failure to file a motion in accordance with this  
22 section shall be deemed a waiver of any objection by such party to the  
23 jurisdiction of the court of appeals.

24 Sec. 2. K.S.A. 2010 Supp. 38-2305 is hereby amended to read as  
25 follows: 38-2305. (a) Venue for proceedings in any case involving a  
26 juvenile shall be in any county where any act of the alleged offense was  
27 committed.

28 (b) Except as provided in subsection (c), venue for sentencing  
29 proceedings shall be in the county of the juvenile offender's residence or,  
30 if the juvenile offender is not a resident of this state, in the county where  
31 the adjudication occurred. When the sentencing hearing is to be held in a  
32 county other than where the adjudication occurred, upon adjudication,  
33 the judge shall contact the sentencing court and advise the judge of the  
34 transfer. The adjudicating court shall send immediately to the sentencing  
35 court a facsimile or electronic copy of the complaint, the adjudication  
36 journal entry or judge's minutes, if available, and any recommendations

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Attachment 2

(iii) neither unreasonable nor unduly burdensome or expensive considering the needs of the case, prior discovery in the case, the amount in controversy and the importance of the issues at stake in the action.

(2) *Failure to sign.* Other parties have no duty to act on an unsigned disclosure, request, response or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

(3) *Sanction for improper certification.* If a certification violates this section without substantial justification, the court, on motion, or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

Sec. 9. K.S.A. 2010 Supp. 60-235 is hereby amended to read as follows: 60-235. (a) *Order for an examination.* (1) *In general.* The court where the action is pending may order a party whose mental or physical condition, including blood group, is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. The court has the same authority to order a party to produce for examination a person who is in its custody or under its legal control.

10.

(2) *Motion and notice; contents of the order.* The order:

(A) May be made only on motion for good cause and on notice to all parties and the person to be examined;

(B) must specify the time, place, manner, conditions and scope of the examination, as well as the person or persons who will perform it; and

(C) must direct the moving party to advance the expenses that will necessarily be incurred by the party or person to be examined.

(b) *Examiner's report.* (1) *Request by the party or person examined.* The party who moved for the examination must, on request, deliver to the requester a copy of the examiner's report, together with like reports of all earlier examinations of the same condition. The request may be made by the party against whom the examination order was issued or by the person examined.

(2) *Contents.* The examiner's report must be in writing and must set out in detail the examiner's findings, including diagnoses, conclusions and the results of any tests.

(3) *Scope.* This subsection applies also to an examination made by the parties' agreement, unless the agreement states otherwise. This subsection does not preclude obtaining an examiner's report or deposing an examiner under other law.

(c) *Report Reports of other examinations.* Any party may request, and is entitled to receive, from another party like reports of all earlier or later examinations of the same condition. But those reports need not be

Sec. 9. K.S.A. 2010 Supp. 60-228a is hereby amended to read as follows: 60-228a. (a) *Citation of section.* This section may be cited as the uniform interstate depositions and discovery act.

(b) *Definitions.* In this section:

(1) "Foreign jurisdiction" means a state other than this state or a foreign country.

(2) "Foreign subpoena" means a subpoena issued under authority of a court of record of a foreign jurisdiction.

(3) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or political subdivision, agency or instrumentality or any other legal or commercial entity.

(4) "State" means a state of the United States, the district of Columbia, Puerto Rico, the United States Virgin islands, a federally recognized Indian tribe or any territory or insular possession subject to the jurisdiction of the United States.

(5) "Subpoena" means a document, however denominated, issued under authority of a court of record requiring a person to:

(A) Attend and give testimony at a deposition;

(B) produce and permit inspection and copying of designated books, documents, records, electronically stored information or tangible things in the possession, custody or control of the person; or

(C) permit inspection of premises under the control of the person.

(c) *Issuance of subpoena.* (1) To request issuance of a subpoena under this section, a party must submit a foreign subpoena to a clerk of court in the county in which discovery is sought to be conducted in this state and pay the docket fee as required by K.S.A. 60-2001, and amendments thereto. A request for the issuance of a subpoena in this state under this section ~~act~~ does not constitute an appearance in the courts of this state.

(2) When a party submits a foreign subpoena to a clerk of court in this state, the clerk, in accordance with that court's procedure, must:

(A) Promptly issue a subpoena for service on the person to which the foreign subpoena is directed; and

(B) assign the subpoena a case file number and enter it on the docket as a civil action pursuant to K.S.A. 60-2601, and amendments thereto.

(3) A subpoena under subsection (c)(2) must:

(A) Incorporate the terms used in the foreign subpoena; and

(B) contain or be accompanied by the names, addresses and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.

(d) *Service of subpoena.* A subpoena issued by a clerk of court under subsection (c) must be served in compliance with K.S.A. 60-303, and amendments thereto.

(e) *Deposition, production and inspection.* K.S.A. 60-245 and 60-245a, and amendments thereto, apply ~~applies~~ to subpoenas issued under subsection (c).

(f) *Application to court.* An application to the court for a protective order or to enforce, quash or modify a subpoena issued by a clerk of court under subsection (c) must comply with the statutes of this state and be submitted to the court in the county in which discovery is to be conducted.

(g) *Uniformity of application and construction.* In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

(h) *Application to pending action.* This section applies to requests for discovery in cases pending on the effective date of this section.



1 and the defendant or respondent shall each designate a health care  
2 provider licensed in the same profession as the defendant or respondent  
3 within ~~20~~ 21 days of such party's receipt of notice of the convening of the  
4 screening panel. The parties shall jointly designate a health care provider  
5 licensed in the same profession as the defendant or respondent within ~~10~~  
6 14 days after the individual designations have been made. If the parties  
7 are unable to jointly select a health care provider within such ~~10~~ 14 days,  
8 the judge of the district court or, if the district court has more than one  
9 division, the chief judge of such court shall select such health care  
10 provider.

11 ~~Sec. 17.~~ K.S.A. 20-3017 and 60-2003 and K.S.A. 2010 Supp. 38-  
12 2305, 38-2305a, 60-203, 60-206, 60-209, 60-211, 60-214, 60-226, 60-  
13 235, 60-249, 60-260, 60-270, 60-310, 60-460 and 65-4902 are hereby  
14 repealed.

18.

60-228a

15 ~~Sec. 18.~~ This act shall take effect and be in force from and after its  
16 publication in the statute book.

19.

1 enters an order granting relief following such a private showing, the  
2 entire text of the statement shall be sealed and preserved in the records of  
3 the court to be made available to the appellate court in the event of an  
4 appeal.

5 (f) Discovery under this section must be completed no later than 20  
6 days after arraignment or at such reasonable later time as the court may  
7 permit.

8 (g) If, subsequent to compliance with an order issued pursuant to  
9 this section, and prior to or during trial, a party discovers additional  
10 material previously requested or ordered which is subject to discovery or  
11 inspection under this section, the party shall promptly notify the other  
12 party or the party's attorney or the court of the existence of the additional  
13 material. If at any time during the course of the proceedings it is brought  
14 to the attention of the court that a party has failed to comply with this  
15 section or with an order issued pursuant to this section, the court may  
16 order such party to permit the discovery or inspection of materials not  
17 previously disclosed, grant a continuance, or prohibit the party from  
18 introducing in evidence the material not disclosed, or it may enter such  
19 other order as it deems just under the circumstances.

20 (h) For crimes committed on or after July 1, 1993, the prosecuting  
21 attorney shall provide all prior convictions of the defendant known to the  
22 prosecuting attorney that would affect the determination of the  
23 defendant's criminal history for purposes of sentencing under a  
24 presumptive sentencing guidelines system as provided in K.S.A. 21-4701  
25 et seq., and amendments thereto.

26 (i) The prosecuting attorney and defendant shall be permitted to  
27 inspect and copy any juvenile files and records of the defendant for the  
28 purpose of discovering and verifying the criminal history of the  
29 defendant.

30 (j) (1) *In any criminal proceeding, any property or material that*  
31 *constitutes a visual depiction, as defined in subsection (a)(2) of section*  
32 *74 of chapter 136 of the 2010 Session Laws of Kansas, and amendments*  
33 *thereto, shall remain in the care, custody and control of either the*  
34 *prosecution, law enforcement or the court.*

35 (2) *Notwithstanding subsection (b), if the state makes property or*  
36 *material described in this subsection reasonably available to the*  
37 *defendant, the court shall deny any request by the defendant to copy,*  
38 *photograph, duplicate or otherwise reproduce any such property or*  
*material submitted as evidence.*

39 (3) *For the purpose of this subsection, property or material*  
40 *described in this subsection shall be deemed to be reasonably available*  
41 *to the defendant if the prosecution provides ample opportunity for*  
42 *inspection, viewing and examination of such property or material at*  
43

sb73\_balloon.pdf  
RS - JThompson - 02/15/11

an appropriately secured

1 *law enforcement facility by the defendant, the defendant's attorney and*  
2 *any individual the defendant may seek to qualify to furnish expert*  
3 *testimony at trial.*

4 Sec. 2. K.S.A. 2010 Supp. 22-3212 is hereby repealed.

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

7

3-2

Bill Number: SB 73	Assigned Committee:
FN Due Date:	
Hearing Scheduled?	Date of Hearing:
Version of the bill: Introduced	DOB Analyst: Cindy Denton
Responding Agency: State Board of Indigents' Defense Services	
Prepared by: Patricia A. Scalia	

Fiscal Impact	Yes	No
State (Would this bill have a fiscal effect on your agency?)	X	
Local (Would this bill have a fiscal effect on local governments?)		
Tax Revenue (Would this bill affect State General Fund revenues?)		
Fee or Other Revenue (Would this bill affect revenues to other state funds?)		

	FY 2011	FY 2012	FY 2013
<b>Expenditures</b>			
State General Fund	\$25,000	\$25,000	\$25,000
Fee Fund(s)	\$25,000	\$25,000	\$25,000
Federal Fund			
<b>Total Expenditures</b>			
<b>Revenues</b>			
State General Fund			
Fee Fund(s)			
Federal Fund			
<b>Total Revenues</b>			
<b>FTE Positions</b>			

### Bill Description

*Briefly describe what the legislation does. Describe the change(s) from current law that would drive an increase or decrease in expenditures or revenues. If federal funds are affected by the bill in some way, explain that relationship as well. Note any technical or mechanical defects with the bill (bill drafting errors only, do not include commentary as to whether the bill should be enacted or not).*

This bill would require inspection of pornographic materials at a crime lab or other location under the control of law enforcement.

**Assumptions for Fiscal Effect Estimate**

**Expenditures:** Detail the assumptions made in preparing the cost estimate. Describe agency expenditures that would become necessary with passage of the bill and how workload assumptions translate into the cost estimates. The estimate for any new position should be detailed to show the salary, benefits and associated other operating costs (such as a computer or other equipment). Distinguish between one-time and ongoing costs.

**Revenues:** Describe the assumptions and methods used in estimating the bill's effect on revenues. Detail the source of the revenue—is it a tax, agency earning, fee income or a federal reimbursement—and the fund that would receive the revenue. Distinguish between one-time and ongoing revenue changes estimated to result from passage of the bill.

There are about 5 cases involving this type of material to be reviewed for purposes of the defense each year. Computer forensics experts must be hired to review the materials. There is only one qualified computer forensics expert in the State of Kansas available for the defense. That one expert will examine materials in his lab but will not travel to a crime labor or other locations to conduct his work. If the materials are to be kept in a location under the control of law enforcement, out-of-state experts must be hired and their travel must be paid. Additionally, it takes a great many hours to examine computer files and to determine whether they were requested or received by “spam”, to date and time verify them and to verify whether third persons could have accessed these materials rather than the defendant. The cost for this service will be \$10,000 per case.

BIDS pays for expert services from its fee fund. However, that fee fund provides only about half of the cost of experts per year. Accordingly, the cost is divided for purposes of this fiscal note between the fee fund and SGF.

**Long-Term Fiscal Considerations**

If the bill affects future years, beyond those shown in the table above, explain the long-term fiscal effect—are the revenues stable over the long term or would there be a phase-in of costs or revenues; if the bill ends at a specific future date, indicate this as well.

**Local Government Fiscal Effect**

*If the bill affects local governments, identify which local governments would be affected (e.g., cities, counties, school districts, water districts, etc.). Describe the bill's fiscal effect to the local governments.*

**References/Sources**

*If there are supporting documents or spreadsheets explaining calculations or assumptions, please attach them.*

3370

Attached is a five year collection report of District Court Debts collected through the Setoff Program. It includes total debt collections for each fiscal year, the computed 17% fee retained by Setoff and the net amount returned to the District Courts.

The Kansas Department of Revenue is the only other State Agency with the authority to add the collection assistance fee to its debts. The following statute allows KDOR to add the Setoff collection assistance fee to its debt:

**KSA 75-5148: Additional penalty for collection of delinquent tax.** The secretary of revenue or the secretary's designee may assess an additional penalty to be added to any delinquent tax owed by a taxpayer in an amount equal to the fee charged by a debt collection agency for the collection of such delinquent tax, as provided by K.S.A. 75-5140 *et seq.*, and amendments thereto, and any charges required to be paid to any government agency within or without the state of Kansas for services rendered in connection with such collection.

As an example of how the fee is "grossed-up" to adjust for the fee, we would add 17% to a \$100 debt to calculate an amount of \$117. A setoff percentage would be set as 14.53% so that a collection against the \$117 would calculate at \$17 ( $\$117 \times 14.53\% = \$17$ ). The amount returned to the court would be \$100.

Please let me know if you need any additional information would if you would like to discuss this explanation in more detail.

Thanks,

Kent E. Olson, Director  
Division of Accounts & Reports  
Department of Administration  
900 SW Jackson, Room 351-South  
Topeka, Kansas 66612-1248  
(785) 296-2314  
Fax (785) 296-6841  
[kent.olson@da.ks.gov](mailto:kent.olson@da.ks.gov)

Senate Judiciary

2-21-11  
Attachment 5

2-5

# **SETOFF PROGRAM** **SUMMARY OF COLLECTIONS FOR DISTRICT COURTS**

	<i>FY 2006</i>	<i>FY 2007</i>	<i>FY 2008</i>	<i>FY 2009</i>	<i>FY 2010</i>
District Courts Collections by Fiscal Year	201,970	178,710	250,507	311,723	349,196
	0.17	0.17	0.17	0.17	0.17
Amount Retained by Department of Admin Setoff Program	<u>34,335</u>	<u>30,381</u>	<u>42,586</u>	<u>52,993</u>	<u>59,363</u>
Net amount returned to the District courts	<u><u>167,635</u></u>	<u><u>148,329</u></u>	<u><u>207,921</u></u>	<u><u>258,730</u></u>	<u><u>289,833</u></u>



**From:** Laurie McKinnon [mailto:LMcKinnon@KPERS.ORG]  
**Sent:** Tuesday, January 25, 2011 4:41 PM  
**To:** Mumford, Terry; Braitman, Mary Beth  
**Subject:** Question About Statute

Terry & Mary Beth: I have a question about the attached statute from Gordon Self at the Revisor's Office. The statute – K.S.A. 20-2622 – provides judges with the opportunity to return to the bench part-time after retirement with an agreement put in place at a particular time. Number one, Gordon questions whether or not this statute is even kosher (and it's been in place since 1995, so it's been blessed by the IRS) and number two, would it remain kosher if the phrases I've highlighted requiring the agreement are removed? Any thoughts? Thank you!

<<20-2622.docx>>

\*\*\*\*\*  
\*\*\*\*\*

CIRCULAR 230 DISCLOSURE: Except to the extent that this advice concerns the qualification of any qualified plan, to ensure compliance with U.S. Treasury Department Regulations, we are now required to advise you that, unless otherwise expressly indicated, any federal tax advice contained in this communication, including any attachments, is not intended or written by us to be used, and cannot be used, by anyone for the purpose of avoiding federal tax penalties that may be imposed by the federal government or for promoting, marketing or recommending to another party any tax-related matters addressed herein.

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## Helen Pedigo

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**From:** Helen Pedigo  
**Sent:** Monday, February 14, 2011 8:54 AM  
**To:** Senator Owens ; Theresa Kiernan; 'Jason.Thompson@rs.ks.gov'  
**Subject:** SB 83 Senior Judge Program Amendments

Senator Owens,  
FYI –It appeared that the bill does not create any problems regarding KPERS or the Feds. See below.

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**From:** Laurie McKinnon [<mailto:LMcKinnon@KPERS.ORG>]  
**Sent:** Friday, February 11, 2011 9:46 AM  
**To:** Kathy Porter  
**Subject:** FW: Question About Statute

Kathy: See conversation about K.S.A. 20-2622, below. Let me know if you need anything else. Thanks!

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**From:** Braitman, Mary Beth [<mailto:MaryBeth.Braitman@icemiller.com>]  
**Sent:** Friday, January 28, 2011 1:44 PM  
**To:** Laurie McKinnon  
**Cc:** Mumford, Terry  
**Subject:** RE: Question About Statute

Laurie:

We believe that the current provisions of KSA 20-2622(1) raise an issue with regard to whether there has been a severance from employment with respect to a judge who retires prior to age 62 who enters into an agreement to perform judicial duties (at the time of retirement or shortly thereafter).

Under IRC Section 401(a)(36), a qualified defined benefit plan such as KPERS may make distributions to a participant who has not separated from service, but who has attained age 62. A qualified plan may also make in-service distributions to a participant who has attained normal retirement age under the plan. If a plan participant is not age 62 or has not attained normal retirement age, then the participant must have a bona fide severance from employment in order to receive a benefit from a qualified pension plan. The IRS has taken the position that a person who moves from a full-time position to a part-time position without a break in service has not really had a bona fide severance from employment. The IRS has also taken the position that a pre-termination agreement to reemploy constitutes a sham separation, and would not qualify as a bona fide separation.

It appears that under KSA 20-2608 a judge can receive a benefit earlier than age 62. It also appears that under KSA 20-2608, age 62 is the normal retirement age under the plan. Therefore, if a judge that is younger than age 62 wants to draw a benefit, he must have a bona fide severance from employment. If such a judge enters into a written agreement to serve as a temporary judge prior to his retirement, then the IRS would likely question whether he really has had a true severance from employment.

Removing the highlighted provisions would be fine under the IRS point of view. In fact, removing the highlighted language in (1) is a simple solution to this issue. However, as far as implementation of the amended provision, the Supreme Court should be aware that, for a judge who has not attained age 62, the agreement to serve as a temporary judge should not be entered into prior to or soon after retirement.

Let us know if this answers your question.

Terry and Mary Beth

Terry A.M. Mumford  
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