BIDS Legislative Committee
300 SW 8th Ave, Suite 303
Topeka, KS 66603
sbids.org/legislativecommittee

KANSAS STATE BOARD OF INDIGENTS' DEFENSE SERVICES

Phone: 785-291-3006
Clayton J. Perkins, Co-Chair
cperkins@sbids.org

Senate Judiciary Committee
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Senate Bill 127
Testimony of the BIDS Legislative Committee
Presented by J. Houston Bales & Jorge De Hoyos
Opponent

Chairperson Warren and Members of the Committee:

SB 127 proposes to modify the hearsay exception regarding "statements of physical or mental condition of the declarant" to allow for a significantly broader definition of who may provide such testimony. In replacing "physician" with dozens of other roles and professions included in "healthcare provider as defined in K.S.A. 60-4915, and amendments thereto," the ultimate result would effectively eliminate the purpose of "physician," and would create a lack of significant confrontation rights to hearsay statements. For these reasons, we oppose this bill.

To understand the problems this bill creates, a little background is helpful. The concept of hearsay comes into our laws in 1603 with the treason trial of Sir Walter Raleigh. At that time, the understanding was that a statement not made before a court is not reliable evidence, and should be examined very carefully. This concept evolved into our current understanding of hearsay: an out-of-court statement made by the declarant that is offered to prove the truth of a matter.

Because of the unreliable nature of using one person's recollections of another person's statements, hearsay evidence is generally inadmissible. But over time, the law evolved to identify some conditions where such a statement may be reliable. A classic example of reliable hearsay is your own birthday. Technically, your own knowledge of your birthday is hearsay, since you did not observe your own birth and only have the statements of others to rely on when asked when your birthday is. But for a variety of reasons mostly based in the reliability of those other people, your own statement about your birthday is reliable. These circumstances evolved into what are codified in our code of civil procedure as exceptions to hearsay. What this bill proposes to do is expand one of these exceptions in a massive way.

In 1963, Kansas adopted K.S.A. 60-460 which defines hearsay and its exceptions. In K.S.A. 60-460(l)(2), the legislature adopted the following:

"(l) Statements of physical or mental condition of declarant… (2) previous symptoms, pain or physical sensation, made to a physician consulted for treatment or for diagnosis with a view to treatment and relevant to an issue of declarant's bodily condition."

This bill proposes to remove "physician" from the statute, and substitute: "…healthcare

provider as defined in K.S.A. 60-4915, and amendments thereto…" On its face, the change seems to do very little, but the effects of such change are astronomically larger than intended.

Under current Kansas law, this hearsay exception applies only to statements made to a "Physician consulted for treatment or for diagnosis with a view to treatment." A physician is commonly understood to be a type of doctor. Not a nurse, administrator, or other person whose role may be in the care and treatment of illnesses, but who is not sufficiently trained and credentialed to be a doctor. These are professionals who have gone through rigorous programs, ethical examinations, and who are trained to listen carefully and speak cautiously, as the power their licenses gives their words is terrible if misused. Few professionals are as strictly regulated as physicians.

That regulation, training, and responsibility provides the logical underpinning for the reason we accept what a physician tells us about another person's words regarding their health. People are least motivated to lie to their healers about their health, and doctors specifically have strong motivations to relay that information accurately. Other healthcare providers do not carry the same assurances. As they do not have the power to prescribe, treat, diagnose, and heal, their patients have a diminished incentive to tell the truth. And since the great weight of responsibility falls primarily on the doctor, other medical professionals do not quite have the same immense incentives to ensure accuracy to the same degree required of doctors.

If the legislature was to adopt the proposed amendments, under K.S.A. 60-4915, there are approximately 13 additionally defined roles, and a provision that includes all those who are "healthcare providers" under K.S.A. 40-3401. Following the reference to K.S.A. 40-3401, there are approximately 24 additionally defined roles classified as "healthcare providers." Of those additional 24 people, more than 10 feature titles of corporations that would be considered "healthcare providers." 40-3401 also includes a list of exemptions from "healthcare provider" which first removes State institutions, but not private institutions, of intellectual or psychiatric care.

The amendments proposed in this bill create language so expansive that it would be hard to imagine who would not qualify as a healthcare provider. Furthermore, because corporations would be considered healthcare providers, the broad scope of the corporation would include testimony from witnesses who qualify as a representative of the corporation, but not a representative of an actual physician. Few, if any, of these roles share any of the characteristics that make a patient's statement to their physician inherently reliable: a desire to heal and an ethical obligation to effectuate that healing in a timely manner, especially since the broad sweep of the statute would include individuals who have no contact with the patient and are simply corporate record keepers. Ultimately the change proposed in this bill would widen the existing hearsay exception from a limited class of highly-trained and strictly monitored professionals to a mass of persons who do not share the same motivations and stringent standards.

It is also important to remember that the changes proposed in this bill will apply not only to criminal prosecutions, but also to every sort of action before a Kansas court. We would urge the committee to carefully consider the effect such a radical and wide-sweeping change would

also have on civil litigation, especially since some of the most active areas of civil litigation concern the testimony of medical professionals: workers compensation, personal injury, and medical malpractice. Passing this legislation will change these extremely active civil litigation areas permanently.

The proposed statutory change would create more chaos and confusion rather than clarity in the statutory scheme regarding hearsay. If passed, this bill would open a Pandora's box not only in criminal cases, but also in civil cases that will trample Constitutional rights and expand the scope and cost of litigation for the average Kansan. Without some showing that simply working in the healthcare field makes a person's recollection of another's unsworn statements inherently more reliable than a non-healthcare professional, a sweeping change to this rule will do vastly more harm than good. For these reasons we oppose this bill.

James Houston Bales
BIDS Legislative Committee Member
jbales@sbids.org

Jorge De Hoyos
BIDS Legislative Committee Member
jdehoyos@sbids.org