

Feb. 18, 2004

TO: House Health and Human Services

FROM: Pedro Irigonegary
Kansas Trial Lawyers Association

RE: HB 2306

Chairman Morrison and members of the committee, thank you for the opportunity to appear before you today. I am Pedro Irigonegaray, a practicing lawyer from Topeka and a past president of the Kansas Trial Lawyers Association.

The Kansas Trial Lawyers Association strenuously opposes HB 2306. The federal and state nursing home inspection/survey system checks the owners' and operators' substantial compliance with, respectively, federal and state certification and licensure laws and regulations. The state licensure system was set up to protect the health, safety and welfare of our frail elders and disabled adults who reside in licensed nursing care facilities (also known as "adult care homes" in Kansas). The federal certification system was set up to do the same, and to assure minimal contractor compliance because Medicaid and Medicare are major payers for nursing facility care. There is only one survey for both purposes. The survey system is the back-bone of the certification and licensure systems. Taxpayers pay for it while also paying for a substantial part of all nursing facility care.

The proposed bill might have some validity if the Legislature has no confidence in the federal- and state-funded certification and licensure survey system for which it authorizes payment. The survey system was the subject of a Legislative Post Audit Study within the last three or four years and found to be reasonably adequate. The nursing facility industry often disputes the validity of the survey system, but a regulated industry is often at odds with its regulatory authority. Further, nursing facilities have the right to contest cited deficiencies through informal dispute resolution and the appeals process.

In any civil case, the trial judge is the arbiter of questions of admissibility of evidence and judicial rulings on such issues are based upon long-established case law and statutes. To suspend that body of law and to legislatively exclude a particular type of evidence from all civil cases should require an overriding state or public interest. No such interest exists with these publicly funded inspection reports. Public survey/inspection reports are clearly distinguishable from, for example, internally-generated quality assurance or peer review documents.

Very often the survey report is the only objective documentation of regulatory compliance and quality of care, and derives from, among other things, surveyor onsite observation, review of medical records and staff, and resident and family interviews. As such it is a unique piece of contemporary evidence, and will be determined by the trial court to be either relevant and admissible or not, for that or other legal bases, on a case by case basis.

Finally, this information is already in the public domain. JCAHCO documents are not. The survey report is conducted by the government, and the survey results, by federal and state law, are public, posted in every facility in the state. Protection of the interests and rights of consumers of nursing facility care should and must be paramount to the protection of the self-interest of the nursing home industry. KTLA respectfully urges defeat of this bill.