

## MINUTES

### 2014 SPECIAL COMMITTEE ON JUDICIARY

January 5, 2015  
Room 112-N—Statehouse

#### Members Present

Senator Jeff King, Chairperson  
Representative Lance Kinzer, Vice-chairperson  
Senator David Haley  
Senator Forrest Knox  
Representative Erin Davis  
Representative Janice Pauls  
Representative John Rubin

#### Members Absent

Senator Greg Smith  
Representative Annie Kuether

#### Staff Present

Robert Allison-Gallimore, Kansas Legislative Research Department  
Lauren Douglass, Kansas Legislative Research Department  
Jason Thompson, Office of Revisor of Statutes  
Natalie Scott, Office of Revisor of Statutes  
Connie Bahner, Committee Assistant

#### Conferees

Kathy Taylor, Kansas Bankers Association  
Pat Hubbell, Pharmaceutical Research and Manufacturers of America  
Kathy Armstrong, Kansas Department for Children and Families  
Saundra Hiller, Kansas Foster and Adoptive Parent Association

Chairperson King called the Committee meeting to order and reviewed the agenda. The first order of business was to approve the minutes of the meeting of the 2014 Special Committee on Judiciary of November 24, 2014. *Representative Pauls moved the minutes be approved, seconded by Vice-chairperson Kinzer. The minutes were approved unanimously.*

Chairperson King asked Mr. Allison-Gallimore, Kansas Legislative Research Department, to advise the Committee of the additional information provided by previous conferees. Mr. Allison-Gallimore stated proposed patent infringement legislation had been submitted by the Kansas Bankers Association (KBA); Kathy Armstrong, Kansas Department for

Children and Families (DCF), had submitted information outlining the grievance procedures in place for foster parents; and the Kansas Foster and Adoptive Parents Association (KFAPA) had submitted the results of a Foster Parent Bill of Rights Survey, which was requested by the Committee.

Representative Pauls asked if she could talk about the Public Speech Protection Act at some point during the meeting. Chairperson King advised they would first consider the patent infringement issue, the *Murdock* and *Powell* decisions, the Public Speech Protection Act, and then the foster care issue.

Chairperson King asked Mr. Allison-Gallimore to give an overview of what the Committee had previously discussed on the patent infringement bill, 2014 HB 2663. Chairperson King then asked if there were any persons who wanted to provide additional information for the Committee's consideration.

Kathy Taylor, KBA, stated the Committee has been provided a clean copy of the bill introduced last year with the changes previously discussed during the interim. She directed the Committee's attention to the last page regarding exempting language. The KBA has been working with Pharmaceutical Research and Manufacturers of America (PhRMA), Pfizer, and Caterpillar, Inc., and she stated the language in Subsection 1 will satisfy the concerns PhRMA and Caterpillar had. The language was taken from the Illinois version of the Vermont bill. Subsection 2 was requested, specifically, by Pfizer.

Chairperson King asked if the two federal code sections cited in Subsection 2 are regulations relating to the development and approval process of pharmaceuticals at the federal level. Ms. Taylor stated they are.

Chairperson King asked if Subsection 2 allays the concerns of PhRMA and others about this proposal. Pat Hubbell, PhRMA, said he is not free to speak as to Pfizer's position on this bill because he has not spoken to them. Mr. Hubbell stated he has not yet received much feedback from the members of PhRMA. All he can say on behalf of PhRMA is when they see a bill, they will either ask for an amendment or sign off on it.

Vice-chairperson Kinzer asked whether, in part 3 of the amendment where it says "notify another of the infringement," the word "another" means the same person to whom the demand letter was sent or someone other than the person to whom the demand letter was sent. Ms. Taylor advised it pertained to the person to whom the demand letter was sent. Vice-chairperson Kinzer stated the way it is worded could be interpreted to mean some third party.

Chairperson King asked if there were other questions. There were none.

*Representative Pauls moved to pass out the legislation favorably with the proposed amendments from the KBA. Representative Rubin seconded the motion.*

Chairperson King stated this was an excellent effort to address the patent infringement issue, but he has the same concerns mentioned by Vice-chairperson Kinzer. Vice-chairperson Kinzer stated they could draft the bill to state who is being notified and that it is not unlawful practice to engage in a good faith notification of the infringement of a patent, or something along those lines.

Senator Knox stated they do not want to inhibit any good faith efforts and suggested there be a requirement the letter state this notification is being made in good faith, notifies the person of the law, and there is a recourse if the receiver thinks it is in bad faith.

Chairperson King stated there are a number of notice requirements that cite the statute showing the recourse a person would have.

Vice-chairperson Kinzer wondered how this might affect smaller, less sophisticated patent holders. If the notice did not get included, would that constitute bad faith?

Chairperson King stated the language in Section 1 of the proposed exemptions also concerned him and he stated it could be construed in such a way it could make the entire bill meaningless. *Chairperson King moved a substitute motion to pass the bill as originally drafted, including Section 2 of the proposed exemption amendment, but to strike Section 1 of the proposed amendment. Vice-chairperson Kinzer seconded the substitute motion. The substitute motion passed.*

Chairperson King stated the motion, as amended by the substitute motion, was now before the Committee for discussion. Representative Rubin asked whether this was going to be submitted to the Legislature as a Special Committee bill. Chairperson King advised it could be, if authorized by the Legislative Coordinating Council (LCC). *Representative Rubin recommended the bill be recommended for referral to the Senate Judiciary Committee since the Chairperson of that Committee has heard all the discussion on this bill. Representative Pauls seconded the motion.*

*There being no further discussion, a vote was taken and the motion passed.*

## **Responses to Kansas Supreme Court Decisions (*Murdock* and *Powell*)**

Chairperson King opened the discussion on the responses to the Kansas Supreme Court decisions in *Murdock* and *Powell*. There were no members of the audience who asked to speak to the Committee. Mr. Allison-Gallimore gave an overview of the cases and the action taken by the Committee to this point.

Chairperson King recognized Representative Rubin for his comments. Representative Rubin wanted to discuss *State v. Murdock* first. *He moved the Committee recommend to the Legislature and, if approved by the LCC, sponsor legislation amending KSAs 21-6811(e), 21-6810(d), and 22-3504, as proposed by the Kansas County & District Attorneys Association (KCDAA) in its submission to this Committee last November. He further moved the legislation be referred to the House Corrections and Juvenile Justice Committee. Representative Pauls seconded the motion.*

## ***Discussion***

Chairperson King joined in Representative Rubin's recommendations, as well as those coming from KCDAA, with regard to amending KSAs 21-6811(e) and 21-6810(d) on how to address an issue that could have substantial ramifications in this state, and to do so in a way that is fully procedural in nature and will enhance to the maximum possibility the likelihood of retroactive application by our state appellate courts. He had concerns, however, about the

proposal on KSA 22-3504. He was not persuaded it would remedy any of the *Murdock* issues, stated it will not fix the situation encountered in *Murdock*, and could even make matters worse by putting up additional impediments in a process that had worked very well prior to *Murdock*. The problem in *Murdock* was not that the process did not work, but that there was a ruling that retroactively overturned the process applied in the state for over 20 years. He asked for comments by the Committee.

Representative Rubin shared Chairperson King's concerns on KSA 22-3504. However, he wanted to include this language for the present because it may not survive the rigors of the Committee and legislative process, anyway, and without these amendments in this section, there may arise a greater question as to retroactive application of what is being suggested here.

*There being no further discussion, Chairperson King called for a vote. The motion carried, with one vote against by Vice-chairperson Kinzer.*

*Chairperson King moved the report indicate the concerns of the Committee regarding the proposed changes to KSA 22-3504, but they are being submitted to the Legislature without a recommendation either for or against that section. Representative Rubin seconded the motion. The motion passed.*

### **State v. Powell**

Chairperson King opened discussion on the case of *State v. Powell*. Representative Rubin moved the Committee recommend in its report and, with the permission of the LCC, sponsor legislation for referral to a standing committee of the amendments to KSA 22-2502, as proposed by the KCDAA in their November submission. He also moved, with regard to subparagraph (d) on the second to last page, lines 78-82, language be added consistent with and parallels the legislation enacted previously about public access to probable cause affidavits and other search warrants. He moved this be referred to the House Standing Committee on Corrections and Juvenile Justice.

Chairperson King asked for clarification. He stated it was his understanding KCDAA gave them an option of either listing out the biological material, as shown in lines 34-36, or striking specific references and simply stating "any item that can be seized under the Fourth Amendment to the *United States Constitution*," as has been done in other Fourth Amendment jurisprudence. Representative Rubin stated his motion would be only what is shown in lines 38-40, "any item that can be seized under the Fourth Amendment to the *United States Constitution*." Vice-chairperson Kinzer seconded the motion.

Vice-chairperson Kinzer stated it is cleaner to strike the existing law and just use the Fourth Amendment language.

Senator Haley had reservations about how broad an effect this will have on a person's constitutional rights.

Chairperson King asked, on the probable cause section, if this was a technical correction from what was passed last year regarding public access to search warrants. Representative Rubin acknowledged it was. Chairperson King asked if perhaps this should be addressed, then, in a separate bill, instead of adding it to this bill. He recommended they note in the report there are technical issues in the proposed legislation.

Jason Thompson, Office of Revisor of Statutes, stated Subsection (d) is old language and was replaced last year. He quickly did some research and confirmed the section had been removed.

*Representative Rubin amended his motion strictly to add the language in lines 38-40 and strike the enumerating language in the existing law.*

*Chairperson King called for a vote, and the motion, as amended, passed.*

### **Anti-SLAPP Bill**

Chairperson King opened discussion on the anti-SLAPP (strategic lawsuit against public participation) bill (2014 HB 2711). Representative Pauls stated the anti-SLAPP bill is the Public Speech Protection Act. It is designed to prevent frivolous lawsuits from proceeding against people who give their opinions in public forums, such as on blogs or in newspaper articles. These lawsuits are filed only to intimidate someone and are trying to shut down their opinion. A number of other states have passed laws similar to this one. *She would like this to be introduced as a Committee bill to the House, and so moved. Representative Rubin seconded the motion.*

Senator Knox asked if this was the same bill as the one passed last year. Representative Pauls acknowledged it was the same as 2014 HB 2711. A number of different groups have looked at this bill and are in support of it.

Vice-chairperson Kinzer noted this was, basically, a motion for judgment on the pleadings procedure with an automatic stay provision and an attorney's fee provision. He believed there are mechanisms in law available, but questioned that this type of lawsuit is more problematic than other types of frivolous lawsuits that arise. He asked whether judges should just be more aggressive in resolving these cases. He had no objection to introducing a bill, but asked whether this could be handled in some other way.

Representative Pauls stated this protects public speech, and that can be a very intimidating situation. She also stated not many judges will dismiss these cases. Also, this process is much faster than how suits usually proceed. She stated again other states have enacted this type of legislation.

Senator Knox asked whether a judge could award damages beyond attorney's fees and direct costs of the defendant. He also asked whether damages would be awarded to the defendant or made to be a fine.

Representative Pauls stated this would help the matter be resolved before large attorney's fees and costs are incurred.

Vice-chairperson Kinzer recommended any award of punitive damages be consistent with existing law. Representative Pauls agreed punitive damages need to be carefully awarded.

*Representative Pauls renewed her motion that the Committee introduce this bill to the House Judiciary Committee.*

Chairperson King stated he has no problem with the concept of the bill, but he was concerned with the punitive damage section. He did not like there being a monetary penalty for failure to verify the petition. In other cases, no one is penalized for not verifying a petition. He was concerned, too, about Section 8 regarding constructing the statute liberally to effectuate its purposes. He would like the report to state the Committee agrees to the legislation's concept, but not every word.

Representative Rubin stated the intent of this bill is to save parties the cost up front so there are fewer frivolous lawsuits.

Senator Knox agreed this is an important bill and he is for protecting free speech. He was confident the standing Committee would sort through all of it.

Representative Pauls stated about 30 states have passed this already, and she was unaware of any abuse regarding punitive damages. She agreed this can be looked into further. *She renewed her motion to pass this out of Committee.*

Senator Haley stated punitive damages are addressed appropriately in this bill.

*Chairperson King called for a vote. The motion passed.*

### **Foster Parents' Bill of Rights (2014 SB 394 and Judicial Council report)**

Chairperson King opened discussion on the Foster Parents' Bill of Rights. He asked if anyone from the audience wanted to address the Committee.

Kathy Armstrong, Assistant Director for Legal Services, DCF, stated written testimony has been submitted. The last time they appeared before the Committee, Chairperson King had asked them to provide their process for grievance when a child has been placed in a foster home for more than 30 days but less than six months. They have two contracted providers that provide foster care. Both of those providers already had grievance processes in place, but the Committee expressed some concern whether there was a consistent, statewide process. The process was set out in their testimony. It is a structure for grievance expression by a foster parent in the event they have received notice of the intent to remove the child from their home and the process to be followed. Both providers have agreed to put this process in place. The process is an internal process, but will not involve the original worker who made the recommendation or that person's immediate supervisor. There is some flexibility as to who will serve on the grievance committee. There were no questions of Ms. Armstrong.

Chairperson King recognized Sandra Hiller, appearing on behalf of the KFAPA. She noted they have submitted the results of the survey the Committee had requested. There were no questions.

### ***Discussion***

Chairperson King stated the Judicial Council did extensive work and submitted their report at the meeting in November.

Senator Knox wanted to make sure the Committee saw from the survey 90 percent of the people surveyed felt the Foster Parent Bill of Rights should be a law as opposed to a DCF policy.

Vice-chairperson Kinzer wanted to know if the Committee or DCF wanted to include the grievance language from DCF into the Judicial Council bill or have it implemented as a DCF rule and regulation or policy.

Ms. Armstrong stated DCF prefers it to be in policy. It is in policy now. These types of practices are best managed in policy and are not easily changed. These policies are reviewed every six months, and various groups provide their input into any policy changes. It allows them to continue to focus on best practice to assure safety, permanency, and well-being of children. If it were made a law, they would have to come back to the Legislature anytime they wanted to make a change.

*Vice-chairperson Kinzer moved the Committee report recommend for bill introduction to the Senate the Judicial Council's report and the report mention, as this issue is being studied, more particular study be done to determine whether more particularized language on the grievance process needs to be added. Chairperson King suggested this be done in two motions.*

*Vice-chairperson Kinzer moved the Committee Report state that while this bill is being studied, particular attention be given as to whether more specific language on the grievance process be included in the statute or implemented by rule and regulation or through other agency policy. Senator Knox seconded the motion.*

Chairperson King stated there are three options of placing a grievance process in action – through statute, through policy, or through formal rules and regulations. He asked Ms. Armstrong whether DCF would have any problem with it being done through a formal rules and regulations process, which would give the legislature an oversight process. Ms. Armstrong stated she did not know if she had authorization to state the agency position. But if the Committee indicated that to be preferable, she did not see it to be a big problem. Most of the regulations that deal with foster parents and foster homes are KDHE regulations because they oversee the licensure and monitoring of the foster homes and families, but there are a few regulations that address different issues and that would be one that could specifically address that process.

*Chairperson King restated the motion, to place in the Report a recommendation the Legislature consider whether the grievance process be done statutorily, through regulation, or through other policy means. A vote was taken, and the motion passed.*

*Vice-chairperson Kinzer moved to recommend for bill introduction into the Senate the Judicial Council proposed legislation, seconded by Representative Pauls.*

Representative Rubin was concerned whether this should be a legislative matter as opposed to a DCF or KDHE policy. He stated there should be legislative oversight.

Vice-chairperson Kinzer stated the Judicial Council proposal ameliorates a lot of Representative Rubin's concerns. He stated the Judicial Council proposal was a reasonable place to start even if it needed to be modified substantially through the legislative process.

Senator Knox asked Ms. Hiller and Ms. Armstrong some questions about the grievance process, as to whether foster parents feel their rights have been violated or the foster child's rights have been violated, and if there were any checks and balances in the grievance process.

Senator Knox pointed out to the Chairperson and the Committee the survey indicated there are widespread problems with the grievance process at this time.

Senator Haley supported the motion and stated it is an important issue that needs to be addressed.

Representative Rubin stated he would vote against the motion. There is a potential conflict between the minority of foster parents who do not look for the best interests of the child. If we elevate the foster parents' role with a bill of rights to the point they are a colleague on the child welfare team, it puts them in a quasi-government role. He admitted this can be addressed by the Legislature, but he would vote against it.

*Chairperson King called for a vote on the motion. The motion passed, with Representative Rubin voting no.*

Chairperson King recognized the years of service provided to the State of Kansas by Vice-chairperson Kinzer. He stated he considers him a valued colleague and a worthy partner in trying to produce the best legislation for the state of Kansas.

Senator Haley supported Chairperson King's comments about Vice-chairperson Kinzer and stated they often were on opposite sides, but he was always respectful and never used his hammer in trying to get things done; he instead used his logic. He hoped his attributes will carry over in this Session.

Representative Pauls stated she enjoyed working with Vice-chairperson Kinzer and appreciated all the work he had done in leading the House Judiciary Committee.

Representative Rubin concurred and said Lance Kinzer had been a wonderful mentor to him and had taught him a lot. He had been the most outstanding Committee Chairperson he had ever worked with.

Vice-chairperson Kinzer stated it had been an honor to work in the Legislature and working with all of the Committee members. He appreciated their comments, their friendships, and relationships, and he was grateful to everyone.

Chairperson King turned over the adjournment of the meeting to Vice-chairperson Kinzer.

Vice-chairperson Kinzer adjourned the meeting at 12:15 p.m.

Prepared by Connie Bahner  
Edited by Robert Allison-Gallimore

Approved by the Committee on:

January 9, 2015  
(Date)