OFFICE OF THE DISTRICT ATTORNEY
EIGHTEENTH JUDICIAL DISTRICT

MARC BENNETT
District Attorney

KIM PARKER
Deputy District Attorney

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Testimony Regarding HB 2555
Submitted by Marc Bennett, District Attorney and Eighteenth Judicial District

Honorable Chairman King and Members of the Senate Judiciary Committee, thank you for the opportunity to bring to your attention certain issues related to HB 2555. As set forth below, I am offering specific concerns to HB 2555, ***as written***. I support the amendments proposed by the Kansas County and District Attorneys Association, which I believe would more effectively achieve the goals of this legislation.

HB 2555 is an effort to expand the values of transparency and open government through access to court documents. While the Kansas County and District Attorneys Association and the Office of the District Attorney, 18th Judicial District, agree that public confidence in our system of justice is strengthened by openness, I urge this committee to consider Supreme Court Rules 3.6, 3.8(f) & 8.4(d) and the logistical steps necessary to enhance openness in our system, when framing any changes to current law.

The Kansas Rules of Professional Conduct speak directly to the issue of pretrial dissemination of information:

3.6 Advocate: Trial Publicity

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.
(b) Notwithstanding paragraph (a) a lawyer may state:
(1) the claim or defense involved and, except when prohibited by law, the identity of the persons involved;
(2) information contained in a public record;
(3) that an investigation of the matter is in progress;
(4) the scheduling or result of any step in litigation;
(5) a request for assistance in obtaining evidence and information necessary thereto;
(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
(7) in a criminal case, in addition to subparagraphs (1) through (6):
(i) the identity, residence, occupation and family status of the accused;
(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that

person;
(iii) the fact, time and place of arrest; and
(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.
(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.
(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

The Kansas Supreme Court's comments following rule 3.6 speak directly to the difficult balance that must be struck when shaping public policy in this area:

"[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy."

Additionally, prosecutors have long been identified as having specific obligations with regard to the dissemination of information in an extra-judicial context:

3.8 Advocate: Special Responsibilities of a Prosecutor

"(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule"

Rule 8.4(d), concerning **Misconduct**, simply says "it is professional misconduct for a lawyer to: . . . (d) engage in conduct that is prejudicial to the administration of justice."

While enhanced access to information is a laudable goal, when the dust settles, prosecutors and judges will be the ones responsible for implementing changes made to K.S.A. 22-2302 and 22-2502, in balance with our ethical obligations. Note, that Canon 3, §(9) of the Kansas Code of Judicial Conduct limits judges from making **public** comment on pending proceedings.

The counter-point is that prosecutors would be cleared of ethics-related concerns by the passage of HB 2555. Whether that proves true, cannot be known until challenged and decided by our Supreme Court. My concern is that prosecutors are solely responsible for charging cases. The notion that we can be insulated from our ethical obligations by any change in the law runs counter to my understanding of the clear and overarching responsibilities inherent in our role. Prosecutors are to be "minister(s) of justice" per

Kansas Supreme Court Rule and case law of the United State Supreme Court. Our charge is to seek justice, not convictions. That concept has been so ingrained that I genuinely doubt any law can modify that obligation.

Turning to the logistical consequences of HB 2555, Sec. 1(c), allows the prosecutor only ***one*** option when an affidavit contains information that would violate Rules 3.6 or 3.8(f): moving to seal the entire affidavit. Sec. 1., §(d) does say the "magistrate shall redact" information that fits one of several factors. That said, until a court decision clarifies the obligations of prosecutors, if faced with the choice of risking a violation of the ethical rules, many prosecutors will simply play it safe and seek to seal all affidavits that contain any such information rather than abdicating their responsibility and placing the entire burden on the magistrate.

The KCDAA's proposed amendment to K.S.A. 22-2302 (Sec. 1 of HB 2555) would be to render an affidavit filed in support of a complaint open after the completion of the preliminary hearing and arraignment, upon request. This would serve two purposes: first, only cases that anyone has expressed an interest in would need to be edited; and second, the defendant's right to confront the evidence in the affidavit would have been protected by either contesting or waiving his or her preliminary hearing.

If the committee is disinclined to make the public wait until the preliminary hearing/ arraignment, I would still urge the committee to allow the State to submit suggested redactions to the court at the time of filing (otherwise, the right to counsel attaches at the first appearance and then any subsequent effort by the state to submit suggested redactions to the court would be construed as an unethical ex parte communication).

Additionally, the requirement that it be open upon request allows editing only of cases where someone has expressed an interest. Otherwise, the state will be submitting redactions for hundreds or thousands of cases that no one will ever seek to view. While I recognize that staff time in prosecutor's offices is not of paramount concern to everyone, it does give rise to a significant fiscal cost when a jurisdiction files nearly 5000 cases supported by affidavit as Sedgwick County did in 2013.

One last logistical note: given that the changes appear to be procedural rather than substantive, it would follow that HB 2555 would effectively open affidavits filed prior to July 1, 2014. Because affidavits drafted and signed prior to this bill were drafted without concern for public dissemination, no steps were taken to redact sensitive information concerning victims & witnesses (Social security numbers, addresses and bank account information). For these cases especially, I urge this body to give consideration to adopting the procedural/ logistical mechanisms suggested by the KCDAA—namely, requiring the party seeking access to submit a request to the prosecutor, which would afford the state the opportunity to redact or, at worst, seek to seal.

Finally, with respect to HB 2555, Sec. 2, which seeks to amend K.S.A. 22-2502, affidavits filed in support of search warrants, the KCDAA has also authored a suggested balloon amendment. The suggested changes allow citizens the right to access affidavits filed in support of search warrants for their property (leased or owned) while giving guidance to the reviewing court as well as providing a specific standard of proof for the Judge.

The effort to add openness to the courts is one I support. I am simply asking this

committee to give consideration to the strongly held ethical concerns and the logistical considerations of this effort, as I strongly believe that neither can be ignored without consequence to the prosecutors of this state.

Thank you for your time, attention and consideration in this matter.

Respectfully submitted,

Marc Bennett, District Attorney
Eighteenth Judicial District