

## MINUTES

### SPECIAL COMMITTEE ON FEDERAL AND STATE AFFAIRS

August 30-31, 2007  
Room 313-S—Statehouse

#### Members Present

Representative Arlen Siegfried, Chairperson  
Senator Pete Brungardt, Vice-Chairperson  
Senator Anthony Hensley, Ranking Minority Member  
Senator Roger Reitz  
Representative Owen Donohoe  
Representative Oletha Faust-Goudeau  
Representative Annie Kuether  
Representative Mike O'Neal  
Representative Jene Vickrey

#### Staff Present

Mike Heim, Office of the Revisor of Statutes  
Jason Long, Office of the Revisor of Statutes  
Ken Wilke, Office of the Revisor of Statutes  
Dennis Hodgins, Kansas Legislative Research Department  
Kathie Sparks, Kansas Legislative Research Department  
Jeannie Dillon, Committee Assistant

#### Conferees

Dr. Howard Rodenberg, Director, Division of Health, Kansas Department of Health and Environment  
Paul Lyons, City Councilman, Overland Park  
Admiral John Babb, Regional Health Administrator for Region VII, United States Department of Health and Human Services  
Dr. Lambert Wu, American Heart Association  
Dr. Brian Holmes, Kansas Academy of Family Physicians  
Terri Roberts, Executive Director, Kansas State Nurses Association  
Kathy Bruner, Clean Air Lawrence Coalition  
Dolores Furtado, Johnson County Commissioner and professor emeritus  
Dion Avello, Mayor, City of Derby  
Joyce Morrison, Clean Air Kansas City  
Mary Jayne Hellebust, Executive Director, Tobacco Free Kansas Coalition  
Dr. James Dixon, Gardner  
Phil Bradley, Kansas Licensed Beverage Association

Thomas Barton, Owner, Rear Inn Lounge, Westminster, CO  
Bill Negro, Vice-President, KC Business Rights Coalition  
Stuart Little, Penn National Gaming  
Ron Hein, Reynolds American, Inc.  
Jeff Martin, Armour Amusement  
Don Saylor, Kansas Restaurant and Hospitality Association  
Alan Cobb, Americans for Prosperity  
James F. Ives, Owner, Blind Tiger Brewery and Restaurant  
John Rostine, Jul's Cocktail Club  
Hollie Becker, Frances O'Dooley's Irish Pub  
Mike Magers, Owner of Salt Mine, Baldwin City  
Rebecca Rice, Kansas Association of Clubs and Associates  
Michael Leitch, Deputy Attorney General  
Greg Crawford, Chief of Vital Statistics Data Analysis, Kansas Department of Health  
and Environment  
Larry Buening, Executive Director, State Board of Healing Arts

### **Others Attending**

Shelly Wakeman, State Board of Healing Arts  
Susan Kang, Kansas Department of Health and Environment  
Chris Schwartz, Deputy Medicaid Director, Kansas Health Policy Authority  
Dr. Margaret Smith, Kansas Health Policy Authority

### **Thursday, August 30 Morning Session**

The meeting was called to order by Chairperson Siegfroid at 10:00 a.m. The Chairperson welcomed everyone to the meeting. He called attention to the great amount of testimony to hear and explained the guidelines for the conferees appearing before the Committee. He said there would be a time limit of five minutes for each conferee, and the conferee would be notified when this time had elapsed. He noted the only exception to this rule in the morning would be Jason Long, Office of the Revisor of Statutes, who would give the Committee an overview of the current Kansas smoking law and court decisions. He said that because of the number of conferees and the time involved, all testimony would be heard before questions were asked by the Committee.

The Chairperson introduced Jason Long, who presented an overview of the current Kansas smoking laws. He explained state statutes and regulations, exceptions, local legislation regulating smoking in a city or county, constitutionality of smoking prohibitions and various court decisions including information on the *Steffes v. City of Lawrence* lawsuit ([Attachment 1](#)).

Chairperson Siegfroid asked if a city would have the right to prohibit any smoking whatsoever inside the city limits.

Mr. Long said he believed that it is within the boundaries of state law to prohibit smoking in public places and public meetings. He said that there is no case law, but he did not think that he would go so far as to say that the cities could ban smoking completely.

The Chairperson asked if smoking in private homes and private cars would be outside a city's purview.

Mr. Long responded that although he could not say definitively, he thought that would be a stretch of the law. He commented that the thrust of the law was public places.

Chairperson Siegfried welcomed Dr. Howard Rodenberg, Director of Health, Kansas Department of Health and Environment. Dr. Rodenberg presented information to the Committee on the hazards of secondhand smoke. He noted opposition to clean air was based on fear and not facts. He said it is incumbent on policymakers to show the courage to make that change when doing so is in the best interest of the public ([Attachment 2](#)).

The Chairperson recognized Paul Lyons, City Councilman, Overland Park. Mr. Lyons was an advocate of the smoking ordinance in his city that was passed in November 2006. He cited three factors affecting the passage of the ordinance. The first factor was the newly released report by the United States Surgeon General on the harmful affects of secondhand smoke on otherwise healthy nonsmokers. The second factor was that 89 percent of the citizens of Johnson County were nonsmokers. The last factor was the date of the compromise between the Kansas Restaurant and Hospitality Association and Clean Air Kansas City, so all the cities could implement similar smoking restrictions on the same date. This factor addressed the issue raised by opponents who believed their businesses would be disadvantaged unless nearby cities went smoke-free together ([Attachment 3](#)).

The Chairperson welcomed Admiral John Babb, Regional Health Administrator, Region VII of the United States Department of Health and Human Services. Admiral Babb asked the Committee to consider the rights and safety of the unborn, infants, children, and those who are at the end of the lower economic spectrum who find themselves working in unsafe environments ([Attachment 4](#)).

Dr. Lambert Wu, Topeka Cardiologist, representing the American Heart Association, was recognized by the Chairperson to speak to the Committee. Dr. Wu gave testimony regarding secondhand smoke and its ill effects on health. He asked the Committee to support an indoor clean air law this year ([Attachment 5](#)).

Dr. Brian Holmes, family practice physician from Abilene representing the Kansas Academy of Family Physicians, was introduced by the Chairperson. Dr. Holmes urged the Committee to support a comprehensive statewide ban on smoking in all workplaces, including restaurants and bars. Dr. Holmes stated that he saw harmful effects of secondhand smoke and tobacco use every day in his practice. He further stated the recent Kansas Supreme Court ruling on the Lawrence ordinance affirmed its constitutionality, and even alluded to the justification for complete prohibition of tobacco because of its undeniable harmful effects ([Attachment 6](#)).

The Chairperson introduced Terri Roberts, Executive Director, Kansas State Nurses Association. Ms. Roberts gave testimony on the economics for business and business interests. She gave information on research evidence with data on how businesses implement clean indoor air that may have an affect and what that affect is. Ms. Roberts also commented on state and local regulations on indoor air. Ms. Roberts shared the highlights from the California case study on the California Smoke-Free Workplace Act ([Attachment 7](#)).

The Chairperson welcomed Kathy Bruner, Clean Air Lawrence Coalition, to the meeting. Ms. Bruner gave information about her experience in a smoke free environment in Lawrence, Kansas. She has shared this experience with various city and county governments in Kansas ([Attachment 8](#)).

Dolores Furtado, former Johnson County Commissioner and professor emeritus, KU Medical School, was recognized by the Chairperson. Ms. Furtado gave testimony regarding the 2006 countywide social behavior survey, jointly funded by the county and by the cities, and conducted by ETC Institute of Olathe. The Committee was informed of the findings ([Attachment 9](#)).

Mayor Avello, City of Derby, was welcomed to the Committee meeting. Mr. Avello related to the Committee the actions taken by the Derby City Council to protect the public health through clean indoor air legislation. He said that on April 10, 2007, the Derby City Council approved a clean indoor air ordinance that would prohibit smoking in indoor public places, places of employment in Derby, and within 20 feet of entrances, exits, and air intake ventilation systems effective January 1, 2009. A provision exempting all establishments licensed to sell liquor for consumption on the premises until Wichita passes its own comprehensive clean indoor air ordinance was included ([Attachment 10](#)).

Joyce Morrison, on behalf of Clean Air Kansas City, was recognized by the Chairperson. She said the Mayor of Overland Park asked representatives from the Clean Air Kansas City and the Kansas Restaurant and Hospitality Association to meet to try to reach an agreement on the issue of smoke free restaurants and bars. Discussion and cooperation between the two groups resulted in an agreement that was instrumental in paving the way for smoke free ordinances, not only in Overland Park, but in Leawood, Lenexa, Olathe, and unincorporated Johnson County ([Attachment 11](#)).

Chairperson Siegfried welcomed Mary Jayne Hellebust, Executive Director, Tobacco Free Kansas Coalition, Inc., to the Committee meeting. Ms. Hellebust stated that a strong public health law in Kansas would provide smoke-free public places and work sites, including restaurants and drinking establishments, as well as places of recreation and sports such as bowling alleys, bingo halls, and billiard rooms. Such a law would not ban smoking; it would move smoking outside away from where it can harm people ([Attachment 12](#)).

The Chairperson asked if there was anyone else in the room that would like to give oral testimony as a proponent.

The Chairperson recognized Dr. James Dixon Gardner. Dr. Gardner stated that he was coming before the Committee as a person who had a heart attack two years ago and since then he has reflected a lot about this subject. He believes it is our inalienable right to have life, liberty and the pursuit of happiness. He asserted that when he walks into a restaurant to meet with someone who has invited him to do so, his inalienable rights have been violated when he is subjected to exposure to secondhand smoke ([Attachment 13](#)).

Chairperson Siegfried again asked if there was anyone else in the room that would like to speak to the Committee as a proponent.

The Chairperson recognized Charles Pomeroy and asked if he had submitted testimony. Mr. Pomeroy submitted a letter he had written to Senator Hensley. Mr. Pomeroy talked about his travels with his family to the eastern part of the United States and how pleased he was that much of the time they were able to travel in states where they were protected from secondhand smoke ([Attachment 14](#)).

Chairperson Siegfried recognized Robert Hertzell to speak to the Committee. Mr. Hertzell gave testimony about his disability while serving in Vietnam. As a result, he suffers from COPD and second hand smoke is very damaging to him. It is his hope that the state will not wait to take legislative action that will immediately send a message to our youth and communities in Kansas that smoking and second hand smoke is harmful ([Attachment 15](#)).

The meeting was opened for questions.

A Committee member asked Joyce Morrison why the term "courtyards provided" was stricken and then reinserted in her testimony.

Ms. Morrison responded that her organization was thinking of restaurants, bars, and places they could provide for their smoking patrons to take it outside. She said that they were trying to be inclusive and most restaurants have a patio or a courtyard area.

A Committee member asked Dr. Rodenberg if he had any specific Kansas studies suggesting that the present law is not working.

Responding to the question, Dr. Rodenberg noted there were two ways of answering the question. He said that you need one of two things to happen. He explained that you need a control group or a community where you prohibit smoking and one where you do not; you compare stroke, heart attack, and cancer rates across the board, or you can look at epidemiologic studies. He said that he did not know of any specific Kansas epidemiologic studies. He stated nationwide epidemiologic studies, even when people are in a designated smoking area and have separate ventilation systems, show that the toxic cigarette smoke still drifts over to the other ventilation system and drifts over into the clean air.

A Committee member asked if retro-fitting of ventilation systems or if other physical barriers were required might work.

Dr. Rodenberg replied that if the data suggested that it was a viable option, he would not object, but all the data suggested that it simply was not going to work. He said there was a copy of the synopsis in the Attorney General's report.

A Committee member asked if he would acknowledge that the State cannot eliminate every health risk even though it recognizes and identifies that there are risks.

Responding to the question, Dr. Rodenberg said that you cannot eliminate every risk, but he did think that the State does have an obligation to eliminate the most obvious health risks that affect the most number of people, and secondhand smoke is critical, at best.

Staff was asked if there is any present legislation and if it is going to move forward in the next legislative session.

Mr. Long said that there are two bills introduced last session that are still alive and remained in Committee. He stated HB 2162 addresses, more specifically, smoking in public schools.

The Chairperson asked staff where the State stands with smoking in the workplace.

Mr. Long responded that as long as private places are open to the public, the state can limit smoking, but the owner of establishments have the opportunity to designate a smoking area.

The Chairperson inquired if anyone knew of any constitutional rulings or rights for the State of Kansas to control smoking in private areas.

Dr. Rodenberg responded that he would be disingenuous if he said that smoking in the home was not a significant cause of illness related to secondhand smoke. He said that the state does, in fact, regulate the environment: public and private places. He stated that they do regulate lead in paint products and asbestos in building materials, and they do that activity as a state. He said that

as a layman, he did not think that smoking was a different constitutional issue than regulating building products or lead in paint. He said children will be exposed to secondhand smoke in the home. He did not think that the State could do much about private residences. He further stated that policymakers have a duty to try to prevent health hazards by looking at public indoor air legislation.

The Chairperson asked if anyone knew of states where smoking was not allowed in the workplace.

Dr. Rodenberg said that there were several states that have partial prohibitions.

The Chairperson commented that last year the State passed legislation that authorized casinos. He said that Missouri allows smoking on their casino floors. He was concerned that if the State put in a smoking ban, it may cause an unlevel playing field for the casinos.

A Committee member inquired if anything is being done to control the substance tobacco.

Admiral Babb responded that he would love for the Occupational Safety and Health Administration (OSHA) to take tobacco on and control it as they do any other hazardous substances, but that has not happened yet. He said there has been discussion about the Food and Drug Administration (FDA) regulating tobacco, but that has not happened either. He said at some point states, 27 to date, say that they are going to protect the people. He commented that Kansas did not have to be last.

Chairperson Siegfried inquired if there are any significant figures that would show what the cost would be to the state for implementing this policy and how quickly it could be implemented.

In response to a question by Chairperson Siegfried, Dr. Rodenberg said that the total cost of tobacco to the State is estimated to be \$700 million. The cost of a specific illness related to second hand smoke is harder to evaluate. He explained to the Committee ways this could be done.

The Chairperson thanked all conferees for taking time to testify. The Chairperson called the Committee's attention to a number of written testimonies and asked them to review them (Attachments 16-27).

The meeting was recessed and the Chairperson asked the Committee to return at 1:30 p.m.

## **Written Testimony**

Linda DeCoursey, American Heart Association (Attachment 16);  
Lisa Benlon, American Cancer Society (Attachment 17);  
Michelle Bernth, American Lung Association (Attachment 18);  
Wayne Martin, Owner, Royal Crest Lanes, and Wayne and Larry's Sports Bar,  
Lawrence (Attachment 19);  
Jon Hauxwell, MD, Hays (Attachment 20);  
Michael Fox, University of Kansas Medical Center (Attachment 21);  
John Zutavern, Abilene City Commission, and former President of Kansas League  
of Municipalities (Attachment 22);  
James R. Behan, Garden City (Attachment 23);  
Todd Kucinski, Manhattan (Attachment 24);  
Bob Strawn, City Commissioner, Manhattan (Attachment 25);  
Ken Davis, PT, MPH, Clinical Assistant Professor, University of Kansas (Attachment  
26); and

Kansas Health Institute (Attachment 27).

### **Afternoon Session**

The meeting was reconvened at 1:30 p.m. The Chairperson explained the rules and time allowed for each conferee.

Phil Bradley, Kansas Licensed Beverage Association, was recognized by the Chairperson. Mr. Bradley stated that voluntary as well as mandatory smoke free areas in establishments are increasing. He noted that there does not exist today in the United States a smoke free ban. He said that every ban has an exemption. He noted the Lawrence ban has three exemptions, including smoke shops and Hallmark Cards.

Mr. Bradley said this is an issue of the rights of private businesses to serve their customers. He noted smoking is a legal activity and the establishments that are targeted in this bill are places that all persons have a choice, whether or not they enter and frequent.

He stated if the Committee believed that they must pass a statewide ban, he would ask for an exemption for businesses licensed for primarily on-premise liquor sales (Attachment 28).

Thomas Barton, owner of the Rear Inn Lounge in Westminster, Colorado, was recognized by the Chairperson. Mr. Barton related how the smoking ban in Colorado directly impacted him in a negative economic way (Attachment 29).

Bill Nigro, Vice-President of the Kansas City Business Rights Coalition, was welcomed. Mr. Nigro stated if a smoking ban is enacted, many of the members of the Kansas City Business Rights Coalition would be forced to lay off some of their employees to compensate for the loss of income incurred (Attachment 30).

Chairperson Siegfried recognized Stuart Little, Penn National Gaming. Mr. Stuart explained Penn National Gaming was appearing today because they are about to apply for a gaming license in Cherokee County, and if they are selected, a smoking ban would have a serious impact on that business. His opinion was that a smoking ban would be more significant in this area than the Kansas City area because of the connection to the States of Missouri and Oklahoma. Oklahoma makes everything more difficult, because the casinos are within 15 minutes of the proposed casino in Cherokee County. Both states allow smoking in their casinos. He said not only would Oklahoma tribal casinos not be under any state ban, most of them have smoking shops and derive a significant portion of their revenue from selling tobacco products in their casinos and on their reservations (Attachment 31).

Ron Hein, legislative counsel for Reynolds American, Inc., was recognized by Chairperson Siegfried. Mr. Hein stated the charge to this Committee is not to discuss or to propose a statewide smoking ban, but to review the smoking regulations in the State and to look at the constitutional decision regarding local smoking ordinances.

He said that he opposed SB 37, a proposed smoking ban, and numerous private business owners appeared to explain to the Legislature the adverse economic impact on private business owners. He said that smoking ban bills take away private business owners' rights to make decisions for themselves and their properties at the same time that businesses are voluntarily providing more and more smoke-free dining options.

He concluded by requesting the Committee to review the court case pursuant to the charge, but to refrain from introducing any type of smoking ban at this time ([Attachment 32](#)).

Jeff Martin, Armour Amusement, spoke to the Committee about the negative impact on the entire hospitality industry in Kansas. He stated that only 18 percent of the bars still allow you to smoke. It was his hope something could be worked out so that the last few smoking bars could be saved ([Attachment 33](#)).

The Chairperson recognized Don Sayler, President and CEO of the Kansas Restaurant and Hospitality Association (KRHA). Mr. Sayler said the KRHA has been one of the leading defenders of the right of private businesses. He believes the owners know best what food to serve, what business decisions to make, and what customers they seek for the best success for their personal businesses. He also contended that the business owner, not the government regulators, are in the best position to determine their customer base.

He clarified the position of the KRHA on a smoking ban. He said the position of the KRHA has been misconstrued because some have claimed the organization would support a ban with no exceptions. He explained the board only indicated that they would not oppose a ban with no exceptions. At no time has the KRHA ever indicated they would support a ban of any sort ([Attachment 34](#)).

Alan Cobb representing Americans for Prosperity was introduced to the Committee. Mr. Cobb focused on two issues. He said that the smoking ban is a violation of the free market principle. He also mentioned the threat of a ban such as this poses harm to nonsmokers as well. He said if you do this with no logical stopping point, criminalizing voluntary behavior which may or may not have health risks, would be an enormous cost to freedom and posterity ([Attachment 35](#)).

The Chairperson welcomed James Ives, owner of Blind Tiger Brewery and Restaurant. Mr. Ives said the idea of a smoking ban in Kansas was very disturbing to him. He stated that Kansas has traditionally been a state that stresses freedom for individuals to choose their own pathways in life. He said he does not smoke, but that he believes in personal freedom. He stated if the government wants to ban smoking in public owned buildings such as the Capitol Building, that is appropriate; however, the government should not ban smoking in private businesses ([Attachment 36](#)).

John Rostine, owner of the Jul's Cocktail Club in Topeka, asked the Committee to oppose a statewide smoking ban. He said that a ban such as this allows the government to place further limitations on how he is allowed to operate his business. He stated when he became an owner of this establishment, he saw fit to make a substantial investment in a ventilation system. The purpose of this investment was to cater to both smokers and non-smokers. If the statewide smoking ban is put into effect, he feels his investment will be rendered worthless ([Attachment 37](#)).

The Chairperson recognized Hollie Becker, owner of Frances O'Dooley's Irish Pub in Topeka. She urged the Committee to oppose a statewide smoking ban. She said that a total smoking ban would add to the growing restrictions being placed on businesses like hers. She stressed the smoking policy of a business should be determined by the business itself. She asked the Committee to stand up for the rights of business owners by opposing this smoking ban ([Attachment 38](#)).

Mike Magers was recognized by the Chairperson. He described his small business, and the effect a smoking ban would have on his business. He stated that a smoking ban is an infringement on his constitutional rights ([Attachment 39](#)).



Chairperson Siegfroid welcomed Louie Riederer. He said he was neither an opponent or proponent of the smoking ban. He stated the smoking ban is going to come, and he would like to see a level playing field for everyone. As far as an economic impact, he stated a smoking ban will have a detrimental effect on some people (Attachment 40).

The Chairperson asked if there was anyone that wanted to speak against the proposed smoking ban that is not on the list to speak.

Rebecca Rice came forward to speak for the Kansas Association of Clubs and Associates. She stated that the Association is opposed to a smoking ban in Kansas. She presented the Committee with petitions they have been collecting since this issue was raised this session. The petitioners were to identify themselves as a smoker or nonsmoker. She noted there were a large number of nonsmokers on the petition (Attachments 41-81).

The Chairperson opened the meeting for questions.

The Chairperson said that we have had very strong testimony stating that smoking is very harmful and that there is compelling reason we have a smoking ban. He asked if anyone has scientific evidence this is not true.

Phil Bradley said that he is neither a doctor or a scientist, but in his written testimony the Committee would find references to scientific evidence. He said he did not think anyone would argue that smoking is not harmful, but that's permanent smoking. He thought the unsatisfied part is what effect happens when secondhand smoke is involved and how much secondhand smoke. If you were exposed once, are you always affected by that one brief exposure? He stated that the subject is not settled.

A Committee member was concerned regarding the exemption made in Lawrence relating to Hallmark Cards and wanted documentation.

Staff responded there was a copy in the overview.

After all questions were answered by the conferees, Chairperson Siegfroid thanked the conferees for taking their time to attend. The Chairperson called a recess and asked the Committee to return at 2:50 p.m.

The Chairperson reconvened the meeting at 2:50 p.m. He recognized Representative O'Neal.

Representative O'Neal said that in looking at the charge, despite the fact that this appeared to be a set of conferees, one side wanting a statewide ban and the other is against it, the Committee's charge was to look at the regulations of public smoking in Kansas and review the Kansas Supreme Court case. He said in view of his reading of the case, the Supreme Court upheld the smoking ban in Lawrence. He further stated that he was impressed by the testimony of those who are very passionate about the health issues, but he was also mindful of the fact that all the wisdom of the State does not reside in this building. He concluded by saying that the appropriate place for this to happen is at the local level just as they did in Lawrence.

*Representative O'Neal made a motion to, at this time, not proceed with a statewide ban, but that the local level is the appropriate place to determine local standards for smoking bans and to acknowledge the decision of the Supreme Court to not place restrictions on the city to do just that. Representative Vickrey seconded the motion.*

After lengthy discussion, the Chairperson called the question. *The motion passed.*

The Chairperson urged the Committee to read the information that was provided. He thanked everyone for attending and announced that we would start the next meeting at 10:00 a.m. on August 31, 2007.

### **Written Testimony**

Chuck Magerl, Wheatfields Bakery, Lawrence KS ([Attachment 82](#));  
Riley Skaggs, Dodge City, KS ([Attachment 83](#));  
Tim Christopher, PJ's Sports and Bar, Shawnee Mission, KS ([Attachment 84](#));  
Jessica Wolverton, Final Approach, Shawnee Mission, KS ([Attachment 85](#));  
Billy Kilgore, Denali's Bar and Grill, Shawnee Mission, KS ([Attachment 86](#));  
John Ross, Owner of 20<sup>th</sup> St. Bar & Grill, Leavenworth, KS ([Attachment 87](#));  
Annette Paden, Owner of Our Place, Leavenworth, KS ([Attachment 88](#));  
Dean Schoenhals, Owner of Backdoor Saloon, Pleasanton, KS ([Attachment 89](#));  
Pam Scott, Executive Director, KS Funeral Directors and Embalmers Association ([Attachment 90](#)); and  
Marcia Nielsen, Ph.D., Executive Director, Kansas Health Policy Authority.

### **Friday, August 31 Morning Session**

Chairperson Siegfried reconvened the meeting on August 31, 2007, at 10:00 a.m. He said this is a legislative fact-finding hearing and the subject matter is somewhat controversial. He explained the guidelines to conferees, guests and the press.

Mike Heim, Office of the Revisor of Statutes, addressed the Committee and gave an overview on current Kansas abortion law. He presented the Committee with a folder which included all Kansas statutes dealing with abortion. Mr. Heim briefed the Committee on the content of that material ([Attachment 91](#)).

The Chairperson asked if any part of Kansas statute 65-444 still stands.

Mr. Heim replied that the substance of the section is still good, but number (3) that states duly licensed physicians attesting to the necessity of such termination have been recorded in writing in the permanent records of the hospital, except in an emergency as defined in section KSA 21-3407 (2) (b) of the Kansas criminal code is no longer effective.

The Chairperson asked about the terminology regarding statute KSA 65-445 that reads "(a) every medical care facility shall keep written records of all pregnancies which are lawfully terminated within such medical care facility and shall annually submit a written report to the Secretary of the Kansas Department of Health and Environment (KDHE) in the manner and form prescribed by the secretary." He questioned if that gives KDHE full reign to create rules and regulations describing how and what the contents will be.

Mr. Heim replied he would assume that relating to that form, KDHE should have that power. He stated that is a general rule for KDHE to adopt rules and regulations also. He stated he assumed that they have adopted a form already.

The Chairperson asked if someone challenged the contents of this form, without the specific authority to do rules and regulations, would it become a matter of the Court to settle whether or not they had good information.

Mr. Wilke responded he thought that was correct.

The Chairperson asked if Mr. Heim saw a problem with the two different definitions of viability.

Mr. Heim replied that he did not think there was any legal issue in terms of this statute itself. He stated he thought it possibly created confusion, and it was probably a good idea to have just one.

The Chairperson asked Mr. Heim about KSA 65-6703 Section 3, regarding the physician reporting the determinations, the reason for such determinations and asked what this means.

Mr. Heim replied that they have to report (1) the gestational age, and (2) determine that an abortion is necessary to preserve the life of the woman or there is substantial and irreversible impairment of a bodily function.

The Chairperson asked Mr. Heim if the doctor has to state what the bodily function is. Mr. Heim replied his interpretation would be yes.

The Chairperson asked if the doctor would have to give a reason why someone would suffer irreversible harm.

Mr. Heim said he thought there would have to be specific information about what was life threatening, if it was a life issue, or what the substantial irreversible impairment was, otherwise it is simply a thing that you just check the box.

A Committee member asked Mr. Heim if it is correct that the records are only to be viewed by the Attorney General or Secretary of Health and Environment.

Mr. Heim said he believed that to be correct. He referred the Committee member to KSA 65-445 (c).

A Committee member asked Mr. Heim if KSA 65-6703 is a prohibition on late term abortion subject to a very limited exception.

Mr. Heim answered that he thought so.

A Committee member asked Mr. Heim why KSA 65-7603 does not mention mental function and KSA 65-6721 does.

He said that there has been an informal interpretation of the late term abortion that mental function is implied in bodily function. He said he thought that the basis for that was Attorney General Stovall's opinion.

Mr. Heim was asked if he would research that opinion and submit a copy. He replied he would.

Mr. Heim was asked by a Committee member that while the State exempts a woman from the conspiracy theory, it does not immunize either the doctor who performs the abortion or the second physician who certifies that the abortion is legal.

Mr. Heim replied that was correct.

A Committee member asked who makes the final decision of the justification for a late term abortion. Mr. Heim said he thought that the prosecutor who would be looking at this. He would do the investigation and decide if there was a conspiracy to violate the law.

The Chairperson asked if the Attorney General's office has the responsibility of review to see that the law is being abided.

Mr. Heim responded yes.

A Committee member asked if Mr. Heim would agree that the law the State wrote dealing with the prohibition on late term abortion is in line with the Supreme Court decisions in terms of placing reasonable restrictions on late term abortion of a viable fetus.

Mr. Heim said yes. After answering all questions from the Committee, Mr. Heim was thanked for the overview on current abortion law.

The Chairperson recognized Jason Long, Office of the Revisor of Statutes. Mr. Long presented some of the differences among the various state statutes that prohibit late term abortion. His research showed there were two general areas of difference among state late term abortion laws. The first is what constitutes a late term abortion; the second, what requirement must be met (Attachment 92).

The Chairperson asked for questions. Seeing none, the meeting was recessed. The Chairperson stated that the Committee would reconvene at 1:30 p.m.

### **Afternoon Session**

The Chairperson welcome everyone back for the afternoon session.

Chairperson Siegfroid recognized Mike Leitch, of the Attorney General's Office. Mr. Leitch reported that in April, the U.S. Supreme Court decided the case of *Gonzales v. Carhart*. He was asked to review the Court's decision and discuss its impact in Kansas.

He stated the Carhart case was brought to challenge the constitutionality of the 2003 Partial-Birth Abortion Ban Act. Dr. Carhart and others filed suit against the United States Attorney General seeking to strike down the law and to enjoin Gonzales from enforcing it.

He stated the Federal Partial Birth Abortion Ban Act was limited and well defined. It prohibited a doctor from performing the procedure known as intact dilation and extraction or D & X. He explained the federal law did not prohibit a woman at any stage of pregnancy from having an abortion. The federal law prohibited one specific type of abortion procedure (Attachment 93).

Responding to questions asked by a Committee member, Mr. Leitch commented that as it stands today, mental health is covered and interpreted to be included within the exceptions.

A Committee member asked if there is nothing before or after Carhart that changes the general concept that there must be some sort of mental health exception.

Mr. Leitch said that was correct.

A Committee member asked what role the State can play in defining and requiring what things need to be shown in order for the mental health exception to be accepted.

Mr. Leitch said he was not familiar with all the cases that deal with mental health exceptions and whether there are other states that passed statutes with more specific detail as to what is required in order to establish the mental health portion.

A Committee member asked if he would agree that current Kansas law does not provide any definition at all and is a very broad concept.

Mr. Leitch commented he thought that was correct

The Chairperson asked Mr. Leitch if he thought the statute required a diagnosis.

Mr. Leitch answered by saying that as the statute is written today, it requires that two physicians agree and reach a determination. After responding to all questions by the Committee, the Chairperson thanked Mr. Leitch for his testimony.

The Chairperson welcomed Greg Crawford, Chief of Vital Statistics Data Analysis for the Center for Health and Environmental Statistics in the Kansas Department of Health and Environment. He gave testimony regarding the role of this Department and discussed the abortion reporting role of KDHE. He provided copies of the *Preliminary Report on Abortions in Kansas, 2006*, which included copies of the abortion reporting form and the physician's certification form.

He said he thought that the Department has tried to enforce all of the laws the Legislature has given it, and said that of the 30 cases reviewed by the Legislative Division of Post Audit, the audit indicated that, based on the facts given them, the outcome seemed reasonable.

He concluded by saying that one of the functions is the collection and reporting of statistics and the other is the dissemination of information. He commented that in collecting the data, the Department makes no judgment on the information obtained from the form (Attachment 94).

A Committee member asked if someone called his office would they give advice as to what to put on the form.

Mr. Crawford said the Department would have no opinion on what to put on the form. He said that on occasion, he has had inquiries and that he read the statute to them over the phone.

A Committee member asked Mr. Crawford in view of the fact that he has one section on partial birth abortion that has a box on mental health exception, and you do not have that box on late term abortion, it would appear that he does not think, at least for statistical purposes, that there is such a thing as mental health exception for late term abortion.

Mr. Crawford said he thought that the only thing the form recognizes is that it collects the information that is required by statute as determined by its attorneys.

Responding to a question from the Committee on what the Department advises, Mr. Crawford said the department is restating the law for a specific purpose. It wants the individual to be making that decision independently.

In response to a question from the Committee regarding diagnostic information going to the Attorney General's Office, Mr. Crawford replied that the Department sees exactly what is summarized in that form or the electronic data summary.

Susan Kang was recognized by the Chairperson and said that the position of KDHE on the abortion and the occurrence thereof, is not an activity that is administered or supervised by them. She stated that their functions are narrow in scope, especially with respect to the collection of data that they receive directly from the physicians.

A Committee member asked if staff could supply forms from states that have similar laws and an indication on how those forms are completed. The Chairperson asked staff to submit them.

The Chairperson introduced Larry Buening, Executive Director of the Kansas State Board of Healing Arts.

Mr. Buening explained the functions pursuant to statutes enacted by the Legislature and rules and regulations adopted by the Board to implement those statutes. He stated the Board's responsibility with regard to the state abortion laws. He defined the meaning of professional incompetency as the following:

- One or more instances involving failure to adhere to the applicable standard of care to a degree which constitutes gross negligence, as determined by the Board;
- Repeated instances involving failure to adhere to the applicable standard of care to a degree which constitutes gross negligence, as determined by the Board; and
- A pattern of practice or other behavior which demonstrates a manifest incapacity or incompetence to practice medicine.

Mr. Buening said that there was 31 definitions of "unprofessional conduct" defined in KSA 2006 Supp. 65-2837(b) and include: Performing, procuring, or abetting in the performance or procurement of a criminal abortion, repeated failure to practice healing arts with that level of care, skill, and treatment which is recognized by a reasonably prudent similar practitioner as being acceptable under similar conditions and circumstances and violating KSA 65-6703 and amendments thereto.

He said the Board carries out its responsibility with regard to the state abortion laws in the Investigatory and Disciplinary Program by reviewing each complaint received. He explained the process of the review and investigation of the complaints and the reporting to the Disciplinary Panel for its review and consideration (Attachment 95).

A Committee member asked if it was the responsibility of the board to discern if the form is completed enough for them to make a judgement that the abortion was done for that exemption.

Mr. Buening said, unless the Board asks for the information, it is not provided.

A Committee member was concerned that if we are using mental health as the exception, there should be follow-up by the doctor after the abortion.

Mr. Buening responded that when the Board receives complaints, it investigates them and tries to determine, based upon those facts, whether or not the standard of care was met.

Senator Hensley stated the statute, in his opinion, addresses the questions being asked.

A Committee member voiced concern that the State has a powerful law and questioned who there is to enforce it. The Committee member thought that someone should be in the position of review, so that life was not taken without legal cause.

Mr. Buening responded that when you get into the mental health part of it, it becomes much more difficult for the Board or anybody to determine whether or not in a retrospective review of those two physicians opinions, if they were proper. He stated the mental state of the individual is not going to be the same in a day, month, or week after the abortion was performed. He said he was not a physician, and he could not say when a person can question whether a mental health diagnosis was valid or not.

Mr. Buening answered questions concerning additional meanings of unprofessional conduct pursuant to the statutes enacted by the Legislature and rules and regulations.

A Committee member asked whether or not there was a basis for a diagnosis of irreversible impairment of a bodily function, would that be a standard of care issue.

Mr. Buening replied it would be a Review Committee issue.

A Committee member inquired of Mr. Buening if there has not been any charges filed of the conspiracy nature, but the facts suggest that a doctor for a reason not supported medically, has agreed on an abortion based on the wants and desires of the patient, would that fit the definition of dishonorable conduct.

Mr. Buening said the Board would have to, like they do in every case, look at the individual facts, what the record reflects, and make a determination based upon the specific facts.

A Committee member requested a copy of the Office Inspection Booklet given to physicians that perform office surgery before inspections of their office.

A Committee member was concerned about the level of expertise needed to make a psychiatric diagnosis of irreversible impairment of a bodily function, and the fact that the skill level of an ordinary doctor may not be adequate.

Mr. Buening answered if the Board has a complaint and it looked at the case, it would look at the particular issue.

Shelly Wakeman answered by saying in any investigation that the Board does involving the care and treatment of a patient, it would look into diagnosis that was made and the treatment provided, and determine whether or not that was the standard. She said a psychiatrist is not the only doctor that can treat a patient for mental health. She stated antidepressants are prescribed more by family practice doctors and not psychiatrists. She said any doctor that seeks to practice psychiatry would be required to be competent in that area.

The relationship between the physician and second doctor giving the second opinion was discussed by Mr. Buening and the Committee.

In response to a question by the Committee, Ms. Wakeman explained the steps that are taken by the Board after a complaint was made on a specific case of a fetus post 22 weeks. She stated the physician has to determine that the patient would suffer major bodily harm. She said it requires the diagnosis to be made of what that bodily harm would be.

After responding to all questions asked by the Committee, Mr. Buening was thanked for his testimony.

Christiane Swartz was welcomed to the Committee to answer questions regarding the written testimony given by Marcia Nielsen, Kansas Health Authority (Attachment 96).

The Chairperson said he would be interested to see if Kansas Medicaid law would allow the State to make a distinction for late term abortions. Ms. Swartz said she would find the information.

After answering questions of a general nature, Ms. Swartz was thanked by the Chairperson.

The Chairperson thanked the Committee and conferees for their participation. The meeting was adjourned until September 7, 2007, at 10:00 a.m.

Submitted by Jeannie Dillon  
Edited by Kathie Sparks

Approved by Committee on:

October 17, 2007  
(Date)