Approved: 2-18-10
Date

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Lance Kinzer at 3:30 p.m. on January 19, 2010, in Room 346-S of the Capitol.

All members were present.

Committee staff present:

Jason Long, Office of the Revisor of Statutes
Matt Sterling, Office of the Revisor of Statutes
Jill Wolters, Office of the Revisor of Statutes
Athena Andaya, Kansas Legislative Research Department
Jerry Donaldson, Kansas Legislative Research Department
Sue VonFeldt, Committee Assistant

1/19

Conferees appearing before the Committee:

None

Others attending:

No guest list for today.

Athena Andaya, Kansas Legislative Research Department, presented an overview of the nineteen page report from the Kansas DUI Commission and explained the origination of the Commission. The 2008 Legislature passed **HB 2707** to create the Substance Abuse Policy Board (SAPB) under the auspices of the Kansas Criminal Justice Coordinating Council (KCJCC). The SAPB was created to consult and advise the KCJCC concerning issues and policies pertaining to the treatment, sentencing, rehabilitation, and supervision of substance abuse offenders and to analyze and study driving under the influence. The SAPB recommended, among other things, that a multi- disciplinary state commission be created to study driving under the influence in Kansas. Eventually the provisions creating the multi-disciplinary state commission as recommended by the SAPB, also known as the Kansas DUI Commission, were placed into 2009 **Senate Sub. For HB 2096.** After passing both houses of Legislature and obtaining the signature of the Governor, the law creating the Kansas DUI Commission became effective on July 1, 2009. The Commission was assigned to prepare and submit an interim report and recommendations to the Legislature on or before the first day of the 2010 Legislative Session and a final report and recommendations on or before the first day of the 2011 Legislative Session. The Commission is scheduled to expire on July 1, 2011, unless extended by statute. (Attachment 1)

At the first meeting of the DUI Commission on July 1, 2009, Senator Tim Owens was elected as Chairperson of the Commission, Representative Jan Pauls as Vice-chairperson, and also included Senator David Haley and Representative Lance Kinzer as members of the Commission. In order to determine the central issues to be discussed, Chairperson Owens created four subcommittees 1) Substance Abuse Evaluation, 2) Criminal Justice, 3) Law Enforcement/Record Keeping and 4) Legislative. The members of the Legislative subcommittee participated in the discussions and recommendations of the other three subcommittees. In addition to the subcommittee work, the full Commission, made up of an additional nineteen Non-Legislative members also met to have presentations on the following topics:

Substance abuse interventions; evidence-based practices.
Regional issues in DUI prosecution.
Ignition interlock device and continuous alcohol monitoring.
Electronic submission of DUI records and information sharing.
DUI from a clerk's perspective.
DUI from a municipal prosecutor's perspective.
Licensing of professional service providers of substance abuse evaluation and treatment.
DUI or speciality courts.
DUI from a defense attorney's perspective.
Drug recognition experts.
Industry efforts to reduce DUI's
Roadside/onsite drug testing

The subcommittee's committed numerous hours of contemplative study and profound discussion on the recommendations made to the full Commission. Since the Commission has an additional year to finalize its

recommendations to the Legislature, the Commission recommended the following:

1) Support and encourage the Legislature to hold full hearings on a bill providing for the licensing process of addiction counselors.

2) Delay the implementation DUI penalty provisions of **2009 HB2096** for an additional year.

Additional discussion followed the report by the committee with Representative Pauls assuring the committee the date needed to be moved back as there are several factors that need to be worked through. Chairman Kinzer reminded everyone the DUI issue is very large and unyielding.

HB 2109 - Kansas uniform health care decisions act.

Jason Long, Office of Revisor of Statutes, presented an overview of **HB 2109** which would create the Kansas Uniform Health Care Decisions Act. The Act is part of an effort to provide uniform legislation among the states regarding advance health care directives and would govern powers of attorney for health care for all other advance health care directives, such as living wills. For this reason, the Act also repeals the durable health care power of attorney statutes, the natural death act, and those statutes governing do not resuscitate orders and directives. Other highlights of the overview included the following: (Attachment 2)

Section 2 of the bill provides several relevant definitions: (1) "Advance health care directive", (2) "Capacity", (3) "Health care decision", and (4) "Life-sustaining procedure".

Section 3 provides individuals with the authority to make an individual instruction or power of attorney for health care.

Section 4 governs for how a written advanced health care directive may be revoked by the principal.

Section 6 provides for when a surrogate may make health care decisions for an individual.

Section 7 provides that if a guardian has been appointed for the principal, then the guardian has the power to revoke or amend a power of attorney for health care.

Section 8 provides the duties and responsibilities of health care providers.

Section 9 grants an agent, guardian or surrogate the same rights to the disclosure of medical information as the patient.

Section 10 provides immunity from civil and criminal liability for health care providers if they act in good faith.

Section 11 imposes liability on health care providers for intentional violations of the Act.

Section 14 provides various statutory determinations:
(1) There is no presumption concerning the intention of an individual who has not made or has revoked an advanced health care directive.
(2) Death resulting from withholding or withdrawing life-sustaining procedures in accordance with the Act does not constitute suicide, homicide, or impair or invalidate an insurance policy providing a death benefit.
(3) The Act does not authorize assisted suicide or euthanasia.
(4) The Act does not authorize an agent or surrogate to commit an individual to a mental health institution, unless the advanced health care directive authorizes such action.

Section 15 allows an individual, the individual's agent, guardian, or surrogate, or a health care provider to petition the court to order compliance with or an injunction against a health care decision, or other equitable relief.

Sections 17 thru 23 contain conforming amendments to various statutes so that the terms match those

used in the Act.

Jason explained there are not necessarily so many major changes as bringing it all together under one law.

Chairman Kinzer requested the staff provide a chart that would show the old and the new to make it easier for the committee members to readily identify the differences. He also described the very lengthy process the Judicial Council went through to arrive at this bill and assured the committee they received input from a number of professionals and stated this bill was a product of delicate compromise. As soon as the staff has the requested comparison chart available, he will see it is distributed to all the committee members and then give everyone a couple days to digest before he brings the bill before the committee to work.

Chairman Kinzer presented a proposed amendment, Balloon # 1, (Attachment 3) to the committee in advance, so the members would have a chance to review and ask questions before the bill is worked in the committee in order to eliminate numerous amendments which could end up killing the bill.

Chairman Kinzer advised the committee the meeting on Monday, January 25, would covers three bills, **HB 2417, HB 2429 and HCR 5026** regarding District Judges and to let him know if any of the members had anyone who wanted to testify on any of these bills.

The next meeting is scheduled for January 20, 2010.

The meeting was adjourned at 4:30 p.m.

Report of the Kansas DUI Commission to the 2010 Kansas Legislature

CHAIRPERSON: Senator Thomas Owens

VICE-CHAIRPERSON: Representative Janice Pauls

OTHER LEGISLATIVE MEMBERS: Senator David Haley and Representative Lance Kinzer

NON-LEGISLATIVE MEMBERS: Gregory Benefiel, Pete Bodyk, Mark Bruce, Hon. Jennifer Jones, Secretary Don Jordan, Wiley Kerr, Mary Ann Khoury, Ed Klumpp, Ken McGovern, Chris Mechler, Helen Pedigo, Marcy Ralston, Hon. Peter Ruddick, Dalyn Schmitt, Les Sperling, Jeremy Thomas, Douglas Wells, Secretary Roger Werholtz, and Karen Wittman

STUDY TOPICS

The Commission's statutory charges are found in 2009 Senate Sub. for HB 2096 (KSA 21-4802) and are as follows:

- Review past and current driving under the influence (DUI) statutes in Kansas;
- Review driving under the influence statutes in other states;
- Review proposals related to driving under the influence introduced in the 2009 Legislative Session;
- Review other subjects related to driving under the influence referred to the Commission by the chairperson of the standing Senate Committee on Judiciary, House Committee on Judiciary, or House Committee on Corrections and Juvenile Justice;
- Review what is effective in changing the behavior of driving under the influence offenders by examining evaluation, treatment and supervision practices, enforcement strategies, and penalty structure;
- Develop a balanced and comprehensive legislative proposal that centralizes recordkeeping so that offenders are held accountable, assures highway safety by changing the behavior of driving under the influence offenders at the earliest possible time, and provides for significant restriction on personal liberty at some level of frequency and quantity of offenses; and
- Assess and gather information on all groups and committees working on issues related to driving under the influence and determine if any results or conclusions have been found to address the issues.

In accordance with the enrolled 2009 Senate Sub. for HB 2096 (KSA 21-4802), the Commission shall prepare and submit an interim report and recommendations to the Legislature on or before the first day of the 2010 Legislative Session and a final report and recommendations on or before the first day of the 2011 Legislative Session.

December 2009

Kansas DUI Commission

Interim Report

Conclusions and Recommendations

The Committee makes the following recommendations:

- Support and encourage the Legislature to hold full hearings on a bill providing for the licensing process of addiction counselors; and
- Delay the implementation of DUI penalty provisions of 2009 HB 2096 for an additional year.

Proposed Legislation: None

Background

The 2008 Legislature passed HB 2707 to create the Substance Abuse Policy Board (SAPB) under the auspices of the Kansas Criminal Justice Coordinating Council (KCJCC). The SAPB was created to consult and advise the KCJCC concerning issues and policies pertaining to the treatment, sentencing, rehabilitation, and supervision of substance abuse offenders and to analyze and study driving under the influence. The SAPB recommended, among other things, that a multi-disciplinary state commission be created to study driving under the influence in Kansas. See: http://governor.ks.gov/files/Grants_Program/SAPBreport.pdf.

Eventually, the provisions creating the multi-disciplinary state commission as recommended by the SAPB, also known as the Kansas DUI Commission (Commission), were placed into 2009 Senate Sub. for HB 2096. After passing both houses of the Legislature and obtaining the signature of the Governor, the law creating the Kansas DUI Commission became effective on July 1, 2009. The Commission is to prepare and submit an interim report and recommendations to the Legislature on or before the first day of the 2010 Legislative Session and a final report and recommendations on or before the first day of the 2011 Legislative Session. The Commission is scheduled to expire on July 1, 2011 unless extended by statute.

Senate Sub. for HB 2096 (KSA 21-4802) provided for the 23-member Commission to be comprised of legislators; agency heads or, in some cases, their designee; judges, a prosecutor, a defense attorney, state and local law enforcement officers, addiction treatment professionals, a victim advocate, a probation officer, and a parole officer. The following is a list of the members and their appointing authority.

- Gregory Benefiel, Assistant Douglas County District Attorney, appointed by the Kansas County and District Attorney Association;
- Pete Bodyk, Manager of Traffic Safety, Kansas Department of Transportation, appointed by the Secretary of Transportation;
- Major Mark Bruce, Major of Support Services Section, Kansas Highway Patrol (KHP), appointed by the Superintendent of

KHP;

- Senator David Haley, Ranking Minority Member of the Senate Committee on Judiciary, designated by statute;
- Honorable Jennifer Jones, Wichita Municipal Court Judge, appointed by the Chief Justice of the Kansas Supreme Court;
- Don Jordan, Secretary of Social and Rehabilitation Services, designated by statute;
- Wiley Kerr, Associate Director of the Kansas Bureau of Investigation (KBI), appointed by the Director of KBI;
- Mary Ann Khoury, President and CEO of the DUI Victim Center of Kansas, appointed by the Governor;
- Representative Lance Kinzer, Chairperson of the House Committee on Judiciary, designated by statute;
- Chris Mechler, Court Services Officer Specialist, Office of Judicial Administration, appointed by the Chief Justice of the Kansas Supreme Court;
- Sheriff Ken McGovern, Douglas County Sheriff's Office, appointed by the Attorney General;
- Senator Thomas C. "Tim" Owens, Chairperson of the Senate Committee on Judiciary, designated by statute;
- Representative Janice Pauls, Ranking Minority Member of the House Committee on Judiciary, designated by statute;
- Helen Pedigo, Executive Director of the Kansas Sentencing Commission, appointed by the Chairperson of the Kansas Sentencing Commission;
- Marcy Ralston, Chief of Driver Control, Kansas Department of Revenue, appointed by the Secretary of Revenue;
- Honorable Peter V. Ruddick, District Judge, 10th Judicial District (Johnson), appointed by the Chief Justice of the Kansas Supreme Court;
- Dalyn Schmitt, CEO of Heartland Regional Alcohol and Drug Assessment Center, appointed by the Kansas Association of Addiction Professionals (KAAP);
- Les Sperling, President of the KAAP Board and CEO of the Central Kansas Foundation, appointed by the KAAP;
- Police Chief Ed Klumpp, Retired, appointed by the Attorney General;
- Jeremy Thomas, Parole Officer II, appointed by the Secretary of Corrections;
- Douglas Wells, Attorney, appointed by the Kansas Bar Association;
- Roger Werholtz, Secretary of the Kansas Department of Corrections, designated by statute; and
- Karen Wittman, Kansas Traffic Safety Resource Prosecutor, appointed by the Attorney General as his designee.

The Commission first met on July 1, 2009 and elected Senator Thomas C. "Tim" Owens as Chairperson of the Commission. The Commission elected Representative Janice Pauls as Vice-chairperson. Soon thereafter, it became apparent that there was a need to divide the initial work of the Commission amongst the membership based upon the expertise of the membership, with the understanding that the work and recommendations of the subcommittees would be brought before the whole Commission for final approval. Chairperson Owens created four subcommittees to determine the central issues to

be discussed and reported on by the Commission. The subcommittees are as follows: Substance Abuse Evaluation and Treatment, Criminal Justice, Law Enforcement/Recordkeeping, and Legislative.

The Substance Abuse Evaluation and Treatment Subcommittee was chaired by Les Sperling. The members included Secretary Don Jordan, Chris Mechler, Dalyn Schmitt, and Jeremy Thomas. This subcommittee studied the implementation of evidence-based practices and the licensure of substance abuse professionals providing evaluations or treatment of DUI offenders. Additionally, this subcommittee studied current evaluation and assessment of substance abuse and how the recommendations of the evaluation and assessment should be implemented to treat the individual to prevent future criminal charges for DUI.

The Criminal Justice Subcommittee was chaired by Secretary Roger Werholtz. The members included Greg Benefiel, Honorable Jennifer Jones, Mary Ann Khoury, Helen Pedigo, Honorable Peter V. Ruddick, and Doug Wells. This subcommittee studied the current DUI statute to see if the penalties are adequate to further the goal of sanctioning the offender for the current DUI offense and deterring future criminal charges for DUI. Additionally, the subcommittee studied issues related to the implementation of DUI Courts in Kansas and which courts should have jurisdiction over DUIs.

The Law Enforcement/Recordkeeping Subcommittee was chaired by Karen Wittman. The members included Pete Bodyk; Major Mark Bruce; Wiley Kerr; Police Chief Ed Klumpp, Retired; Sheriff Ken McGovern; and Marcy Ralston. This subcommittee studied records and recordkeeping, administrative driver's license hearings, ignition interlock devices, and the Implied Consent Advisory law (KSA 8-1001).

The Legislative Subcommittee included Senator David Haley, Representative Lance Kinzer, Senator Thomas C. "Tim" Owens, and Representative Janice Pauls. The members of this subcommittee participated in the discussions and recommendations of the Substance Abuse Evaluation and Treatment Subcommittee, Criminal Justice Subcommittee, and the Law Enforcement/Recordkeeping subcommittees.

In addition to the subcommittee work, the full Commission met to have presentations on numerous topics. The topics are listed below. More details of the presentations can be found in the section entitled "Meetings."

- Substance abuse interventions: evidence-based practices;
- Regional issues in DUI prosecution;
- Ignition interlock device and continuous alcohol monitoring;
- Electronic submission of DUI records and information sharing;
- DUI from a clerk's perspective;
- DUI from a municipal prosecutor's perspective;
- Licensing of professional service providers of substance abuse evaluation and treatment;
- DUI or specialty courts;
- DUI from a defense attorney's perspective;
- Drug recognition experts;
- Industry efforts to reduce DUIs; and
- Roadside/onsite drug testing.

Meetings

The following is a list of dates on which the commission and its subcommittees met:

- July 1 and 2, 2009;
- August 6 and 7, 2009;
- September 14 and 15, 2009;
- October 1 and 2, 2009;
- November 5 and 6, 2009; and
- December 7, 2009.

All items discussed by the Kansas DUI Commission relating to its statutory duties are reviewed in the following material.

July

The statute authorizing the creation of the Kansas DUI Commission became effective on July 1, 2009. The Commission had its first meeting on July 1, 2009. Senator Thomas C. "Tim" Owens was elected Chairperson of the Commission by the members. Representative Janice Pauls was elected Vice-chairperson. After a staff briefing on the Commission's statutory charges, the Chairperson divided the Commission into subcommittees for in-depth study of assigned topics.

The Commission was provided a review of the 2009 Report of the Kansas Substance Abuse Policy Board (SAPB) by J. Russell Jennings, Commissioner, Juvenile Justice Authority, and Chairperson of the Kansas SAPB. The SAPB's recommendation to create a multi-disciplinary state commission to study DUI served as the impetus for the creation of the Kansas DUI Commission.

Additionally, the Commission was provided a review of current Kansas DUI law, a review of active bills referred to the Commission (2009 HB 2263, 2009 HB 2315, 2009 SB 279, 2009 SB 280, and 2009 SB 289), and a review of other states' DUI laws by staff.

After receiving the reviews, the Commission had a discussion on specific problems with various aspects of current laws on DUI the Commission may want to study and address in a report to the Legislature. These included:

- Recommended treatments;
- Ignition interlock devices and conflicting statutes;
- Establishment of the central repository of arrests and convictions;
- Closing loopholes in existing statutes such as the impoundment of vehicles;
- Recommendations for funding of programs;
- Availability of programs for rural communities; and
- Clarification, recommendations, or both, to statutes to include penalties for maiming.

Karen Wittman, Chairperson of the Law Enforcement/Recordkeeping Subcommittee reported that the subcommittee concluded that the Kansas Bureau of Investigation database does have the reporting capabilities necessary for courts to use to enhance punishments. Discussion then proceeded to what could be done with the Division of Motor Vehicles on how the State might deal with sanctions that have been imposed by the courts. There was discussion regarding interlock devices and ways to eliminate current conflicts between the State and the courts, and improved monitoring of vehicles whether owned, leased, or operated by the offender. The subcommittee observed there appeared to be too many courts with jurisdiction over DUIs and too many different approaches to the problem. The subcommittee discussed ways to improve effective adjudication of DUIs. The subcommittee determined it would study driver sanctions in other states and how the sanctions are monitored; how other states track repeat

offenders; and how many allow DUI's to be handled by municipalities.

Les Sperling, Chairperson of the Substance Abuse and Treatment Subcommittee, reviewed the Substance Abuse Policy Board Report and stated the goal will be to bring consistency to the assessment and treatment of all DUI offenders. An immediate recommendation would be to require all alcohol and drug safety action providers to be licensed. This will raise the standard of care to a consistent and uniform level of intervention and treatment programs. The Subcommittee will summarize state statutes and treatments currently available, the best practices, and ways to incorporate them in Kansas including screening practices.

Roger Werholtz, Chairperson of the Criminal Justice Subcommittee summarized the discussion of anticipated outcomes of the Commission, specifically what will prevent people from driving while under the influence and how to prevent repetition of that action. In addition to fair and effective consequences to these actions, there is a need for education on how to change people's behavior, ensure that responses to these issues are positive, and promote the desired outcome. The Subcommittee will look at the policy and treatments used in Kansas and other states, compare sentencing guidelines, look at models of other states with respect to court assignments, and determine ways to remove the geographic disparity within the state.

August

Commission members Les Sperling and Dalyn Schmitt briefed the Commission on Substance Abuse Interventions: Evidence-Based Practices. They emphasized that effective treatment breaks the cycle of addiction, criminal behavior, and recidivism and has a rehabilitative approach. Effective treatment matches intensity of treatment interventions with severity of illness and provides close supervision/case management. Close supervision/case management includes frequent drug/alcohol testing, high level of accountability, and predictable and escalating sanctions.

Evidence-based research suggests the following key principles of addiction treatment:

- Addiction is a complex but treatable disease that affects brain function and behavior;
- No single treatment is appropriate for everyone;
- Treatment needs to be readily available;
- Effective treatment attends to multiple needs of the individual, not just his or her drug abuse;
- Remaining in treatment for an adequate period of time is critical;
- Individual or group counseling, or both, and other behavioral therapies are the most commonly used forms of drug abuse treatment;
- Medications are an important element of treatment for many patients, especially when combined with counseling and other behavioral therapies;
- An individual's treatment and services plan must be assessed continually and modified as necessary to ensure that it meets his or her changing needs;
- Many drug-addicted individuals also have other mental disorders;
- Medically assisted detoxification is only the first stage of addiction treatment and by itself, does little to change long-term drug abuse;
- Treatment does not need to be voluntary to be effective;

- Drug use during treatment must be monitored continuously, as lapses during treatment do occur; and

- Treatment programs should assess patients for the presence of HIV/AIDS, hepatitis B and C, tuberculosis, and other infectious diseases as well as provide targeted risk-reduction counseling to help patients modify or change behaviors that place them at risk of contracting or spreading infectious diseases.

The Commission heard a briefing on regional issues in DUI prosecutions by a prosecutor from a rural judicial district and a prosecutor from an urban judicial district. The briefing provided the Commission with points of discussion on how regional differences may affect policy considerations.

Staff provided a review of the Kansas ignition interlock device statute and regulation, Continuous Alcohol Monitoring (CAM) use by courts and accuracy of devices, driver sanctions in other states and how they are monitored, how repeat offenders are tracked, and the number of states allowing DUI offenses to be handled by municipalities.

After the presentations, the Commission heard reports of the Criminal Justice Subcommittee, the Substance Abuse Evaluation and Treatment Subcommittee, and the Law Enforcement/ Recordkeeping Subcommittee.

Roger Werholtz, Chairperson of the Subcommittee on Criminal Justice, reported that his subcommittee began its discussion on the effectiveness of current strategies. The subcommittee believes the current law on penalties for first-time DUI offenders is adequate. Secondly, the majority of the subcommittee agreed on the need to criminalize refusal to submit to a breath test. The subcommittee also reported it would like to review the current response to juvenile offenders and possible recommendations to improve current law.

Les Sperling, Chairperson of the Substance Abuse and Treatment Subcommittee, stated his subcommittee will study what is the absolute best approach, regardless of the cost, to determine which enhancements to the DUI laws should be recommended for implementation.

Karen Wittman, Chairperson of the Law Enforcement/Recordkeeping Subcommittee, continued the discussion on the issues regarding records. The subcommittee discussed the possibility of creating a two-page journal entry for every DUI as a solution to tracking repeat offenders. The subcommittee also will study the current database capabilities of the Kansas Bureau of Investigation, Department of Motor Vehicles, and the Kansas Criminal Justice Information System (KCJIS) with respect to the creation of a central repository for records.

September

The Commission heard several presentations on Electronic Submission of DUI Records and Information Sharing.

Wiley Kerr, Associate Director, and Steve Montgomery, Chief Information Officer, Kansas Bureau of Investigation (KBI), provided the Commission with an overview on the current KBI database. Information included the current capabilities regarding record keeping and information sharing. Mr. Montgomery described the types of information provided to the agency and what information currently is available to law enforcement. Discussion followed addressing how the specific needs of prosecutors regarding previous convictions could be provided in a prompt and concise fashion. Several points made during the discussion included:

- Convictions in Kansas versus out-of-state convictions will continue to be a problem;

- Municipal courts cover two-thirds of

DUI cases and reporting standards differ widely. Large municipalities use electronic reporting, whereas small jurisdictions do not have that capability;

- The need for a good exchange model and State mandated guidelines regarding the transfer of data to ensure consistency throughout the State; and
- Problems regarding records before 1996, between 1996 and 2001, and the need for consistency across the State at all levels does exist.

The discussion also addressed the lifetime look back regarding DUI convictions and possible decay rates. The laws have changed considerably over the years, and records that would have been expunged or decayed are now back on an individual's record and are considered in determining the individual's prior offenses.

Kelly O'Brien, Office of Judicial Administration, provided the Commission with a review of the FullCourt Case Management software system used to manage court cases. This software is used in 103 counties across the State and is a client-server based system. The court data is stored at the client's server (*i.e.*, in each county) and can provide court information to state agencies as provided by statute. There is no statewide repository of court data in Kansas. Mr. O'Brien then described how and what information is sent from FullCourt to Driver Control in the Department of Revenue.

Marcy Ralston addressed the Commission on information received by the Division of Motor Vehicles. Ms. Ralston stated the Division receives data from hundreds of courts and estimates approximately 86 percent of municipal courts submit data electronically. Electronic submission is mandatory. Ms. Ralston described the process followed when information is sent to Driver Control. She indicated much of the information is still entered manually which provides opportunity for errors. Currently, there is a new system in development which will address these issues. The new system also will allow police and prosecutors access to the information. Ms. Ralston indicated that convictions prior to 1996 were routinely purged at the end of the required five-year limit until the law was changed in 2001.

The Commission heard presentations on DUI from a Court Clerk's Perspective and from a municipal prosecutor's perspective. The information received from the municipal prosecutors indicated the search for prior convictions is difficult and tedious, requiring a mailed letter rather than a phone call and causes substantial delays; blood tests do not get processed quickly enough; and not all Kansas Disposition Reports are reported. Additionally, one of the prosecutors stated it would be extremely helpful to have "one-stop" shopping for journal entries for prior and pending cases and suggested enforcement of reporting laws would result with a more accurate accounting of prior cases.

Sarah Riley-Hansen addressed the Commission regarding licensing of professional service providers for all DUI offenders. The case was made for the importance of licensing which would provide consumer safety, oversight, and accountability to clients while providing screening and assessment, treatments, and documentation of progress. Secretary Don Jordan indicated that SRS supports licensing of addiction counselors and recommended that the Behavioral Sciences Regulatory Board would be the appropriate agency to monitor such licensing.

After the presentations, the Commission heard reports of the Criminal Justice Subcommittee, the Law Enforcement/Recordkeeping Subcommittee, and the Substance Abuse Evaluation and Treatment Subcommittee.

Roger Werholtz, Chairperson of the Criminal Justice Subcommittee, provided a summary of the subcommittee's discussions. The subcommittee's

overall goal is to keep people from driving while intoxicated or from committing additional offenses, or both. Secretary Werholtz stressed that all of the recommendations are based on the assumption of an accurate criminal history. Initial recommendations concerning convictions are:

- The current penalty for a first conviction is sufficient but there is a need to criminalize refusals to submit to breath tests;
- The current second offense penalty is adequate;
  - The range of options available to the courts generally is adequate but the majority of members felt that "jail time" should really mean jail time;
  - Offenders using the ignition interlock system should be on probation with a more systemic feedback on performance provided to probation, courts, and treatment providers;
  - There is a need to have treatment imposed by the courts be based on meaningful evaluations which includes verified criminal history, treatment history, and is responsive to the individual's treatment needs; and
  - Independent verification of client self-reporting;
- Third-time DUI offenses should be a misdemeanor with the same penalties currently attached to third-time convictions.
  - Should be handled at the district court level;
  - Assumes that the treatment now being targeted toward third DUI's as a felony remains available;
  - Supervision shifts to community corrections;
  - Revocation time is served in county jails; and
  - Requires at least 12-month probation period.

The subcommittee will revisit details of third DUI penalties; they are concerned with the perception of the Commission "moving backwards." Put simply, recommending a change from a felony DUI back to a misdemeanor may cause people to think the proposal is not as stringent as current law. The fact is, the recommendation to change from a felony to a misdemeanor actually provides a more stringent penalty.

Fourth and subsequent DUI convictions are felonies with substantial sentences with incapacitation as the predominant strategy.

Karen Wittman, Chairperson of the Law Enforcement/Recordkeeping Subcommittee, presented results from this subcommittee's discussion on the issues regarding arrests, processing, and recordkeeping. The discussions resulted in several tentative recommendations.

- The Kansas Criminal Justice Information System appears to be the most suitable source for comprehensive reporting.
  - Reports will need a certification statement to overcome hearsay rule; and
  - Reports will need to contain specific data including arrest information, prosecution information, and conviction information.
- Legislation will be needed to address counties charging State government agencies for information they failed to report initially (usually disposition data);
- Initiate an auditing factor to enforce

compliance in reporting;

- Sanctions imposed for prosecutors amending DUI charges to lesser charges;
- Fees imposed for a driver's license hearing with a reduced charge for phone hearings; and
- Simplify the process for obtaining a search warrant for blood or urine tests and requested information on the time limits on testing in other states.

Les Sperling, Chairperson of the Substance Abuse Evaluation and Treatment Subcommittee discussed his subcommittee's tentative recommendations, which are as follows:

- Recommend a single state authority (SSA) to license ADSAP (Alcohol and Drug Safety Action Program) and provide information to the courts;
- The SSA will produce a licensing standard for ADSAP agencies;
- Development of a standardized assessment tool to provide courts with appropriate clinical information;
- SSA develop a standard for clinical best practice (education, outcomes);
- Recommend the use of American Society of Addiction Medicine (ASAM) criteria as an information tool and make recommendations based upon the severity of the problem;
- SSA adjust the rules to agencies administering ASAM criteria to provide consistency across the state;
- Monitoring is not working as anticipated and recommends that language be eliminated and that responsibility not be attached to the ASAM license or designation; and
- The subcommittee recommends moving the fourth time DUI offender program to the third offense due to the high success rate.

Dalyn Schmitt provided an update on the fourth time DUI offender program which lost its funding September 1, 2009 essentially ending the program. Fourth time offenders now have less accountability and with the current statute (2009 HB 2096 provisions to become effective on July 1, 2010) of moving fourth DUI sanctions to the third offense the program will need to be funded, enforced, and measurable.

Les Sperling indicated data shows that any engagement in treatment is beneficial and the more offenders who can be monitored and supervised, the better the results. From a clinical perspective only, speciality courts may provide better results and he would like for the Commission to investigate this subject further.

October

David Wallace, Director, National Center for DWI (Driving While Impaired) Courts, National Association of Drug Court Professionals, provided the Commission with an overview of DWI/DUI Courts. Mr. Wallace provided background on the establishment of DWI Courts and the advantages specialized courts provide such as the development of a specialized treatment focus and a manageable network of relevant and supportive community resources. Mr. Wallace reviewed the 10 Guiding Principles of DUI Courts and studies of the programs established in Michigan and Georgia regarding success and recidivism.

Honorable Peggy Davis, Court Commissioner and DWI Court Facility Member for the National Drug Court Institute, addressed the Commission on the various aspects of the Greene County (Missouri) DWI Court. The presentation covered the development and current performance of the DWI court.

Steve Talpins, Chairman and CEO, National Partnership on Alcohol Misuse and Crime spoke on DUI Courts, the South Dakota 24/7 Sobriety Program, and Hawaii's HOPE (Hawaii's Opportunity Program with Enforcement).

Honorable Peter Ruddick presented the Commission with one judge's perspective on DUI in Kansas. Comments included:

- Data on the number of filings, jail populations, and work release admissions in Johnson County;
- Effective local programming for pre-trial release, probation, and a successful hybrid work release program; and
- Suggestions on the increased felony DUI cases due to current statutes and recent Appellate Court decisions.

Gordon Lansford, Director, Kansas Criminal Justice Information System (KCJIS) spoke about KCJIS and the electronic submission of DUI records and information sharing. Mr. Lansford provided a brief overview of the KCJIS system.

The Commission discussed the potential issues surrounding the licensing of addiction professions. Initially, the Commission wanted to support and encourage the Legislature to hold full hearings on a bill providing for the licensing process of addiction counselors and to pass such legislation provided it includes meeting the goals of assuring addiction counseling providers are qualified and accountable without jeopardizing availability of services, and that related administrative and regulatory support is funded adequately. After discussing it further, the Commission agreed to support and encourage the Legislature to hold full hearings on a bill providing for the licensing process of addiction counselors.

Doug Wells, Commission member appointed by the Kansas Bar Association, addressed the Commission on DUI from the perspective of a defense attorney. Mr. Wells agreed the goal is to protect the public by providing full and fair implementation of DUI statutes efficiently and with a focus on rehabilitation. His remarks included suggestions on the establishment of the decay rate for prior convictions, plea bargaining authorization as it is for other crimes, and expungements. He described problems facing rural areas and the increased costs to taxpayers if proposed changes are approved. He is of the opinion that the refusal to take a breath test should not be criminalized. Mr. Wells also suggested increased judicial discretion in sentencing, with driver's license restrictions or interlock devices rather than suspension, and not making internal possession of a drug or drug metabolite in a person's system a prima facie or per se DUI violation. The focus of DUI laws should be on the inability to safely operate a motor vehicle.

Michael R. Clarke, attorney, provided his perspective on DUI defense stating the focus needs to be on stopping repeat offenders. He endorsed the use of ignition interlock devices indicating suspension of drivers' licenses is not working. It does not stop people from driving, most of the State is rural and it is nearly impossible to manage without driving. Mr. Clarke also stated his opinion that mandatory sentences are not effective, partially due to an uninformed public. The implied consent statute is confusing, and current law does not encourage a breath test.

November

The Commission heard presentations on Drug Recognition Experts and on continuous alcohol monitoring devices.

Jeff Collier, State Coordinator, Kansas Drug and Classification/Standardized Field Sobriety Testing Program, Kansas Highway Patrol, addressed the Commission regarding Drug Recognition Experts (DREs). Mr. Collier provided an overview of the program in Kansas,

indicating that officers are trained to detect DUIs caused by substances other than alcohol. This training is not part of basic police training. Evaluations are based on a standardized 12-step process, which was described in detail. DREs are recognized as technical experts and may testify as such in court.

Kevin Barone, Vanguard Offender Management, spoke on continuous alcohol monitoring devices. Mr. Barone indicated there are no solid rules on house arrest across the State and there is much inconsistency between monitoring. He recommended the Commission set the standard criteria.

The Commission also heard reports of the Law Enforcement/Recordkeeping Subcommittee, the Criminal Justice Subcommittee, and the Substance Abuse Evaluation and Treatment Subcommittee.

The Law Enforcement/Recordkeeping Subcommittee met jointly with the Criminal Justice Subcommittee to discuss the "look back" issue regarding previous convictions. Following a lengthy discussion, the subcommittees recommend using the specific date of July 1, 1996 for charging offenses. This is due to the lack of complete driving records available before that date. This does not preclude the use of older records for judges to use in sentencing. This issue was not voted on by the full Commission.

The Law Enforcement/Recordkeeping Subcommittee then discussed the issue of criminalizing test refusals in order to stop individuals from avoiding charges of a DUI. Three options were discussed:

- Whether to make it a second criminal offense;
- Make it a per se violation; or
- Make it a rebuttal presumption.

The advantages and disadvantages of each option were discussed with no consensus reached. The Subcommittee will continue to work on this issue.

Roger Werholtz indicated the Criminal Justice Subcommittee has numerous issues to address and recommendations are based on the basic principles of:

- Supervision should be based on risk;
- Treatment should be based on meaningful evaluations; and
- The number of courts hearing DUI cases should be reduced.

The subcommittee has made some previous recommendations, one of which is that third DUI convictions are treated as a misdemeanor but that those cases are heard in a district court. The subcommittee further recommends the third DUI be sent to community corrections for evaluation and assessment and then assigned based on the results of that assessment, being either continued supervision under community corrections or supervision under court services.

The second recommendation is any municipal court wanting jurisdiction over DUI cases must be approved by the Supreme Court. Rules should include standardized risk assessments, standardized substance abuse evaluations, and the capacity to supervise according to that assessment and evaluation.

The third recommendation is in regard to second DUI offenses. In court hearings following a second DUI conviction, the court would be required to order a standardized evaluation and a standardized assessment.

Ed Klumpp recommended adding to the recommendation regarding approval of municipal courts. His suggestion was to add to the list of criteria the ability to comply with electronic reporting of the arrest and disposition.

Les Sperling reported the Substance Abuse Subcommittee had not reached any specific recommendations but continues to discuss the issues. These include:

- Standardized electronic assessment;
- Direct payment of fees to treatment providers; and
- A system to provide oversight of the program providing assessment of supervision and monitoring.

No action was taken by the full Commission since the reports did not include a final recommendation for the Interim Report.

December

The Commission heard presentations on current industry efforts to reduce DUIs and Onsite/Roadside Drug Testing.

Spencer Duncan appeared on behalf of the Kansas Wine and Spirits Wholesalers Association, providing a perspective on current industry efforts to reduce DUIs. Mr. Duncan indicated the organization's dedication in promoting responsible alcoholic beverage consumption in Kansas and reviewed several programs designed to encourage responsible drinking. Programs include server training, which educates servers on the proper ways to serve and sell alcohol. Individuals receiving this training are less likely to serve alcohol to minors or to intoxicated persons. Mr. Duncan reviewed several "Smart Alcohol Practices" that have proven to reduce drunk driving and underage drinking. These include:

- Public education campaigns on the dangers of driving under the influence (DUI), underage access, and the penalties associated with them;
- Support laws providing the prompt administrative suspension or revocation of driver's license for refusal or failure of a blood alcohol content (BAC) test;
- Graduated penalties for repeat offenders;
- Ignition interlock devices;
- Increased sanctions for DUI offenders with blood alcohol concentration levels above .15;
- Increased penalties for driving while suspended;
- Increased penalties for those who commit bodily injury or death while driving while under the influence;
- Mandatory assessment prior to conviction or sentencing to determine the potential for alcohol dependency or abuse and make appropriated treatment referrals;
- Support programs that promote the use of sober designated drivers and safe rides;
- Increased penalties for the use and manufacture of fake IDs;
- Mandatory alcohol education for college freshmen and college offenders;
- Support bans on Alcohol Without Liquid (AWOL) machines (Kansas has banned this device); and
- A support hotline that motorists can use to report drivers suspected to be driving while under the influence.

Whitney Damron appeared on behalf of the Distilled Spirits Council of the United States (DISCUS) which has a long history of supporting efforts to prevent drunk driving and underage drinking. Mr. Damron indicated in 1991 a number of spirits manufacturers created The Century Council to coordinate efforts at reducing underage drinking and drunk driving.

The Century Council has hosted events in Kansas that bring together parents, youth, educators, law enforcement officials, and traffic safety professionals to reduce underage drinking and driving. The Council's efforts at educating youth begin in middle school and continue through college.

Mr. Damron stated that the Council supports legislation to enact comprehensive and effective solutions to the hardcore drunk driving problem. Hardcore drunk drivers are those who repeatedly drive with a high blood alcohol concentration over .15, have more than one drunk driving arrest, and are highly resistant to changing their behavior despite previous sanctions, treatment, and education efforts. These offenders account for the majority of alcohol-impaired fatalities and the Council created the National Hardcore Drunk Driver Project to serve as a comprehensive resource to assist state legislators, as well as highway safety officials, law enforcement officers, judges, prosecutors, community activists, and treatment officials in developing programs to reduce hardcore drunk driving.

A written statement on industry efforts to reduce DUIs was provided by Jeff Becker, President, Beer Institute.

Linda Chezem, Purdue University, provided the Commission a review of the issues pertaining to roadside/on-site drug testing. Professor Chezem indicated effective drugged driving prevention is one of the best ways to improve highway safety, reduce illegal drug use, and get abusers into addiction treatment. Professor Chezem indicated that statutes should be realistic, clear, and with coherent use of evidence-based science, provide adequate support for the justice system. She reviewed the various issues that need to be addressed in forming legislation to address drugged driving. These include:

- Science of detection;
- Various types of tests;
- The need for adequate resources;
- Sound policies;
- Legal issues;
- Justice system issues; and
- Cost considerations.

A written statement on roadside/on-site drug testing was provided by John A. Enrici, Medical Dimension Group.

After the presentations, the Law Enforcement/ Recordkeeping Subcommittee, the Criminal Justice Subcommittee, and the Substance Abuse Evaluation and Treatment Subcommittee provided the full Commission with each subcommittee's recommendations.

Law Enforcement/Recordkeeping Subcommittee

Karen Wittman, Chairperson of the Subcommittee on Law Enforcement and Record Keeping, reviewed its recommendations to date. The tentative recommendations are as follows.

Drug Testing. Given the utility of saliva as a biological specimen for the detection of recent drug use has been supported by a number of studies, and roadside screening device technology has advanced to include testing for drug use, the subcommittee requests the Commission direct the KBI to look into these types of devices and make a recommendation to the Commission as to the type of device(s), if any, the KBI would recommend for use by law enforcement.

Records. The Kansas Criminal Justice Information System (KCJIS) is the appropriate entity to collect and furnish data to agencies in need of information concerning DUI criminal history. This information would allow one inquiry that would check all records on an individual, such as Department of Motor Vehicle (DMV) records, arrest history, and conviction data.

The subcommittee envisioned an inquiry to KCJIS which would produce a "certified" record of information held by the State of

Kansas concerning an individual identified. A report could be generated that would provide an "evidentiary" report which would be offered in court as the "official record." This might require a legislative change in KSA 60-465 (Authentication of Copies of Records).

Finally, the subcommittee recommends a "subscription and notify" program to be created to generate information to alert prosecutors, court officials, and probation officers of any activity of an individual pertaining to any current law enforcement contact on a daily basis.

Administrative Driver's License Hearings (DL Hearings). The subcommittee tentatively decided to recommend that administrative DL hearings should remain with the Kansas Department of Motor Vehicles. A fee, similar to a docket fee, should be assessed for a request for hearing. The fee assessed would be different depending on whether a "face to face" hearing or a "phone" hearing is requested.

The subcommittee recommends establishing a protocol for the hearing and require hearing officers to receive special training. Finally, there might need to be a statutory change to identify specifically the scope of the hearing.

Ignition Interlock. The subcommittee recommends requiring ignition interlock devices to use photo technology to insure the person producing the sample is the person required to produce the sample.

Additionally, the subcommittee recommends a report be generated of the persons required by the Division of Motor Vehicles (DMV) to have interlock in their vehicle to compare that to the reports generated and submitted to DMV from interlock providers. Additionally, the subcommittee recommends a notification be given to those individuals required to have interlock that do not have the device that further sanctions may be imposed. That would require some type of sanction for those individuals not having interlock in their vehicle when required. The possible sanctions included impoundment of vehicle or extension of requirement of interlock, or both. The subcommittee recommends a graduated sanction for those individuals who have had a prior violation for failure to have an ignition interlock device in their vehicle.

Implied Consent Law-KSA 8-1001. The subcommittee recommends a review of the language of the Implied Consent form to simplify it. In the review, the subcommittee recommends that any change in the statute comply with *Standish v. KDOR*, 235 Kan. 900, 683 P.2d 1276 (1984). It is noted that any wording change would require a legislative change to KSA 8-1001. Also, the subcommittee requests a review by persons at DMV to report to the subcommittee concerning implied consent law, specifically in light of current changes around the country with regard to implied consent *i.e. State v. Machuca* --- P.3d ----, 2009 WL 3106114 Or.App.,09/30/09 and South Dakota statutes: SDCL 32-23-10.

Time Frame for Testing. At the current time a test within 2 hours of operating or attempting to operate an automobile can be used to prove a per se violation under KSA 2007 Supp. 8-1567(a)(2). In some rural areas this is somewhat problematic especially dealing with fatal or near fatal crashes, as time is of the essence for law enforcement. The appellate courts indicate tests should be administered as near in time to the arrest as practicable, however, due to manpower limitations or severity of the crash, sometimes performing testing within two hours is not possible.

After review of case law, the subcommittee concludes there really is no indication where this 2 hour limit came from except from what seemed "reasonable." This subcommittee has reviewed other states 'per se' time limits. They range from 4 hours to "a reasonable time" without a numerical limit. Therefore, the subcommittee has concluded what would be more practicable

for everyone is a 3-hour time limit to prove a 'per se' violation and recommends the change be made.

Prior DUIs. A joint meeting of the Law Enforcement/Recordkeeping Subcommittee and the Criminal Justice Subcommittee met to discuss the issue of the "look back" on prior DUIs. The subcommittees recommend using the specific date of July 1, 1996 for charging offenses. This is due to the lack of complete driving records available before that date. This does not preclude the use of older records for judges to use in sentencing. Put simply, the sentencing judge could take into account all DUI's in a person's lifetime, that could be proven, to determine the appropriate sentence.

Refusals. At the present time, the fact someone refuses to take the test can be used against them in court on a charge of DUI. Statistically, the refusal rate is about one-third of the population requested to take a breath test. It is well known repeat offenders are more apt to refuse, thus making it harder to prosecute. In an attempt to dissuade a person from refusing to take a test, there has been a number of attempts to toughen penalties for refusing, such as license suspensions. There is a need to find sanctions for test refusal more compelling to the suspect to complete the test. The primary penalty at this time is license suspension which is not a strong motivating factor for persons who already have their license suspended.

There has been a suggestion to either make it a criminal offense to refuse, make it a per se violation of DUI if they refuse, or attempt to craft a rebuttable presumption the person is in fact DUI. At the present time, the subcommittee does not have a recommendation for the Commission as a whole but will continue this discussion in the new year.

The Commission as a whole discussed these recommendations but did not decide upon a final recommendation for the interim report.

Substance Abuse Evaluation and Treatment Subcommittee

Les Sperling, Chairperson of the Substance Abuse Subcommittee stated the effective evaluation, education, and treatment of substance use plays a vital role in the continuum of interventions targeted to reduce the incidence of DUI in the State of Kansas. He indicated some of the recommendations may be implemented by rules and regulations, as opposed to drafting legislation. The subcommittee also indicated that when offenders are incarcerated for multiple offenses, mandatory treatment services should be included. The following recommendations are respectfully submitted in an effort to enhance the quality and scope of treatment services in Kansas and to reduce the impact that DUI has on the citizens of the State of Kansas.

Require All Alcohol and Drug Safety Action Programs to Be Licensed by Social and Rehabilitation Services-Addiction and Prevention Services. The Kansas Department of Social and Rehabilitation Services (SRS) currently has licensing standards for Alcohol and Drug Safety Action Programs (ADSAP) that include standards for both evaluation and Alcohol and Drug Information School curriculum. However, under current legislation, ADSAP providers are not required to obtain this important license and are not subject to annual licensing visits that ensure compliance with the minimum standards of competency, as defined in the state standards. This has resulted in a disparity of the quality and consistency of ADSAP evaluations across the State of Kansas.

Licensed ADSAP Providers Comprise the ADSAP Network Available to All Judicial Districts and Municipal Courts. Each judicial

district currently selects ADSAP providers. While judicial districts strive to select providers in a manner consistent with current statutes, testimony provided to the Kansas Substance Abuse Policy Board and Kansas DUI Commission reveals that selection criteria currently utilized are not consistent. Municipal courts also may select ADSAP providers. While most municipal courts utilize the provider list generated by their district court, they are not required to do so and there are instances where district and municipal court provider lists differ. This can be confusing to all stakeholders and in some cases, limit access to services. If ADSAP providers were licensed by SRS, the agency could provide all stakeholders with a complete listing of eligible providers.

It is anticipated that the number of providers available to complete ADSAP work will increase if licensing is required.

Require All DUI Substance Use Evaluations Be Completed in a Standardized Electronic Format. Testimony submitted to the Kansas Substance Abuse Policy Board indicates that DUI substance use evaluations prepared for the court for pre-sentencing purposes vary widely in quality and scope. It is recommended that the American Society of Addiction Medicine Patient Placement Criteria 2 (ASAMPPC2) be utilized as the foundation of the standardized evaluation. The ASAMPPC2 has been widely accepted as the most comprehensive information and decision-making tool used to assess the severity of alcohol/drug problems and recommend the appropriate intensity and level of treatment intervention. Collecting this information in an electronic format is crucial because it will provide an efficient method for treatment histories and outcome measures, to be included in the larger DUI data system. Adequate resources for the implementation of the standardized evaluation should be made available to SRS.

SRS ADSAP Licensing Standards Should Be Revised to Reflect Best Practices. While SRS currently has ADSAP standards, revisions are necessary to ensure that identified best practices are included in the minimum standards.

Educational and Treatment Interventions for Each DUI Conviction Should Match the Individual Offender's Clinical Profile. DUI interventions should be based upon the severity of the alcohol/drug problem, not the number of convictions. Too often, it is assumed that a first DUI conviction only requires a brief educational intervention and that treatment intensity and duration should increase with each offense. Efforts to decrease DUI recidivism will be aided by matching the offender with appropriate treatment at the appropriate time. This can be accomplished by evaluating severity of the offender's substance use upon each DUI conviction, following the licensing and evaluation standards set out above.

Review References to "Supervision and Monitoring" in Existing Statutes. ADSAP providers supply Court Services with attendance, completion, and progress in treatment reports on a regular basis. KSA 8-1008 describes an expanded role of the ADSAP provider that includes "supervision and monitoring" of the offender. In current practice, this role of monitoring is being completed by Court Services personnel. Clarification of these two roles in this statute is recommended.

Implement Evidenced Based Practice Approaches to All DUI Treatment. The State of Kansas developed an effective strategy to address 4th time DUI offenders. This program utilized best practices that included utilization of wrap around team planning meetings, care coordination, proven DUI clinical practices, data collection, and outcome measurement. Due to state budget cuts, this program is no longer being funded at the level necessary to generate the same results. While financial resources do not exist today to implement this program at the first, second, and third DUI convictions, development of future services given by ADSAP

providers should value the core principles of this successful strategy.

ADSAP Fees Should Be Paid Directly to ADSAP Providers at Time of Service. Collection and disbursement of ADSAP evaluation fees are not completed consistently across the state. Some judicial districts and municipal courts require offenders to pay the provider and some require payment to the court, with the court retaining up to 10 percent of the fee. Payment of ADSAP fees to the provider at time of service would simplify this process and save administrative costs throughout the system. A change in current statutes would be required to implement this change.

Items Requiring Further Investigation

DUI Specialty Courts. Outcome data suggest that DUI courts are an effective tool to reduce DUI recidivism. It is recommended that additional research and investigation into these courts be completed. The DUI court approach appears to have many components that are similar to the Kansas 4th DUI program, specifically the "team approach" to supervision and treatment, which has proven to be successful in reducing recidivism among DUI Offenders. It also is recommended that a compilation of successful programs in other states be completed and utilized to guide future planning activities.

Do We Need ADSAP At All? Current SRS substance use program licensing standards address evaluation and treatment components. Programs may seek to be licensed as a "Diagnostic and Referral" center. The standards for ADSAP providers and a "Diagnostic and Referral" center can be viewed as nearly the same. Through appropriate standard revision, the designation of ADSAP could become unnecessary. If this is deemed appropriate, it is anticipated that additional providers would be available to complete DUI work and the access to quality services for the courts, attorneys, and DUI offenders would improve. It is recommended that further study be completed on this issue.

Special Note. A significant number of the recommendations included in this report will require additional effort and resources from the Kansas Department of Social and Rehabilitation Services. As the licensing authority for substance abuse programs in the State of Kansas, its responsibility for monitoring the quality and scope of DUI treatment services is critical to success. It is recommended that sufficient resources be provided to SRS in order to complete these tasks.

The Commission as a whole discussed the recommendations but did not decide upon a final recommendation for the interim report. The subcommittee will continue to work on a standardized ADSAP evaluation.

Criminal Justice Subcommittee

The Criminal Justice Subcommittee had four basic principles on which the recommendations are based: supervision should be based on risk, treatment should be based on a meaningful evaluation, it is desirable to reduce the number of courts handling DUI cases, and fourth time DUI convictions should be presumed to serve at least one year with subsequent DUI conviction penalties progressively increasing. The Criminal Justice Subcommittee recommends the following:

- No changes for penalties for a first time conviction of DUI;
- No changes for penalties for a second time conviction of DUI, except that the mandatory minimum jail time would be spent in jail rather than allowing a combination of 48 hours jail with the remainder of the sentence being served on house arrest or work release;
- On a third time conviction of DUI, the subcommittee recommends that the penalty

be a misdemeanor, rather than a felony, and that it solely be within the jurisdiction of the district court. The mandatory minimum sentence is recommended to be 10 days in jail with no authority to satisfy the requirement with house arrest or work release. Additionally, there would be a 90 day personal alcohol monitoring requirement by technological means and treatment as ordered by the court based on a standardized substance abuse evaluation. Finally, the court has the option of sentencing an offender to up to 18 months probation supervised by community corrections. Third time DUIs should be initially referred to community corrections programs for assessment of risk, and then assigned to community corrections or court services for supervision and substance abuse evaluation and standardized risk assessment. The results of the evaluation and assessment will be considered by the district court in determining whether the offender will be supervised by community corrections or court services and what treatment requirements will be imposed upon the offender.

  - It is not the intent of this recommendation to imply that community corrections programs will perform the substance abuse evaluation. Because of their responsibility for supervising SB 123 offenders, community corrections programs are familiar with the process of obtaining substance abuse treatment evaluations. The subcommittee simply wanted to take advantage of that existing knowledge.

- The subcommittee supports criminalizing refusal to take a breath alcohol test but reserves the option to make additional clarifications of this position;

- The effective date of 2009 HB 2096 should be delayed an additional year to allow the Commission further time to study DUI penalties;

- Each judicial district should be encouraged, but not mandated, to establish at least one DUI court within the district. Any DUI court so established should be required to follow the ten evidence based principles of effective problem solving courts and conform to evidence based practices. Fidelity to the model is important to achieve successful outcomes. The subcommittee noted that the Sentencing Commission, the Joint Committee on Corrections and Juvenile Justice Oversight, and the Supreme Court appear to be taking similar positions regarding encouraging but not mandating the establishment of DUI courts;

- Municipal courts wanting jurisdiction over first and second time DUI cases must be approved by the Supreme Court in accordance with rules promulgated by the Court. The subcommittee recommends those rules should include requirements that a standardized risk assessment approved by the Kansas Sentencing Commission be used, that offenders receive a substance abuse evaluation meeting standards established by the Department of Social and Rehabilitation Services, that the court utilize the results of the risk assessment and substance abuse evaluation in determining dispositions, and that the court have the capacity to supervise the offenders accordingly;

  - Not contained in the recommendation but part of the discussion was a recognition that some municipal courts have resources and the capacity to comply with these recommendations. For those which do not, consideration may be given to utilizing community corrections programs to carry out these tasks if properly resourced to do so;

- Any court hearing first and second time DUI

cases that result in a conviction shall order a standardized risk assessment approved by the Kansas Sentencing Commission and a substance abuse evaluation conforming to standards established by the Department of Social and Rehabilitation Services;

- Any court hearing DUI cases shall have the ability to report those transactions electronically to the Kansas Criminal Justice Information System (KCJIS);

- Recommend treatment capacity be established within the Kansas Department of Corrections for offenders convicted of a fourth or subsequent DUI; and

- Indicate the subcommittee's preference that treatment be offered during each incarceration, but the prioritization for placement and impact on parole eligibility should diminish with each subsequent conviction.

Items Still Requiring Attention

The Criminal Justice Subcommittee will study and discuss how decisions are made regarding which courts may have jurisdiction over DUI cases, the rules for determining what is a third or subsequent DUI, where fourth and subsequent DUIs sit on the sentencing grid, related laws or other crimes ancillary to the DUI, implied consent issues, and plea bargaining.

The Commission as a whole discussed the recommendations and adopted the recommendation to delay the implementation of the DUI penalty provisions in 2009 Senate Sub. for HB 2096 for an additional year. The remaining recommendations were not acted upon by the full Commission.

Conclusions and Recommendations

The Law Enforcement/Recordkeeping Subcommittee, the Criminal Justice Subcommittee, and the Substance Abuse Evaluation and Treatment Subcommittee committed numerous hours of contemplative study and profound discussion on the individual recommendations made to the full Commission. The full Commission, being cognizant that the Commission has an additional year to finalize its recommendations to the Legislature, has concluded that the Commission recommend the following:

- Support and encourage the Legislature to hold full hearings on a bill providing for the licensing process of addiction counselors; and

- Delay the implementation DUI penalty provisions of 2009 HB 2096 for an additional year.

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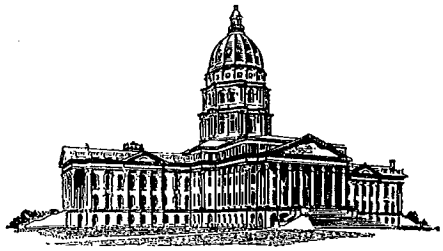

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Overview of HB 2109
Kansas Uniform Health Care Decisions Act

Jason B. Long
Assistant Revisor
Office of Revisor of Statutes

January 19, 2010

House Bill 2109 would create the Kansas Uniform Health Care Decisions Act ("Act"). The Act is part of an effort to provide uniform legislation among the states regarding advance health care directives. The Act would govern powers of attorney for health care and all other advance health care directives, such as living wills. For this reason, the Act also repeals the durable health care power of attorney statutes, the natural death act, and those statutes governing do not resuscitate orders and directives. This memorandum provides an overview of the contents of HB 2109.

Section 2 of the bill provides the following relevant definitions:

(1) "Advance health care directive" includes individual instructions regarding health care decisions and powers of attorney for health care.

(2) "Capacity" as defined in the bill is "an individual's ability to understand to a minimally reasonable extent the significant benefits, risks and alternatives to proposed health care and to make and communicate a health care decision with reasonable accommodation, interpreter or assistive technology when needed."

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(3) "Health care decision" is defined to include decisions regarding selection and discharge of health care providers, approval or disapproval of medical tests, procedures, medications and orders not to resuscitate, and directions to provide, withhold or withdraw nutrition or hydration.

(4) "Life-sustaining procedure" is defined as any procedure or intervention that will only prolong the dying process. It does not include medication and medical procedures necessary to provide comfort care or to alleviate paid.

Section 3 of the bill provides individuals with the authority to make an individual instruction or power of attorney for health care. First, an individual may make an instruction regarding a health care decision. This instruction may be either written or oral, except that if the instruction involves withholding or withdrawing life-sustaining procedures then the instruction must be in writing and either signed by the individual, or by another person in the individual's presence and at their direction.

An individual may also execute a power of attorney for health care. In this document the individual, called the principal, designates another person to act as the principal's agent. The agent is granted the duty and responsibility for making health care decisions for the principal if the principal becomes incapacitated. This document must be in writing and signed by the principal.

An individual instruction, which includes instructions to withhold or withdraw life-sustaining procedures, or power of attorney for health care must either be signed in the presence of at least two disinterested witnesses or acknowledged by a notary public. Furthermore, if the instruction or power of attorney for health care directs the withholding or withdrawal of nutrition or hydration which is likely to result in or hasten the death of the principal, then such direction must be specifically authorized in a separate provision of the document and separately executed by the principal.

Section 4 governs for how a written advanced health care directive may be revoked by the principal. This includes physically destroying or defacing the document, revoking by a written provision in another document signed by the principal, or a verbal expression of the intent to revoke the advanced health care directive. To become effective the verbal revocation must be

witnessed by another adult who then signs and dates a writing confirming the intent to revoke and delivers it to the supervising health care provider. This section also provides for automatic revocation if certain conditions occur, such as divorce if a spouse is designated as the agent, the filing of a protection order against the agent, or the execution of a second advanced health care directive that conflicts with an earlier advanced health care directive.

Section 6 provides for when a surrogate may make health care decisions for an individual. A surrogate is permitted to make health care decisions when the individual becomes incapacitated and no agent or guardian has been designated or appointed. The designation of a surrogate may be made by the individual by simply informing the supervising health care provider of such designation. If the individual cannot make a designation, then a member of the individual's family may act as surrogate in the following descending order of priority: spouse; adult child; parent; or adult sibling. If a family member is not available as a surrogate, then the section provides that an adult "who has exhibited special care and concern for the person, who is familiar with the person's personal values and who is reasonably available" can act as the surrogate.

If more than one member of the individual's family assumes authority as a surrogate and the surrogates cannot agree, then the supervising health care provider must comply with the majority decision of the surrogates. If the surrogates are evenly divided, then they are disqualified as surrogates. A supervising health care provider may require a surrogate to make a written declaration establishing their claim to authority as a surrogate.

Section 7 provides that if a guardian as been appointed for the principal, then the guardian has the power to revoke or amend a power of attorney for health care. The guardian is still subject to the provisions of the laws governing guardians, K.S.A. 59-3050 et seq.

Section 8 provides the duties and responsibilities of health care providers. These include: (1) continuing to communicate with the patient when a health care decision is made by an agent, guardian or surrogate; (2) maintaining a copy of all advanced health care directives, revocations of advanced health care directives and designations or disqualifications of surrogates in the patient's health care record; and (3) recording in the patient's health care record determinations of capacity and communicating such determinations to the patient, if possible, and the agent,

guardian or surrogate. Section 9 of the bill grants an agent, guardian or surrogate the same rights to the disclosure of medical information as the patient.

Health care providers are required to comply with patient instructions and decisions by agents, guardians and surrogates. However, a health care provider may decline to comply with a decision or instruction: (1) For reasons of conscience; (2) if there is a timely communicated institutional policy against the instruction or decision and such policy is expressly based on reasons of conscience; or (3) if the instruction or decision requires medically ineffective health care contrary to generally accepted standards.

If a health care provider does decline to comply with an instruction or decision, the provider must promptly inform the patient and the agent, guardian or surrogate, continue to provide care until a transfer can be arranged, and make reasonable efforts to assist in the transfer of the patient to an institution that is willing to comply with the instruction or decision.

Section 10 provides immunity from civil and criminal liability for health care providers if they act in good faith. This applies to compliance with a health care decision made by a person with apparent authority, declining to comply with a decision made by a person if there is no belief the person has authority, and assuming an advanced health care directive is valid when there is no reason to believe it has been revoked. Immunity is also provided to agents and surrogates when making health care decisions in good faith.

Section 11 imposes liability on health care providers for intentional violations of the Act. Damages for such violations are $500 or actual damages, and reasonable attorney's fees. Also, individuals acting fraudulently with respect to the execution or revocation of an advanced health care directive are liable for such actions. Damages for such liability are $2,500 or actual damages, and reasonable attorney's fees.

Section 14 provides various statutory determinations:

(1) There is no presumption concerning the intention of an individual who has not made or has revoked an advanced health care directive.

(2) Death resulting from withholding or withdrawing life-sustaining procedures in accordance with the Act does not constitute suicide, homicide, or impair or invalidate an insurance policy providing a death benefit.

(3) The Act does not authorize assisted suicide or euthanasia.

(4) The Act does not authorize an agent or surrogate to commit an individual to a mental health institution, unless the advanced health care directive authorizes such action.

Section 15 allows an individual, the individual's agent, guardian or surrogate, or a health care provider to petition the court to order compliance with or an injunction against a health care decision, or other equitable relief.

Sections 17 through 23 contain conforming amendments to various statutes so that the terms match those used in the Act.

House Committee on Judiciary

Balloon #1

House Judiciary
Date 1-19-10
Attachment # 3

Session of 2009

HOUSE BILL No. 2109

By Committee on Judiciary

1-27

AN ACT concerning health care; enacting the Kansas uniform health care decisions act; amending K.S.A. 39-1401, 40-2130 and 65-1734 and K.S.A. 2008 Supp. 58-654, 59-3075, 65-2837 and 65-4974 and repealing the existing sections; also repealing K.S.A. 58-625, 58-626, 58-627, 58-628, 58-629, 58-630, 58-631, 58-632, 65-28,101, 65-28,102, 65-28,103, 65-28,104, 65-28,105, 65-28,106, 65-28,108, 65-28,109, 65-4941, 65-4942, 65-4943, 65-4944, 65-4945, 65-4946, 65-4947 and 65-4948 and K.S.A. 2008 Supp. 65-28,107.

Be it enacted by the Legislature of the State of Kansas:

New Section 1. Sections 1 through 16, and amendments thereto, shall be known and may be cited as the Kansas uniform health care decisions act.

New Sec. 2. As used in the Kansas uniform health care decisions act:

(a) "Advance health care directive" means an individual instruction or a power of attorney for health care.

(b) "Agent" means an individual designated in a power of attorney for health care to make a health care decision for the individual granting the power.

(c) "Capacity" means an individual's ability to understand to a minimally reasonable extent the significant benefits, risks and alternatives to proposed health care and to make and communicate a health care decision with reasonable accommodation, interpreter or assistive technology when needed. A determination ~~by a physician that an individual lacks capacity~~ does not constitute a determination that the individual is incompetent as a matter of law.

of capacity made by a responsible physician pursuant to subsection (f) of section 3, and amendments thereto,

(d) "Guardian" means a judicially appointed guardian as defined in subsection (e) of K.S.A. 59-3051, and amendments thereto, having authority to make a health care decision for an individual.

(e) "Health care" means any care, treatment, service or procedure to maintain, diagnose or otherwise affect an individual's physical or mental condition.

(f) "Health care decision" means a decision made by an individual or the individual's agent, guardian or surrogate, regarding the individual's health care, including:

(d) "Continuing care" means the provision of health care sufficient to assure, to the extent possible in reasonable medical judgment, that no material deterioration of the patient's condition is likely to occur pending transfer.

(e) "Disposition of a body" means any lawful manner of disposition, including arranging for a funeral service, burial, cremation, entombment or anatomical donation.

Reletter remaining subsections accordingly

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(1) Selection and discharge of health care providers and institutions;
(2) approval or disapproval of diagnostic tests, surgical procedures, programs of medication and orders not to resuscitate; and
(3) directions to provide, withhold or withdraw nutrition and hydration provided through medical intervention and all other forms of health care.

(g) "Health care institution" means an institution, facility or agency licensed, certified or otherwise authorized or permitted by law to provide health care in the ordinary course of business.

(h) "Health care provider" means an individual licensed, certified or otherwise authorized or permitted by Kansas law to provide health care in the ordinary course of business or practice of a profession.

(i) "Individual instruction" means an individual's direction concerning a health care decision for the individual.

(j) "Life-sustaining procedure" means any medical procedure or intervention which, when applied to a patient, would serve only to prolong the dying process and where, in the judgment of the ~~primary~~ physician, death will occur whether or not such procedure or intervention is utilized. "Life-sustaining procedure" shall not mean the administration of medication or the performance of any medical procedure deemed necessary to provide comfort care or to alleviate pain.

responsible

(k) "Person" means an individual, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision, agency or instrumentality, or any other legal or commercial entity.

(l) "Physician" means a person licensed to practice medicine or surgery by the state board of healing arts.

(m) "Power of attorney for health care" means the designation of an agent to make health care decisions for the individual granting the power.

"Principal" means an individual, patient or person who has granted the power of attorney for health care to an agent.

Reletter remaining subsections accordingly

(n) "~~Primary~~ physician" means a physician designated by an individual or the individual's agent, guardian or surrogate, to have primary responsibility for the individual's health care or, in the absence of a designation or if the designated physician is not reasonably available, a physician who undertakes the responsibility.

Responsible

(Move definition so alphabetical)

(o) "Reasonably available" means readily able to be contacted without undue effort and willing and able to act in a timely manner considering the urgency of the person's health care needs.

(p) "Reasonable medical judgment" means a medical judgment that would be made by a reasonably prudent physician who is knowledgeable about the case and the treatment possibilities with respect to the medical conditions involved.

(q) "State" means a state of the United States, the District of Columbia, the commonwealth of Puerto Rico or a territory or insular possession

subject to the jurisdiction of the United States.

(r) "Supervising health care provider" means the ~~primary~~ physician or, if there is no ~~primary~~ physician or the ~~primary~~ physician is not reasonably available, the health care provider who has undertaken primary responsibility for an individual's health care.

(s) "Surrogate" means an individual, other than a person's agent or guardian, authorized under this act to make a health care decision for the person.

New Sec. 3. (a) An adult or emancipated minor may give an individual instruction. The instruction may be oral or written, except that an instruction directing the withholding or withdrawal of life-sustaining procedures shall be in writing and signed by the principal or by another person in the principal's presence and by the principal's expressed direction. The instruction may be limited to take effect only if a specified condition arises.

(b) An adult or emancipated minor may execute a power of attorney for health care, which may authorize the agent to make any health care decision the principal could have made while having capacity. The power must be in writing and signed by the principal. The power remains in effect notwithstanding the principal's later incapacity and may include individual instructions. Unless related to the principal by blood, marriage or adoption, an agent may not be an owner, operator or employee of an adult care home or a long-term care unit of the medical care facility at which the principal is receiving care.

(c) An individual instruction directing the withholding or withdrawal of life-sustaining procedures or a power of attorney for health care shall be:

(1) Signed in the presence of two or more witnesses at least 18 years of age, neither of whom shall be the agent, the person who signed the individual instruction on behalf of the principal, related to the principal by blood, marriage or adoption, entitled to any portion of the estate of the principal according to the laws of intestate succession of this state or under any will of the principal or codicil thereto, or directly financially responsible for the principal's medical care; or

(2) acknowledged before a notary public.

(d) If a person has executed, and has not revoked, an individual instruction directing the withholding or withdrawal of life-sustaining procedures or a power of attorney for health care, and if withholding or withdrawal of nutrition or hydration provided through medical intervention would in reasonable medical judgment be likely to result in or hasten the death of the person, it may be withheld or withdrawn only if the instruction specifically authorizes the withholding or withdrawal of nutrition or hydration or both provided through medical intervention, or the

responsible

The power may authorize the agent to make decisions relating to autopsy or disposition of the principal's body after death.

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power of attorney for health care either specifically authorizes its withholding or withdrawal or authorizes the agent to direct its withholding or withdrawal, either by a statement in the signer's own words or in a separate section, separate paragraph or other separate subdivision that deals only with nutrition or hydration or both provided through medical intervention and which section, paragraph or other subdivision is separately initialed, separately signed or otherwise separately marked by the person executing the directive.

(e) Unless otherwise specified in a power of attorney for health care, the authority of an agent becomes effective only upon a determination that the principal lacks capacity and ceases to be effective upon a determination that the principal has recovered capacity.

(f) Unless otherwise specified in a written advance health care directive, a determination that an individual lacks or has recovered capacity, or that another condition exists that affects an individual instruction or the authority of an agent, must be made by the ~~primary~~ responsible physician.

(g) An agent shall make a health care decision in accordance with the principal's individual instructions, if any, and other wishes to the extent known to the agent. The powers of an agent shall be limited to the extent set out in writing in the power of attorney for health care and shall not include the power to revoke or invalidate a previously existing individual instruction by the principal.

(h) A health care decision made by an agent for a principal is effective without judicial approval.

(i) A written advance health care directive may include the individual's nomination of a guardian of the person.

(j) An advance health care directive is valid for purposes of this act if it complies with this act, regardless of when or where executed or communicated.

(k) An individual instruction made before July 1, 2009, shall not be limited or otherwise affected by the provisions of this act. A power of attorney executed before July 1, 2009, that specifically authorizes the attorney in fact or agent to make decisions relating to the health care of the principal, shall not be limited or otherwise affected by the provisions of this act.

(l) Any individual instruction which is valid under the laws of the state of the principal's residence at the time the individual instruction was made shall be an individual instruction under this act. Any power of attorney for health care which is valid under the laws of the state of the principal's residence at the time the power of attorney for health care was signed shall be a power of attorney for health care under this act. All acts taken by an agent in this state under such a power of attorney for health care, which would be valid under the laws of this state, shall be valid acts.

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All acts taken by an agent for a principal whose residence is Kansas at the time the power of attorney for health care is signed shall be valid if valid under Kansas law.

New Sec. 4. (a) An individual may revoke a written advance health care directive at any time by any of the following methods:

(1) By obliterating, burning, tearing or otherwise destroying or defacing the advance health care directive in a manner indicating intent to cancel;

(2) by a written revocation of the advance health care directive signed and dated by the individual or person acting at the direction of the individual; or

(3) by a verbal expression of the intent to revoke the advance health care directive, in the presence of a witness at least 18 years of age who signs and dates a writing confirming that such expression of intent was made. Any verbal revocation shall become effective upon receipt by the supervising health care provider of the above-mentioned writing. The supervising health care provider shall record in the person's medical record the time, date and place when the provider received notice of the revocation.

at the time such revocation is made

(b) A health care provider, agent, guardian or surrogate who is informed of a revocation shall promptly communicate the fact of the revocation to the supervising health care provider and to any health care institution at which the person is receiving care.

(c) A decree of annulment, divorce, dissolution of marriage or legal separation revokes a previous designation of a spouse as agent unless otherwise specified in the decree or in a power of attorney for health care. The designation of an agent shall be revoked effective upon the filing of an order of protection by the principal against the agent. The agent shall be reinstated upon the termination of the order of protection.

(d) An advance health care directive that conflicts with an earlier advance health care directive revokes the earlier directive to the extent of the conflict.

New Sec. 5. An advance health care directive shall be deemed sufficient if in substantial compliance with the form set forth by the Kansas judicial council.

New Sec. 6. (a) A surrogate may make a health care decision for a person who is an adult or emancipated minor if the person has been determined by the ~~primary~~ physician to lack capacity and no agent or guardian has been appointed or the agent or guardian is not reasonably available.

responsible

Decisions as to the disposition of the body after death can only be made by an agent under a power of attorney for health care decisions, or as prescribed by K.S.A. 65-1734, and amendments thereto.

(b) An adult or emancipated minor may designate any individual to act as surrogate by personally informing the supervising health care provider. In the absence of a designation, or if the designee is not reasonably

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claiming the right to act as surrogate for a person to provide a written declaration under penalty of perjury stating facts and circumstances reasonably sufficient to establish the claimed authority.

New Sec. 7. (a) If, following execution of a power of attorney for health care, a court of the principal's domicile appoints a guardian charged with the responsibility for the principal's person, the guardian has the same power to revoke or amend the power of attorney for health care that the principal would have had if the principal were not impaired.

(b) In exercising the authority provided for in subsection (a), a guardian remains subject to the provisions of K.S.A. 59-3075, and amendments thereto.

(c) A health care decision made by a guardian for the ward is effective without judicial approval.

New Sec. 8. (a) Before implementing a health care decision made for a patient, a supervising health care provider, if possible, shall promptly communicate to the patient the decision made and the identity of the person making the decision.

(b) A supervising health care provider who knows of the existence of an advance health care directive, a revocation of an advance health care directive or a designation or disqualification of a surrogate, shall promptly record its existence in the patient's health care record and, if it is in writing, shall request a copy and if one is furnished shall arrange for its maintenance in the health care record.

(c) A ~~primary~~ physician who makes or is informed of a determination that a patient lacks or has recovered capacity, or that another condition exists which affects an individual instruction or the authority of an agent, guardian or surrogate, shall promptly record the determination in the patient's health care record and communicate the determination to the patient, if possible, and to any person then authorized to make health care decisions for the patient.

responsible

(d) Except as provided in subsections (e) and (f), a health care provider or institution providing care to a patient shall:

(1) Comply with an individual instruction of the patient and with a reasonable interpretation of that instruction made by a person then authorized to make health care decisions for the patient; and

(2) comply with a health care decision for the patient made by a person then authorized to make health care decisions for the patient to the same extent as if the decision had been made by the patient while having capacity.

(e) A health care provider may decline to comply with an individual instruction or health care decision for reasons of conscience. A health care institution may decline to comply with an individual instruction or health care decision if the instruction or decision is contrary to a policy

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3-1

of the institution which is expressly based on reasons of conscience and if the policy was timely communicated to the patient or to a person then authorized to make health care decisions for the patient.

(f) A health care provider or institution may decline to comply with an individual instruction or health care decision that requires medically ineffective health care or health care contrary to generally accepted health care standards applicable to the health care provider or institution.

(g) A health care provider or institution that declines to comply with an individual instruction or health care decision shall:

(1) Promptly so inform the patient, if possible, and any person then authorized to make health care decisions for the patient;

(2) provide continuing care to the patient until a transfer can be effected; and

(3) unless the patient or person then authorized to make health care decisions for the patient refuses assistance, immediately make all reasonable efforts to assist in the transfer of the patient to another health care provider or institution that is willing to comply with the instruction or decision.

(h) A health care provider or institution may not require or prohibit the execution or revocation of an advance health care directive as a condition for providing health care.

New Sec. 9. Unless otherwise specified in an advance health care directive, a person then authorized to make health care decisions for a patient has the same rights as the patient to request, receive, examine, copy and consent to the disclosure of medical or any other health care information.

This power with regard to access to health care information continues after the death of the principal.

New Sec. 10. (a) A health care provider or institution acting in good faith and in accordance with generally accepted health care standards applicable to the health care provider or institution is not subject to civil or criminal liability or to discipline for unprofessional conduct for:

(1) Complying with a health care decision of a person apparently having authority to make a health care decision for a patient, including a decision to withhold or withdraw health care;

(2) declining to comply with a health care decision of a person based on a belief that the person then lacked authority; ~~or~~

(3) complying with an advance health care directive and assuming that the directive was valid when made and has not been revoked or terminated.

; or

(4) declining to comply with an individual instruction or health care decision pursuant to the provisions of subsections (e) or (f) of section 8, and amendments thereto

(b) An individual acting as agent or surrogate under this act is not subject to civil or criminal liability or to discipline for unprofessional conduct for health care decisions made in good faith.

(c) A funeral director or funeral establishment or crematory who in good faith acts pursuant to the terms of a power of attorney for health care without knowledge of its invalidity shall be immune from liability that may be incurred or imposed from such action.

New Sec. 11. (a) A health care provider or institution that intentionally violates this act is subject to liability to the aggrieved individual for