

MEMORANDUM

TO: House Judiciary Committee

FROM: Anne M. Kindling for the Kansas Association of Defense Counsel

DATE: 13 February 2007

RE: HB 2188

Chairman O'Neal and Members of the Committee:

My name is Anne Kindling and I submit this written testimony regarding HB 2188 on behalf of the Kansas Association of Defense Counsel, of which I serve as President-Elect. The KADC consists of more than 200 practicing attorneys who devote a substantial portion of their professional practice to the defense of lawsuits and the defense of screening panel actions. The KADC maintains a strong interest in improving the adversary system and the efficient administration of justice. We believe that the interests of justice will be served by the enactment of HB 2188 to clarify or remedy certain difficulties with the operation of medical malpractice and professional malpractice screening panels.

HB 2188 makes a number of changes to the screening panel statutes, and those on which KADC is taking a position will be addressed in turn.

Sections 1 and 6 would modify K.S.A. 60-3502 and K.S.A. 65-4901, respectively, to entitle a defendant or respondent to request separate screening panels where there is more than one defendant or respondent named in the action. The KADC supports this provision. Since the statutes provide for only one panel member selected by the defendant(s) in the action, allowing the convening of separate screening panels will afford each defendant the opportunity to select a panel member of his or her choosing, instead of having to do so jointly with the co-defendant(s) whose interests may differ. Additionally, the purpose of the screening panel is best served when panel members in the same specialty as the defendant are called upon to evaluate the conduct at issue. This is clearly seen in medical malpractice screening panels, where several providers from very different specialties may be named as respondents in the same screening panel action. To meet the purpose and efficiency of the screening panel process, it is imperative that separate panels be convened in order that panel members can be designated from the same specialties as the various defendants.

Section 6 also requires that health care providers selected as screening panel members must meet the expert witness qualifications of K.S.A. 60-3412. To give opinion testimony in court in a medical malpractice case, a health care provider must have devoted at least 50% of his professional time to the actual clinical practice of medicine in the two years preceding the act of alleged negligence. It is appropriate that if a screening panel member is going to give opinions on the standard of care, this same qualification must be satisfied. This also fits with the provisions of K.S.A. 65-4904 which allows panel members to testify as witnesses at trial.

Sections 2 and 7 modify K.S.A. 60-3503 and K.S.A. 65-4902, respectively, to allow a staggered timeline for designating panel members. The existing provisions require that all three panel members be designated within 10 days of the convening of the action. This time frame has proved unrealistic and unworkable in everyday practice. One reason for this is that the defendant does not always know the allegations of negligence that are being made by the claimant, and additional time is helpful to begin to develop an understanding so that an appropriate professional may be designated to serve as a panel member. In addition, this would more closely match the progression of a lawsuit where the plaintiff designated experts and then the defendant designates experts.

Sections 3 and 8 modify K.S.A. 60-3505 and K.S.A. 65-4904 to allow an additional 30 days for the panel to issue its written report, increasing the time period from 90 days to 120 days. Ninety days has proven to be insufficient to complete the screening panel's work. The KADC supports lengthening this time period, whether it is to 120 days or something even longer. However, it is also noted that while the statutes state that the report "shall" be filed within that time frame, in reality this does not occur. The time period has been construed by the Kansas appellate courts to be directory and not mandatory.

Sections 4 and 9 would increase the fees to be paid to panel members. Presently just \$250 per panel member (\$500 for the panel chairperson), this would increase the fees by \$250. The fees have not been increased since the screening panel mechanism was adopted. While this increased amount will not adequately compensate the panel members for their time spent in service, it is a reasonable increase at this time.

Sections 5 and 10 modify K.S.A. 60-3509 and K.S.A. 65-4908, which provide for a tolling of the statute of limitations. The KADC takes no position at this time on the amendments which would commence the tolling provision when the panel is convened by the court, rather than when the plaintiff files the request to convene a screening panel. However, the KADC does support an outside limitation on how long the statute of limitations would remain tolled. In practice, many screening panels go on far beyond the expedited time frame contemplated by the statutes. This defeats the intent of the screening panel process to provide for resolution of claims without the expense and delay of litigation. The outside limitation could be 180 days or even a year, but it is appropriate to fix an ending point of the tolling provision.

One alternative to an outside limitation on the tolling provision would be to make clear that the tolling statutes do not operate to toll the applicable statutes of repose. Under Kansas law, the statute of repose for medical malpractice claims is 4 years. A reason behind this statute of repose is so that the information – and memories – are not completely stale before the case is prosecuted. If there is an outside limitation on the length of tolling of either 180 days or a year, then the statute of repose will not come into play. If, however, the tolling of the statute of limitations is indefinite, as it presently is, then the tolling provision should not be construed to toll the statute of repose as well. The KADC believes, however, that the outside limitation on tolling the statute of limitations is a better way to proceed.

These are all changes to the screening panel process that are consistent with the original intent of the process to provide an expedited and cost-effective opportunity to resolve professional and medical malpractice claims. They will bring the operation of the screening panel process closer in line with how such cases actually progress.

Thank you for the opportunity to testify in support of HB 2188. I would be happy to stand for questions.