



The Kansas District Judges' Association



SENATE COMMITTEE ON JUDICIARY

Hon. Sen. Rick Wilborn, Chair
Hon. Sen. Eric Rucker, Vice Chair
Hon. Vic Miller, R. M. Member
March 19, 2019 at 10:30 a.m.
Room 346-S

Chief Judge Merlin G. Wheeler

Fifth Judicial District

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TESTIMONY IN OPPOSITION TO SENATE BILL 213

Thank you for the opportunity to present testimony in opposition to SB 213. I am Merlin G. Wheeler, Chief Judge of the Fifth Judicial District (Lyon and Chase Counties) and a member of the Executive Committee of the Kansas District Judges Association (KDJA). I also serve as one of three Legislative Co-Chairs of the association along with Chief Judge Thomas Kelly Ryan of the 10th Judicial District and Chief Judge Glenn R. Braun of the 23rd Judicial District.

I am aware that you will also receive testimony from Martha Coffman, General Counsel for the Office of Judicial Administration. KDJA has reviewed her testimony and wishes to express our concurrence with the position of that office. While our organization includes only district judges, we feel a responsibility to protect the interests of all staff of the Judicial Branch of Kansas, and agree with her comments regarding eliminating this protection for employees.

Our first objection to the bill as drafted is that it does not offer any objective standard for the Attorney General to utilize in making the decision whether or not to refuse legal representation. The draft language simply provides that the "...Attorney General *may* refuse to provide either legal representation or indemnification of a public agency or employee..." Under these circumstances, the Attorney General has the complete and unfettered discretion to refuse in some circumstances, but provide representation or indemnification in other similar cases. We are **not** suggesting that any Attorney General would improperly exercise this authority, but the distinct possibility remains.

Ethical considerations aside, even more troublesome is that the authority sought also includes refusal of indemnification. There may be valid professional ethical standards for an Attorney General to not provide representation, but the ability to refuse indemnification to an employee should be exercised based only on statutory or constitutional criteria, not the arbitrary exercise of power. Employees who act responsibly and within the bounds of discretion afforded them should be entitled to this protection. The power to refuse the protection not only undermines the employee financially, but also negatively affects the very nature of the employer/employee relationship.

The authority sought to be given the Attorney General is presumably predicated on a perception or belief that the Attorney General's office should not provide representation when it might be involved in pursuing a KORA/KOMA claim against a public agency or employee. This potential conflict may be understandable but is frequently dealt with by obtaining outside counsel and permitting counsel to independently defend the claim. Hiring outside counsel does not equate to directing the work of counsel such that an ethical conflict would arise. Simply put, this legislative proposal appears to be an attempt to change the system because of a non-existent problem.

A final matter we suggest you consider is cost. Removing the possibility of defense services and indemnification places the employee in the untenable position of either risking having to pay their own defense costs or seeking separate insurance coverage in order to protect themselves. This is true even if the claim of

KORA/KOMA violations is frivolous. Consequently, many of our judges will turn to insurance coverage because our immunity extends only to acts done in our judicial capacity and not in the course of our management activities. Since those costs are borne by local units of government, this change therefore will result in increased costs being shifted to our counties for such coverage.

For the foregoing reasons, we respectfully request that SB 213 not be passed to the Senate for any further consideration.

Thank you for the opportunity to present this position.

Hon. Merlin G. Wheeler
Chief Judge 5th Judicial District

Hon. Thomas Kelly Ryan
Chief Judge 10th Judicial District

Hon. Glenn R. Braun
Chief Judge 23rd Judicial District