Approved: February 23, 2010
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Tim Owens at 9:30 a.m. on February 1, 2010, in Room 548-S of the Capitol.

All members were present.

Committee staff present:
Doug Taylor, Office of the Revisor of Statutes
Jason Thompson, Office of the Revisor of Statutes
Athena Andaya, Kansas Legislative Research Department
Karen Clowers, Committee Assistant

Conferees appearing before the Committee:
Chris Clarke, Legislative Division of Post Audit
Nick Badgerow, Kansas Judicial Council
Cynthia Smith, Advocacy Council, Sisters of Charity of Leavenworth Health System
Debra Stern, Kansas Hospital Association
Gary White, Kansas Association for Justice
Dan Morin, Kansas Medical Society

Others attending:
See attached list.

The Committee reviewed the Committee minutes of January 21 and January 22. Senator Schodorf moved, Senator Donovan seconded, to approve the minutes of January 21 and January 22. Motion carried.

Senator Mary Pilcher-Cook introduced a bill relating to parole and post release supervision for violent offenders and sex offenders. The bill was introduced without objection.

Judge Phil Journey requested the introduction of three bills. The first bill would amend K.S.A. 22-4603 regarding the resolution of financial obligations to the courts. The second bill amends qualifications for the Secretary of Corrections. The third bill relates to pre-trial and post-trial service fees. The bills were introduced without objections.

Kathy Porter requested the introduction of a bill regarding the implementation of e-filing. The bill was introduced without objection.

The Chairman opened the hearing on **SB 368 - Amending penalties for driving under the influence of alcohol or drugs**. Jason Thompson, staff revisor, reviewed the bill.

The bill would amend current law for third and fourth or subsequent driving under the influence (DUI) convictions. Senator Owens informed the Committee that the bill was requested by the Kansas DUI Commission to allow them to finalized their recommendations for a comprehensive DUI bill next session.

There being no conferees, the hearing on **SB 368** was closed.

The Chairman opened the hearing on **SB 434 - Increasing criminal penalties for unlawful sexual relations**.

Senator Jean Schodorf testified in support stating most employees of the Department of Corrections are honest and hardworking. However, a person of authority must be held to a higher standard when working with a person in a subservient, dependent position, including students. This bill elevates the penalty for unlawful sexual relations to a severity level 5, person felony. (Attachment 1)

Chris Clarke provided neutral testimony regarding the recent audit that included the issues of unlawful sexual relations in correctional facilities including a comparison of sanctions from other states. This bill would bring Kansas penalties for correctional staff unlawful sexual relations more in-line with those of other states and implement some recommendations following the audit. Those include:

- require individuals convicted to register as a sex offender,

- toughen the penalty for sexual misconduct so it includes jail time rather than presumptive probation, and
- bring the penalty for sexual misconduct more inline with the penalty for staff trafficking in contraband.

(Attachment 2)

Written testimony in support of **SB 434** was submitted by:
Russ Jennings, Commissioner, Kansas Juvenile Justice Authority (Attachment 3)
Roger Werholtz, Secretary, Kansas Department of Corrections (Attachment 4)

There being no further conferees, the hearing on **SB 434** was closed.

The Chairman opened the hearing on **SB 374 - Adopting a Kansas apology law**.

Nick Badgerow appeared in support and provided the Committee with a review of the bill proposed by Kansas Judicial Council Civil Code Advisory Committee following a review of **SB 32** as requested by the Senate Judiciary Committee. Following a review of written testimony, academic and law review articles, and apology laws from other states the committee recommends **SB 374**. The Committee was unanimous in its determination that statements or expressions of fault should not be the subject of an evidentiary exclusion. The Committee was also unanimously opposed to the limitation that the law apply solely to health care providers. It is the opinion of the Council that **SB 374** is a superior approach to an apology statute and fairly meets the objective of codifying the public policy favoring apologies without limiting the immunity to health care provider or extending it to admissions of fault. (Attachment 5)

Cynthia Smith appeared in favor stating while in favor of an apology law, she disagrees with the conclusion of the Judicial Council and recommended a substitute bill based on South Carolina law. Apology laws encourge good communication between doctors and patients, encourage early settlements when warranted, and reduce costly litigation. Ms. Smith asserts that under **SB 374**, health care providers will not be able to rely on protection under the law and so will follow the advice not to communicate with patients or acknowledge an adverse event. (Attachment 6)

Debra Stern spoke in support stating the Kansas Hospital Association strongly believes in the ability of health care providers to express benevolence, regret, mistake, error, sympathy, apology commiseration, compassion and condolence, and waive charges for medical care provided, without an admission of liability. Such actions should be encouraged and will increase transparency as well as communications between all parties. Ms. Stern recommended the substitute bill as proposed by Ms. Smith. (Attachment 7)

Gary White testified in support of **SB 374** as introduced stating the bill resolves the concerns that were raised during the hearing on **SB 32** in 2009. The bill is not limited to health care providers, and does not exclude statement or expression of fault as evidence of liability or admission against interest. SB 374 is consistent with the majority of state apology laws. (Attachment 8)

Dan Morin appeared as a proponent stating 35 states have laws offering some kind of legal protection for physicians who express regret or empathy to patients who experience an adverse event. **SB 374** represents a logical step toward reducing liability lawsuits. (Attachment 9)

Written testimony in support of **SB 374** was submitted by:
William W. Sneed, University of Kansas Hospital Authority (Attachment 10)

The next meeting is scheduled for February 2, 2010.

The meeting was adjourned at 10:30 a.m.

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: Feb. 1, 2010

NAME	REPRESENTING
Lee Henry	Saulsbury Grp LLC
Callie Jill Denton	Ks Assn for Justice
[illegible]	KSAJ
Chris Sigstad	Federico Consulting
Jackson Lindsey	Hein Law
Chris Clarke	Post Audit
Bill Sneed	UKHA
[illegible]	SCL Health System
John L. Hampton	Kansas Judicial Council
NICK BADGEROW	KANSAS JUDICIAL COUNCIL
[illegible]	Judicial Council
DEBORAH STERN	KS. HOSPITAL ASSN.
Whitney Damron	KS Bar Assn
Ashley Ballweg	Pinegar, Smith & Associates
Kevin Bonne	KPBBA
SEAN MILLER	CAPITOL STRATEGIES
Lane Welsh	Judicial Branch
Melissa Wangemann	KAC

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 2/1/2010

NAME	REPRESENTING
Ed Klumpp	KACP/KPOA/KSA
Jeremy Barclay	KDOC
Roger Werholtz	KDOC
Matt Casey	GBA
Shannon Bell	LGR
Patrick Woods	SRS
Scott Rothschild	Lawrence Journal-World
Karen Lair	
Katie Lair	
Emily Lair	
Regan Aylward	
Kayla Underwood	
Jill Aylward	
Kip Money	Kennedy & Assoc.
Kathy Porter	Judicial Branch

STATE OF KANSAS

JEAN KURTIS SCHODORF
SENATOR, 25TH DISTRICT
3039 BENJAMIN CT.
WICHITA, KS 67204
316-831-0229, CELL 316-259-0912

DURING SESSION
STATE CAPITOL—241-E
TOPEKA, KANSAS 66612-1504
HOT LINE 1-800-432-3924
TTY 1-785-296-8430
FAX: 785-368-6365

TOPEKA
SENATE CHAMBER
ASSISTANT MAJORITY LEADER/WHIP

COMMITTEE ASSIGNMENTS
CHAIR: EDUCATION
JOINT COMMITTEE ON ARTS AND CULTURAL RESOURCES
MEMBER: WAYS AND MEANS
COMMERCE
JUDICIARY
CONFIRMATION OVERSIGHT

HOME: jschodorf@gmail.com
CAPITOL: jean.schodorf@senate.ks.gov

Testimony to
SENATE JUDICIARY COMMITTEE

Senate Bill 434

Senator Jean Kurtis Schodorf

February 1, 2010

SB 434 elevates the severity level from 10 to 5 for unlawful sexual relations in ten categories, to include the following:

1. the offender is an employee or volunteer of the department of corrections,
2. the offender is a parole officer,
3. the offender is an employee of a jail,
4. the offender is an employee of a juvenile detention facility,
5. the offender is an employee of the juvenile justice authority or the employee of a contractor who is under contract to provide services in a juvenile correctional facility,
6. the offender is an employee of the juvenile justice authority or an employee of a contractor who provides direct supervision and offender control services,
7. the offender is an employee of the Department of Social and Rehabilitation Services,
8. the offender is a teacher or a person in a position of authority,
9. the offender is a court services officer or the employee of a contractor providing such services, or
10. the offender is a community correctional services officer.

This bill would elevate this offense to the same level as trafficking in contraband. Frequently, these two offenses occur at the same time.

Ninety-nine percent of our employees are honest and hardworking in the Department of Corrections. However, a person who is in a position of authority must be held to a higher standard in terms of working with a person in a subservient, dependent position, or even a student.

I have been working with the Corrections Department concerning this bill. They also feel that the felony level should be at level 5. The recent recommendations of the Post Audit Co upheld raising the severity level.

Jean Kurtis Schodorf

Senate Judiciary
2-1-10
Attachment 1

LEGISLATURE OF KANSAS
LEGISLATIVE DIVISION OF POST AUDIT

800 SOUTHWEST JACKSON STREET, SUITE 1200
TOPEKA, KANSAS 66612-2212
TELEPHONE (785) 296-3792
FAX (785) 296-4482
E-MAIL: LPA@LPA.KS.GOV
WWW.KSLEGISLATURE.ORG/POSTAUDIT

Senate Judiciary
Testimony on SB 434
Chris Clarke, Legislative Post Audit
February 1, 2010

Mr. Chairman and members of the Committee, thank you for allowing me to provide neutral testimony on SB 434. The bill amends the penalty for unlawful sexual relations from a level 10 to a level 5 person felony.

Our office just completed an audit that included looking into issues of unlawful sexual relations in correctional facilities. As part of our audit work, we compared the statutory sanctions in Kansas to those of other states. We found the following:

- In Kansas, unlawful sexual relations by a correctional employee is a level 10 person felony with a presumptive sentence of probation.
- According to a 2009 survey by the National Institute of Corrections, all but six other states have stronger penalties for this type of staff sexual misconduct than Kansas. In fact, Idaho and Alaska have maximum penalties of up to life in prison.
- Even states where this crime is a misdemeanor have penalties of up to a year in prison.
- 32 states also have mandatory registration as a sex offender. Kansas does not.

This bill would bring Kansas penalties for correctional staff unlawful sexual relations more in-line with those of other states and would partially implement the recommendations we made in our report related to K.S.A. 21-3520. The audit recommendations in this area were:

a. Amend K.S.A. 21-3520 to require individuals convicted under this statute to register as a sex offender.
b. Amend K.S.A. 21-3520 to toughen the penalty for sexual misconduct, so it includes jail time rather than just presumptive probation.
c. Amend K.S.A. 21-3520 to bring the penalty for sexual misconduct more in-line with the penalty for staff trafficking in contraband.

At its January 28 meeting, the Legislative Post Audit Committee voted to introduce legislation to implement these recommendations, and a recommendation related to staff trafficking in contraband.

Senate Judiciary
2-1-10
Attachment 2

TESTIMONY ON SB 434

TO THE SENATE JUDICIARY COMMITTEE

BY COMMISSIONER J. RUSSELL JENNINGS

KANSAS JUVENILE JUSTICE AUTHORITY

FEBRUARY 1, 2010

J. Russell Jennings
Commissioner
785-296-0042
rjennings@jja.ks.gov

Senate Judiciary
2-1-10
Attachment 3

SB434 proposes to increase the penalty provision for the crime of unlawful sexual relations from a severity level 10 person felony to a severity level 5 person felony. The Kansas Juvenile Justice Authority strongly supports enhancing the level of severity for this offense. Individuals placed in a position of trust and authority over others should suffer significant consequence when they abuse their power and trust for their own personal gratification. Employees within juvenile correctional facilities and community corrections offices are expected and trusted to maintain a professional therapeutic relationship with the youth under their control. A breach of this trust undermines public confidence in the entire juvenile justice system, reduces the likelihood of effective intervention into the life of the youths and is therefore deserving of significant consequence.

KANSAS
DEPARTMENT OF CORRECTIONS

Mark Parkinson, Governor
Roger Werholtz, Secretary

www.doc.ks.gov

Testimony on SB 434
to
The Senate Judiciary Committee

By Roger Werholtz
Secretary of Corrections
February 1, 2010

The Department supports SB 434. SB 434 amends K.S.A. 21-3520, Unlawful Sexual Relations, by increasing the penalty for that crime from a Severity Level 10 person felony to a Severity Level 5 Person felony. As a severity level 5 felony, offenders with no criminal history would nonetheless be subject to the presumptive imprisonment of a "border box" disposition on the sentencing grid. The crime of Unlawful Sexual Relations is a serious offense warranting a significant penalty.

The Department of Corrections first requested legislation defining the crime of Unlawful Sexual Relations in 1992. While each chamber of the Legislature passed separate bills containing provisions prohibiting consensual sexual relations between corrections staff and offenders, a single bill was not passed by both chambers that session. The Department again requested that legislation in 1993 which was enacted into law. Since that time, the crime of unlawful sexual relations has been expanded to include a prohibition against officials working for jails, Juvenile Justice, court services, community corrections, the Department of Social and Rehabilitation Services and teachers sexually abusing persons under their supervision or control.

The Department supports the uniform application of the increased penalty applicable to staff of criminal justice agencies but defers to the judgment of SRS and school administrators regarding the appropriate criminal penalty applicable to the staff of those entities.

KANSAS JUDICIAL COUNCIL

Kansas Judicial Center
301 S.W. Tenth Street, Suite 140
Topeka, Kansas 66612-1507

Telephone (785) 296-2498
Facsimile (785) 296-1035

judicial.council@ksjc.state.ks.us
www.kansasjudicialcouncil.org

MEMORANDUM

TO: **Senate Judiciary Committee**

FROM: **Kansas Judicial Council**

DATE: **February 1, 2010**

RE: **2010 SB 374**

SB 374 was drafted by the Judicial Council Civil Code Advisory Committee, which had been asked to study and make recommendations on 2009 SB 32.

SB 32 was introduced on January 15, 2009 by Sen. Jim Barnett at the request of the Sisters of Charity of Leavenworth Health System and contains what is commonly known as an "apology law." SB 32 excludes a health care provider's apology or admission of fault under certain circumstances from admissibility "as evidence of an admission of liability or as evidence of an admission against interest" in a trial relating to an "unanticipated outcome of medical care." The bill was first referred to the Public Health and Welfare Committee, but was then withdrawn and referred on January 20, 2009 to the Judiciary Committee. Hearings were held on January 28, 2009 and the bill was subsequently referred by Judiciary Chair Owens to the Judicial Council for study. The Judicial Council assigned the study to the Civil Code Advisory Committee. A list of the Committee members is included with this testimony.

In its consideration of HB 32, the Committee reviewed the written testimony submitted to the Senate Judiciary Committee, academic and law review articles on the topic, and apology laws from other states. The Committee concluded that although public policy favors apologies, and that it would be consistent with public policy to exclude an apology or expression of sympathy for purposes of proving liability, the Committee did not agree with the approach taken in HB 32. The Committee was unanimous in its determination that statements or expressions of fault should not be the subject of an evidentiary exclusion. Further, although the primary proponent of HB 32 operates hospitals and clinics and drafted the bill to apply solely to health care providers, the Committee was unanimously opposed to that limitation.

Senate Judiciary
2-1-10
Attachment 5

The Committee reviewed apology statutes enacted in 35 other states and found that there has not been uniformity in the approach taken. The Committee selected Hawaii's law as the model in drafting SB 374, approving of both the statute's substance and its simplicity. Haw. Rev. Stat. § 626-1, Rule 409.5 (2007).

SB 374 is simple and straightforward and meets the Committee's primary objectives:

- A person should be free to make an apology without fear that the gesture will be used against him in court. However, an admission of fault should remain admissible, to the extent it always has been.

- The evidentiary exclusion created by the bill does not extend to outright admissions of fault. This is consistent with the vast majority of apology statutes studied, only four of which explicitly include statements of responsibility or liability.

- Like the original apology statute enacted in Massachusetts and many others, the evidentiary exclusion created by the bill is not limited to health care providers.

- The proposed statute deals with mixed expressions of apology and fault by rendering them neither specifically included nor excluded from the immunity granted, instead leaving the decision on such expressions to the court.

- The proposed statute is consistent with the Kansas approach to offers of compromise that include express admissions of facts. See K.S.A. 60-452.

It is the opinion of the Committee and the Judicial Council that SB 374 is a superior approach to an apology statute in Kansas. SB 374 fairly meets the objective of codifying the public policy favoring apologies without limiting the immunity to health care providers or extending it to admissions of fault.

Amendment

The Judicial Council does recommend one amendment to the bill due to a typographical error. A copy of the bill showing the correction is attached to this testimony.

Session of 2010

SENATE BILL No. 374

By Committee on Judiciary

1-14

AN ACT concerning evidence in civil actions; expression of apology, sympathy, commiseration or condolence not admissible as evidence of an admission of liability or as evidence of an admission against interest.

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

Section 1. Evidence of statements or gestures that express apology, sympathy, commiseration or condolence concerning the consequences of an event in which the declarant was a participant is not admissible to prove ~~provide~~ liability for any claim growing out of the event. This section does not require the exclusion of any apology or other statement or gesture that acknowledges or implies fault even though contained in, or part of, any statement or gesture excludable under this section.

Sec. 2. This act shall take effect and be in force from and after its publication in the statute book.

JUDICIAL COUNCIL CIVIL CODE ADVISORY COMMITTEE

The members of the Judicial Council Civil Code Advisory Committee who participated in the study of SB 32 and the drafting of SB 374 are:

J. Nick Badgerow, Chairman, practicing attorney in Overland Park and member of the Kansas Judicial Council

Hon. Terry L. Bullock, Retired District Court Judge, Topeka

Prof. Robert C. Casad, Distinguished Professor of Law Emeritus at The University of Kansas School of Law, Lawrence

Prof. James M. Concannon, Distinguished Professor of Law at Washburn University School of Law

Hon. Jerry G. Elliott, Kansas Court of Appeals Judge, Topeka

Hon. Bruce T. Gatterman, Chief Judge in 24th Judicial District, Larned

John L. Hampton, practicing attorney in Lawrence

Joseph W. Jeter, practicing attorney in Hays and member of the Kansas Judicial Council

Hon. Marla L. Luckert, Kansas Supreme Court, Topeka

Hon. Kevin P. Moriarty, District Court Judge in 10th Judicial District, Olathe

Thomas A. Valentine, practicing attorney, Topeka

Donald W. Vasos, practicing attorney, Fairway

Sisters of Charity of Leavenworth Health System

Senate Judiciary Committee
State of Kansas
February 1, 2010

Written Testimony on Senate Bill 374

Expressions of apology, sympathy, compassion or benevolent acts by health care providers not admissible as evidence

In 2009, the Sisters of Charity of Leavenworth Health System requested a bill be introduced in the Kansas legislature to conform Kansas law with "apology laws" in more than 30 other states. Per our request, Senate Bill 32 was introduced on January and referred to the Judiciary Committee. The Judiciary Committee held a hearing on Senate Bill 32 on January 23, 2009, and ultimately referred it to the Kansas Judicial Council for study. The Judicial Council adopted a report on Senate Bill 32 in December and requested Senate Bill 374, another version of an apology law and the subject of today's hearing.

The Sisters of Charity of Leavenworth religious community was founded in 1858 by Mother Xavier Ross and the early Sisters responding to a call for health and social services in the ranching and mining communities throughout the Western states. From such humble origins, these committed women built the Sisters of Charity of Leavenworth Health System (SCLHS), which is made up of eleven hospitals and four stand-alone clinics located in the states of Kansas, Colorado, Montana and California.

SCLHS operates three hospitals in Kansas – St. Francis Health Center in Topeka, Providence Medical Center in Kansas City, Kansas, and Saint John Hospital in Leavenworth – as well as three safety net clinics.

The Mission of SCL Health System is *to improve the health of the individuals and communities we serve*…which is realized through our Vision, including the *unyielding pursuit of clinical excellence.* Our Core Values encompass not only that we owe excellent service to the people we serve, but also that we treat each and every person with respect and dignity. Because we are people caring for people, situations may occur wherein the patients we serve are harmed or injured while under our care or in our facility. If and when that should occur, it is the foundation of our Core Values that guides our subsequent actions and deeds.

As you may recall, the purpose of Senate Bill 32 was for Kansas to adopt public policy that that would allow expressions of apology or compassion and other benevolent acts by health care providers without fear of it being used as evidence of liability when a patient experiences an adverse medical outcome.

Senate Judiciary
2-1-10
Attachment 6

The logic of this policy is that, when there is an adverse outcome of a medical procedure or treatment, compassion and benevolence is warranted regardless of fault. *By keeping open the lines of communication between a patient and his or her doctors and hospital during that difficult time, an adversarial relationship and potentially costly lawsuits can be avoided.* Doctors won't need to wait for legal counsel to give advice, or for fault to be investigated, before they can freely express compassion to their patients.

This policy limits evidence if a case goes to trial. If fault is clear – such as a wrong limb being operated on, or something left inside a patient – we assert that evidence isn't needed and *what is gained far outweighs what is lost*.

Thirty-five states have apology laws in statute (list attached). Much has been written about the success of these laws.

Since the hearing on Senate Bill 32 last session, more proof has become available about the effectiveness of apologies. **The University of Michigan Health System reduced malpractice claims by 55 percent between 1999 and 2006, and reduced average litigation costs by greater than 50 percent. Average claims processing time dropped from 20 months to about 8 months.** Reports on their experience are provided.

During the hearing on Senate Bill 32 in 2009, questions were raised about whether expressions of "fault" were appropriately included in the language of the bill. This question culminated in the bill being referred to the Kansas Judicial Council for study.

We communicated with the Judicial Council, offered our expertise, and suggested they consider the language of the South Carolina law on adverse medical outcomes. **We had we determined the South Carolina law was a better, clearer model than the Colorado model used in Senate Bill 32.**

Instead, the Judicial Council advisory committee decided the Hawaii law was preferred, and requested Senate Bill 374 which is before you today. **We respectfully disagree with the conclusion of the Judicial Council.**

First, Hawaii law is not limited to health care providers. As we said testified last year, perhaps there are other circumstances where an apology law would be good public policy. What we know is that apology laws encourage good communication between doctors and patients, encourage early settlements when warranted, and reduce costly litigation. We are all concerned about rising health care costs, and apology laws move us in the right direction. **In fact, during the health reform debate, apology laws were held up by Republicans in Congress as a desirable model of medical liability reform.**

Second, the Hawaii law offers no assurance that an apology will be excluded from evidence. Instead, the statute commentary states "Whether a challenged utterance amounts to an expression of sympathy or an acknowledgment of fault will be entrusted to the *sound discretion of the trial court*…In making this determination, the court could consider factors such as the declarant's language, the declarant's physical and emotional condition, and the context and circumstances in which the utterance was made." (emphasis added)

In other words, the Hawaii law and SB 374 demand that whether an apology will be excluded from evidence must be – in each case, after the fact – decided in court.

We assert that, under S. 374, health care providers will not be able to rely on protection under the law, so will follow their lawyers' advice not to communicate with patients or acknowledge an adverse event, and the law will be useless in opening lines of communications and do nothing to reduce costly medical liability litigation.

We therefore request substitute language, based on the South Carolina law. The substitute has been readied by the committee revisor and is provided. You will find it to be an improvement over the language of SB 32 and a substantially more effective apology law than SB 374 as introduced.

Respectfully submitted,
Cynthia Smith, JD
Advocacy Counsel

Testimony joined by Via Christi Health System, Saint Luke's Health System, Shawnee Mission Medical Center

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Attachments:

- PROPOSED Substitute for SENATE BILL NO. 374 (9rs1606)
- *Honesty and apology after medical errors result in 55 percent reduction in malpractice claims*, Premier SafetyShare, September 2009
- Boothman RC, et al., *A better approach to medical malpractice claims? The University of Michigan experience*, J. of Health and Life Sciences Law, Vol. 2, Issue #2 (January 2009).
- List of 35 state apology laws
- Hawaii statutes HRS Sec.626-1
- Kansas Senate Bill 32

2010 9rs1606

PROPOSED Substitute for SENATE BILL NO. 374

By

AN ACT enacting the Kansas adverse medical outcome transparency act; concerning evidence in civil actions; expression of apology, sympathy, compassion or benevolent acts by health care providers not admissible as evidence of an admission of liability or as evidence of an admission against interest.

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

Section 1. (a) This section may be cited as the "Kansas adverse medical outcome transparency act."

(b) In any claim or civil action brought by or on behalf of a patient allegedly experiencing an adverse outcome of medical care, any and all statements, activities, waivers of charges for medical care provided or other conduct expressing benevolence, regret, mistake, error, sympathy, apology, commiseration, condolence, compassion or a general sense of benevolence which are made by a health care provider, an employee or agent of a health care provider, shall be inadmissible as evidence and shall not constitute an admission of liability or an admission against interest.

(c) A defendant in a medical malpractice action may waive the inadmissibility of statements defined in subsection (b) that are attributable to such defendant by expressly stating, in writing, the intent to make such a waiver.

(d) As used in this section:

(1) "Health care provider" has the meaning prescribed in K.S.A. 65-4915, and amendments thereto.

(2) "Adverse outcome" means the outcome of a medical treatment or procedure, whether or not resulting from an intentional act, that differs from an intended result of such medical treatment

6-4

or procedure.

Sec. 2. This act shall take effect and be in force from and after its publication in the statute book.

6-5

PREMIER

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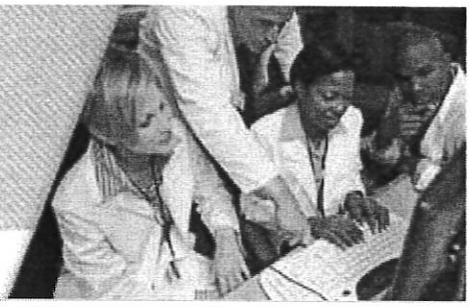

Malcolm Baldrige National Quality Award 2006 Award Recipient

September 2009

Dear Colleague:

Our lead story this month confirms that saying *I am sorry* is still the best approach after medical errors. Follow the Safety Institute on Twitter for breaking news.

Sincerely,

Gina Pugliese, editor
Vice President, Premier Safety Institute

Honesty and apology after medical errors result in 55 percent reduction in malpractice claims

Open communication and honesty with patients about medical errors, including an apology, were found to be the key to reducing malpractice claims by as much as 55 percent.

The evidence appears to support the position that patients file malpractice lawsuits because they get so angry when communication, honesty, accountability, and literally good customer service are lacking after a perceived error. A lawsuit is often the only way to find out what actually happened to a loved one. This position was addressed in a recent commentary in the British Medical Journal (BMJ) referencing decades of evidence published by "Sorry Works!," a coalition led by Doug Wojcieszak.

The University of Michigan Health System (UMHS) has adopted many of these strategies, including an apology after a medical error that resulted in a greater than 50 percent reduction in average litigation costs and reduced malpractice claims by 55 percent between 1999 and 2006. UMHS published its effective strategy for reducing litigation and malpractice claims. The article notes that a principled accounting of what occurred is best not only for patients and their families and the institution, but also for the healthcare providers involved in the event, future patients and even the lawyers. In addition to the policy of owning up to responsibility for adverse events, apologizing, and compensation to the patient and family as the core of the program, UMHS has a comprehensive patient safety initiative that includes other structural and cultural changes.

Other organization's disclosure programs UMHS isn't the only organization to implement a comprehensive disclosure program. The Department of Veterans Affairs, the University of Illinois at Chicago (UIC) Medical Center, and Kaiser Permanente also have well-developed programs of apology and disclosure. As originally developed by UMHC and enhanced by the UIC, principles of "full disclosure" include the following elements:

OVER, PLEASE

6-6

- Provide effective and honest communication to patients and families following adverse patient events;
- Apologize and compensate quickly and fairly when inappropriate medical care causes injury;
- Defend medically appropriate care vigorously; and
- Reduce patient injuries and claims by learning from past experience.

Downloads and links

- You can say sorry. Feinmann BMJ 2009;
- Sorry works! Editorial Wojcieszak
- Journal of Health & Life Sciences Law-Boothman, January 2009
- Premier Inc. Web conference on "Disclosure, Apology and Early Resolution" http://www.premierinc.com/risk/education-newsletters/websessions/may27/
- Patient Safety Share - January 2009: "Recent rise in "apology" laws in 36 states protect physicians from malpractice."
- Joint Commission White Paper: "Healthcare at the crossroads: Strategies for improving the medical liability system and preventing patient injury."

6-7

OVER, PLEASE

J Health Life Sci Law. 2009 Jan;2(2):125-59

A better approach to medical malpractice claims? The University of Michigan experience

Boothman RC, Blackwell AC, Campbell DA Jr, Commiskey E, Anderson S

Abstract:

The root causes of medical malpractice claims are deeper and closer to home than most in the medical community care to admit. The University of Michigan Health System's experience suggests that a response by the medical community more directly aimed at what drives patients to call lawyers would more effectively reduce claims, without compromising meritorious defenses. More importantly, honest assessments of medical care give rise to clinical improvements that reduce patient injuries. Using a true case example, this article compares the traditional approach to claims with what is being done at the University of Michigan. The case example illustrates how an honest, principle-driven approach to claims is better for all those involved-the patient, the healthcare providers, the institution, future patients, and even the lawyers.

The Michigan way to reduce malpractice claims

University of Michigan Health System, which employs 18,000 workers and has a $1.5 billion annual budget, has reaped national fame and the admiration for its success in reducing litigation and malpractice claims. The architects of the renowned program spell out how they do it in the January 2009 issue of **Journal of Health & Life Sciences Law**.

First, the results. The number of new claims against the health system has dropped steadily from 136 in 1999 to 88 in 2002 to 61 in 2006. The number of open claims has also dropped steadily from 262 in 2001 to 114 in 2005 to 83 in 2007.

"Over that same time span (August 2001 through August 2007), the average claims processing time dropped from 20.3 months to about 8 months. Total insurance reserves dropped by more than two-thirds. Average litigation costs have been more than halved," report Richard Boothman, J.D., chief risk officer for the University of Michigan Health System, and colleagues.

Although Michigan's success is often summed up by the phrase "sorry works," offering apologies for medical errors explains only a small part of the health system's success. The university's well-funded risk department works closely with excellent clinicians and, throughout, there is a focus on improving patient safety.

In addition to rapid response teams, a large hospitalist service, provision of pulse oximetry for adult and pediatric inpatients, and purchase of portable "vein sensors" to reduce complications, the health system also has a "patient safety contingency fund" that allows the chief of staff to pay

for needed clinical improvements without going through a ponderous institutional capital process.

The health system also benefits from the fact that its physicians are employees of the university and faculty members of its medical school. "UMHS has been self-insured since the mid-1980s, which allowed for consistency and alignment of ethical and financial motivation between the hospital, care providers, and insurer. Alignment of these components remains an important advantage," the authors write.
The health system is known for its willingness to compensate patients quickly if they were harmed by unreasonable care. "The key challenge is distinguishing between reasonable and unreasonable care. This determination is pivotal – it provides direction for the institutional response – and it is critical to get it right," they say.

UMHS developed the expertise to accomplish the detailed investigation and expert assessments necessary to know the difference between reasonable and unreasonable care. It revamped its risk management department and staffed it with experienced nurses "based on the reasoning that it would be easier to teach claims handling to caregivers than to acquaint claims handlers with complex medical issues."
Using experienced caregivers to review claims also helps the health system achieve one of its central objectives, i.e. learning from patients' experiences to reduce patient injuries. "Every risk management consultant at UMHS is assigned specific clinical services. It is the consultant's task to understand how care is delivered, counsel the department chair or division chief, and continually look for ways to improve patient safety and decrease the risks of injury and mistake," the authors write.

In a wide-ranging essay, the authors also emphasize the value of informed consent, when done properly. "In this approach, addressing the root causes of litigation begins before an injury occurs. The informed
consent process is an under appreciated opportunity to establish rapport with the patient and create realistic expectations," they say.

Building on that important first step, the Michigan health system takes pains to follow through. "If the patient's experience reasonably mirrors expectations, if the patient's need for information is met readily, if the patient is assisted in processing the information, and if the patient believes that the system has responded to his or her experience with improvements, the likelihood that the patient will feel the need for an advocate or seek satisfaction through the legal system diminishes significantly," they conclude.

States with Apology Laws

Arizona A.R.S. 12-2605 (2005)

California Evidence Code 1160 (2000)

Colorado Revised Statute 13-25-135 (2003)

Connecticut Public Act No. 05-275 Sec.9 (2005) amended (2006) Conn. Gen. Stat. Ann. 52-184d

Delaware Del. Code Ann. Tit. 10, 4318 (2006)

Florida Stat 90.4026 (2001)

Georgia Title 24 Code GA Annotated 24-3-37.1 (2005)

Hawaii HRS Sec.626-1 (2006)

Idaho Title 9 Evidence Code Chapter 2 .9-207

Illinois Public Act 094-0677 Sec. 8-1901, 735 ILL. Comp. Stat. 5/8-1901 (2005)

Indiana Ind. Code Ann. 34-43.5-1-1 to 34-43.5-1-5

Iowa HF 2716 (2006)

Louisiana R.S. 13:3715.5 (2005)

Maine MRSA tit. 2908 (2005)

Maryland MD Court & Judicial Proceedings Code Ann. 10-920 (2004)

Massachusetts ALM GL ch.233, 23D (1986)

Missouri Mo. Ann. Stat. 538.229 (2005)

Montana Code Ann.26-1-814 (Mont. 2005)

Nebraska Neb. Laws L.B. 373 (2007)

New Hampshire RSA 507-E:4 (2005)

North Carolina General Stat. 8C-1, Rule 413

North Dakota ND H.B. 1333 (2007)

Ohio ORC Ann 2317.43 (2004)

Oklahoma 63 OKL. St. 1-1708.1H (2004)

Oregon Rev. Stat. 677.082 (2003)

South Carolina Ch.1, Title19 Code of Laws 1976, 19-1-190 (2006)

South Dakota Codified Laws 19-12-14 (2005)

Tennessee Evid Rule 409.1(2003)

Texas Civil Prac and Rem Code 18.061(1999)

Utah Code Ann. 78-14-18 (2006)

Vermont S 198 Sec. 1. 12 V.S.A. 1912 (2006)

Virginia Code of Virginia 8.01-52.1 (2005)

Washington Rev Code Wash 5.66.010 (2002)

West Virginia 55-7-11a (2005)

Wyoming Wyo. Stat. Ann. 1-1-130

Hawaii statutes HRS Sec.626-1

[Rule 409.5] Admissibility of expressions of sympathy and condolence. Evidence of statements or gestures that express sympathy, commiseration, or condolence concerning the consequences of an event in which the declarant was a participant is not admissible to prove liability for any claim growing out of the event. This rule does not require the exclusion of an apology or other statement that acknowledges or implies fault even though contained in, or part of, any statement or gesture excludable under this rule. [L 2007, c 88, §1]

RULE 409.5 COMMENTARY

This rule, shielding expressions of "sympathy, commiseration, or condolence," resembles measures recently adopted in several sister states. See, e.g., CA Evid. Code § 1160, excluding expressions of "sympathy or a general sense of benevolence." The rule favors expressions of sympathy as embodying desirable social interactions and contributing to civil settlements, and the evidentiary exclusion recognizes that the law should "facilitate or, at least, not hinder the possibility of this healing ritual." Robbennolt, Apologies and Legal Settlement: An Empirical Examination, 102 Mich. L. Rev. 460, 474 (2003). The Hawaii legislature also stated: "Your committee finds it appropriate to allow individuals and entities to express sympathy and condolence without the expression being used ... to establish civil liability". Senate Standing Committee Report No. 1131, March 21, 2007.

Whether a challenged utterance amounts to an expression of sympathy or an acknowledgment of fault will be entrusted to the sound discretion of the trial court under rule 104(a). In making this determination, the court could consider factors such as the declarant's language, the declarant's physical and emotional condition, and the context and circumstances in which the utterance was made.

Session of 2009

SENATE BILL No. 32

By Committee on Public Health and Welfare

1-15

AN ACT concerning evidence in civil actions; expression of apology, sympathy, compassion or benevolent acts by health care providers not admissible as evidence of an admission of liability or as evidence of an admission against interest.

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

Section 1. (a) No oral or written statements or notations, affirmations, gestures, conduct or benevolent acts including waiver of charges for medical care provided, expressing apology, fault, sympathy, commiseration, condolence or compassion which are made by a health care provider or an employee of a health care provider to a patient, a relative of the patient or a representative of the patient and which relate to the discomfort, pain, suffering, injury or death of the patient as the result of the unanticipated outcome of medical care shall be admissible as evidence of an admission of liability or as evidence of an admission against interest.

(b) As used in this section:

(1) "Health care provider" has the meaning prescribed in K.S.A. 65-4915, and amendments thereto.

(2) "Relative" means a patient's spouse, parent, grandparent, stepfather, stepmother, child, grandchild, brother, sister, half-brother, half-sister or spouse's parents. The term includes such relationships that are created as a result of adoption and any person who has a family-type relationship with a patient.

(3) "Representative" means a legal guardian, attorney, person designated to make decisions on behalf of a patient under a medical power of attorney or any person recognized in law or custom as a patient's agent.

(4) "Unanticipated outcome" means the outcome that differs from the anticipated outcome of a treatment or procedure.

Sec. 2. This act shall take effect and be in force from and after its publication in the statute book.

6-12

Tom Bell
President and CEO

February 1, 2010

TO: Senate Judiciary Committee

FROM: Deborah Stern, Vice President Clinical Services & General Counsel

RE: Senate Bill 374

The Kansas Hospital Association appreciates the opportunity to testify regarding this important proposed legislation. The practice of medicine is both an art and a science and therefore the treatment of patients does not always proceed as planned. KHA along with over 30 states strongly believes that a health care provider, an employee or an agent of a health care provider should be able to express benevolence, regret, mistake, error, sympathy, apology, commiseration, compassion and condolence and waive charges for medical care provided, without these expressions or actions being admissible as evidence, considered an admission of liability, or an admission against interest. Such conduct, statements, or activity should be encouraged between health care providers, health care institutions, and patients experiencing an adverse event resulting from their medical care.

The movement to increase transparency is welcomed by patients and by more and more regulatory and accreditation agencies that are requiring health care providers and health care institutions to discuss the outcomes of their medical care and treatment with their patients, including adverse events. Studies have shown such discussions foster improved communications and respect between provider and patient, promote quicker recovery by the patient and reduce the incidence of claims and lawsuits arising out of such events. KHA supports the amendments offered by The Sisters of Charity.

In keeping with society's expectations that health care providers "do the right thing" and communicate openly and honestly with patients regarding adverse events, KHA urges the Committee to amend SB 374 as proposed by the Sisters of Charity of Leavenworth.

Thank you for your consideration of our comments.

KANSAS ASSOCIATION FOR JUSTICE

719 SW Van Buren St., Ste. 100, Topeka, KS 66603
PHONE: 785-232-7756
FAX: 785-232-7730
www.ksaj.org

Your rights. Our mission.

To: Senator Thomas "Tim" Owens, Chair
Members of the Senate Judiciary Committee

From: Gary D. White
Palmer, Leatherman, White & Dalton, LLP, Topeka

Date: February 1, 2010

Re: SB 374 Apology Bill

The Kansas Association for Justice (KsAJ) appreciates the opportunity to testify in support of SB 374. SB 374 changes the rules of evidence in civil trials relating to statements of apology.

The rules of evidence promote truth by spelling out what information may be provided to a jury, when and how it may be provided, and the purpose for which it is provided. The rules of evidence are important because they ensure that each party is given the same opportunity to present their case and that the trier of fact relies on truthful evidence—evidence that demonstrates a provable fact, and is not without basis.

SB 374 is the work of the Kansas Judicial Council. The issue emerged after the Senate Judiciary Committee heard a similar bill, SB 32, in 2009. The Council's review and recommendations were sought on SB 32 at the request of Chairman Owens on behalf of the Senate Judiciary Committee.

KsAJ believes that SB 374 resolves the concerns that were raised at the 2009 hearing on SB 32.

1. Unlike SB 32, SB 374 is not limited to health care providers. SB 32 creates a special rule of evidence that applied only to health care providers as defined in K.S.A. 65-4915. The Council unanimously opposed the limitation in SB 32.

2. Unlike SB 32, SB 374 does not exclude statements or expressions of fault as evidence of liability or admission against interest. The Judicial Council, in its review, found that the vast majority of states do not exclude from the jury admissions of fault as evidence of liability. SB 374 is consistent with the majority of state apology laws.

When KsAJ testified in 2009 on SB 32, we proposed a public policy test for evaluating the reasonableness of an apology bill: that appropriate and fair legislation must promote the truth, rather than conceal it. We are satisfied that SB 374 meets this test.

On behalf of KsAJ, I respectfully request your support of SB 374 without amendments.

Thank you for the opportunity to provide you with our testimony.

Senate Judiciary
2-1-10
Attachment 8

Approved by the Judicial Council December 4, 2009

REPORT OF THE JUDICIAL COUNCIL
CIVIL CODE ADVISORY COMMITTEE ON 2009 SB 32

DECEMBER 4, 2009

BACKGROUND

In March, 2009 Senator Tim Owens requested that the Judicial Council review and make recommendations on 2009 Senate Bill 32, which concerns admissibility of expressions of apology by health care providers. At its June 4, 2009 meeting, the Judicial Council assigned the study to the Civil Code Advisory Committee. The Committee considered the bill at its September 25, 2009 meeting.

COMMITTEE MEMBERSHIP

The members of the Judicial Council Civil Code Advisory Committee are:

J. Nick Badgerow, Chairman, practicing attorney in Overland Park and member of the Kansas Judicial Council

Hon. Terry L. Bullock, Retired District Court Judge, Topeka

Prof. Robert C. Casad, Distinguished Professor of Law Emeritus at The University of Kansas School of Law, Lawrence

Prof. James M. Concannon, Distinguished Professor of Law at Washburn University School of Law

Hon. Jerry G. Elliott, Kansas Court of Appeals Judge, Topeka

Hon. Bruce T. Gatterman, Chief Judge in 24th Judicial District, Larned

John L. Hampton, practicing attorney in Lawrence

Joseph W. Jeter, practicing attorney in Hays and member of the Kansas Judicial Council

Hon. Marla L. Luckert, Kansas Supreme Court, Topeka

Hon. Kevin P. Moriarty, District Court Judge in 10th Judicial District, Olathe

Thomas A. Valentine, practicing attorney, Topeka

Donald W. Vasos, practicing attorney, Fairway

INTRODUCTION

SB 32 was introduced on January 15, 2009 by Sen. Jim Barnett at the request of the Sisters of Charity of Leavenworth Health System and contains what is commonly known as an "apology law." SB 32 excludes a health care provider's apology or admission of fault under certain circumstances from admissibility "as evidence of an admission of liability or as evidence of an admission against interest" in a trial relating to an "unanticipated outcome of medical care." The bill was first referred to the Public Health and Welfare Committee, but was then withdrawn and referred on January 20, 2009 to the Judiciary Committee. Hearings were held on January 28, 2009 and the bill was subsequently referred to the Judicial Council for study.

BACKGROUND

The first apology law was passed in Massachusetts in 1986. The daughter of a Massachusetts state senator was killed in the 1970's when she was struck by a car while riding her bike. The senator was angry that the driver never apologized, and he was told that the driver dared not do so because the apology could constitute an admission in the trial over the girl's death. Following his retirement, the senator and his successor presented a bill designed to offer some protection to apologizers. Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 Yale L.J. 1135, 1151 (2000).

The Massachusetts statute provides in part that "[s]tatements, writings or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering or death of a person involved in an accident and made to such person or to the family of such person shall be inadmissible as evidence of liability in a civil action." Mass. Gen. Laws Ann. ch 233, § 23D. It was the only statute of its kind in the country for many years. Texas then passed an apology law in 1999, and by 2007 apology laws had been enacted in 35 states.

In general, apology laws are based on the theory that apologies are healing for both sides and should not be discouraged by the fear of legal ramifications. Debate has raged over the last decade concerning the relationship of apology and the law. See, *e.g.*, the extensive list of articles cited in Runnels, *Apologies All Around: Advocating Federal Protection For the Full Apology in Civil Cases*, 46 San Diego L. Rev. 137, FN 13 (Winter 2009). While all apology laws exclude for purposes of

proving liability at least some expression of apology or sympathy, there are many variations. Although the Massachusetts statute refers to "an accident," approximately two-thirds of states opted to restrict the exclusion of apologies to cases involving health care providers. The vast majority of states do not extend the exclusion to admissions of fault. There are four states that explicitly include statements of responsibility or liability (Arizona, Colorado, Connecticut, and Washington) and a few others that may, but it is not as clearly stated (Georgia, Indiana, South Carolina, and Vermont).

DISCUSSION

In its consideration of HB 32, the Committee reviewed apology laws from other states, academic and law review articles on the topic, and the written testimony submitted to the Senate Judiciary Committee.

HB 32 applies only to health care providers and does explicitly exclude from admissibility expressions of fault. The text of the bill is as follows:

> (a) No oral or written statements or notations, affirmations, gestures, conduct or benevolent acts including waiver of charges for medical care provided, expressing apology, fault, sympathy, commiseration, condolence or compassion which are made by a health care provider or an employee of a health care provider to a patient, a relative of the patient or a representative of the patient and which relate to the discomfort, pain, suffering, injury or death of the patient as the result of the unanticipated outcome of medical care shall be admissible as evidence of an admission of liability or as evidence of an admission against interest.
>
> (b) As used in this section:
>
> (1) "Health care provider" has the meaning prescribed in K.S.A. 65-4915, and amendments thereto.
>
> (2) "Relative" means a patient's spouse, parent, grandparent, stepfather, stepmother, child, grandchild, brother, sister, half-brother, half-sister or spouse's parents. The term includes such relationships that are created as a result of adoption and any person who has a family-type relationship with a patient.
>
> (3) "Representative" means a legal guardian, attorney, person designated to make decisions on behalf of a patient under a medical power of attorney or any person recognized in law or custom as a patient's agent.
>
> (4) "Unanticipated outcome" means the outcome that differs from the

anticipated outcome of a treatment or procedure.

At the outset, the Committee was in agreement with the underlying premise that public policy favors apologies, and that it would be consistent with public policy to exclude for purposes of proving liability an apology or expression of sympathy.

In spite of that common ground, the Committee did not agree with the approach taken in HB 32. The Committee was unanimous in its determination that statements or expressions of fault should not be the subject of an evidentiary exclusion. Further, although the primary proponent of HB 32 operates hospitals and clinics and drafted the bill to apply solely to health care providers, the Committee was unanimously opposed to that limitation.

After reaching unanimous agreement that it would not support HB 32 as written, the Committee did a comprehensive review of apology laws passed in other states. The Committee noted that most states had reached the same conclusion as the Committee had regarding the issue of extending the exclusion to admissions of fault. The Committee also noted that under many apology laws, it was unclear whether a mixed statement of apology and liability would be deemed inadmissible under the law.

Some states have opted to answer that question by specifically providing that statements of fault that are part of, or in addition to, an apology that would be inadmissible under the applicable apology provision would not likewise be deemed inadmissible. Hawaii has taken a different approach, providing that the apology rule "does not require the exclusion of an apology or other statement that acknowledges or implies fault even though contained in, or part of, any statement or gesture excludable under this rule." Haw. Rev. Stat. § 626-1, Rule 409.5 (2007). This provision directly responds to concerns that uncertainty about whether the words "I'm sorry" are an apology or an admission of fault make it impossible for physicians to believe they can rely on an apology law unless expressions of fault or liability are specifically covered by the statute. Hawaii's approach leaves that decision squarely in the capable hands of the trial judge, allowing the court to weigh the probative value against the risk of undue prejudice as it routinely does on questions of admissibility.

The Committee agreed to propose an alternative to SB 32 that is based on the Hawaii apology law.

COMMITTEE'S CONCLUSIONS

The Committee is unanimously opposed to SB 32. While it supports an apology law for Kansas, the Committee does not support legislation limited to health care providers and specifically rejects extending the immunity to admissions of fault.

COMMITTEE RECOMMENDATION

The Committee proposes an alternative to SB 32 that is based on Hawaii's apology law. The provision is not limited to health care providers. In addition, the provision deals with mixed expressions of apology and fault by rendering them neither specifically included nor excluded from the immunity granted, instead leaving the decision on such expressions to the court. Finally, this proposed statute is consistent with the Kansas approach to offers of compromise that include express admissions of facts. See K.S.A. 60-452.

The Judicial Council Civil Advisory Committee proposes that the following statute be presented to the legislature:

> **Admissibility of expression of apology, sympathy, commiseration, or condolence**. Evidence of statements or gestures that express apology, sympathy, commiseration, or condolence concerning the consequences of an event in which the declarant was a participant is not admissible to prove liability for any claim growing out of the event. This section does not require the exclusion of any apology or other statement or gesture that acknowledges or implies fault even though contained in, or part of, any statement or gesture excludable under this section.

KANSAS MEDICAL SOCIETY
Established 1859

To: Senate Committee on Judiciary

From: Dan Morin
Director of Government Affairs

Date: February 1, 2010

Subject: SB 374; expressions of sympathy or apology not construed as admission of liability in civil actions

The Kansas Medical Society appreciates the opportunity to appear today as you consider SB 374, which is commonly referred to as, "I'm Sorry" legislation. The bill would provide that statements or gestures that express apology, sympathy, commiseration or condolence concerning the consequences of an event would not be admissible as evidence of liability for any civil claim arising from such event. We support this legislation. According to the American Medical Association, 35 states have laws offering some kind of legal protection for physicians who express regret or empathy to patients who experience an adverse event.

Unanticipated, adverse outcomes in health care happen, even when there has been no departure from the accepted standard of care. Highly trained, competent practitioners, working in excellent health care facilities, occasionally have patient care outcomes that are regrettable, for both patient and practitioner. In those situations, physicians and other health care providers often want to express their concern and sympathy to the patient and his or her family, but are reluctant to do so for fear of having such expressions used against them as an admission of liability in the event of litigation. Apologies can ward off lawsuits; however, there then is a need to ensure that a physician's words are not twisted into admissions of guilt. Oftentimes plaintiff attorneys will misinterpret the statement and mischaracterize what was said. This fear creates a very real obstacle to effective communication with patients at a time when they need it most.

The bill also is clear that exclusion of such statements or gestures is not required in any potential liability lawsuit. Statements made last year before your committee on SB32 relayed a concern that being prohibited from using such evidence in a beneficial way could harm the defendant's case.

SB 374 represents a logical step toward reducing liability lawsuits. We urge you to report the bill favorably for passage.

623 SW 10th Avenue • Topeka, Kansas 66612 • 785

Senate Judiciary
2-1-10
Attachment 9

Polsinelli Shughart PC

Memorandum

TO: The Honorable Tim Owens, Chairman
Senate Judiciary Committee

FROM: William W. Sneed, Retained Counsel
University of Kansas Hospital Authority

SUBJECT: S.B. 374

DATE: February 1, 2010

Mr. Chairman, Members of the Committee: My name is Bill Sneed and I represent the University of Kansas Hospital Authority. This is the Authority that the Kansas Legislature created to run and operate the hospital commonly referred to as KU Med. We appear here today in support of S.B. 374.

Along with the other specifics offered by the proponents of this bill, we contend that open communication is one of the most essential components between a patient and the health care provider. An upfront apology or expression of sympathy can relieve anger and frustration and reduce the level of emotion.

Finally, by encouraging honest, open communication, bills like S.B. 374 facilitate the continuation of the patient-health care provider relationship following an adverse event.

Based upon the foregoing, we would respectfully request your favorable action on S.B. 374. I would be happy to respond to questions.

Respectfully submitted,

William W. Sneed

WWS:kjb
cc:
/

555 South Kansas Avenue, Suite 101
Topeka
Telephone: (
Fax: (

Senate Judiciary
2-1-10
Attachment 10