Approved: August 25, 2011
(Date)

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The Chairman called the meeting to order at 9:35 A.M. on March 7, 2011, in Room 548-S of the Capitol.

All members were present, except Senator Donovan, who was excused

Committee staff present:
Lauren Douglass, Kansas Legislative Research Department
Robert Allison-Gallimore, Kansas Legislative Research Department
Jason Thompson, Office of Revisor of Statutes
Tamera Lawrence, Office of Revisor of Statutes
Theresa Kiernan, Committee Assistant

Conferees appearing before the committee:
Nick Badgerow, Kansas Judicial Council
Bob Williams, Executive Director Kansas Association of Osteopathic Medicine
Whitney Damron, Kansas Bar Association
Callie Jean Denton, Kansas Association for Justice
Cynthia Smith, Advocacy Counsel, Sisters of Charity of Leavenworth Health System
Chad Austin, Kansas Hospital Association
Mitzi McFatrich, Kansas Advocates for Better Care

Others attending:
See attached list.

The Chairman opened the hearings on **HB 2029 -- Charitable health care provider defined to include ultrasound technologist**.

Jason Thompson, Staff Revisor, reviewed the bill. He stated that the bill would amend the Kansas Tort Claims Act by including ultra sound technologists in the definition of charitable health care provider.

Written testimony in support of **HB 2029** was submitted by Robert Stiles, Director of Primary Care Director, KDHE, (Attachment 1) and Dr. Barbara Atkinson, MD, University of Kansas Medical Center (Attachment 2). Written testimony in opposition to **HB 2029** was submitted by Callie Jean Denton, Kansas Association for Justice (Attachment 3).

The Chairman closed the hearings on **HB 2029**.

The Chairman opened the hearings on **SB 142 -- Making expressions of apology, sympathy, commiseration or condolence inadmissible as evidence of an admission of liability or an admission against interest** and **HB 2069 -- Enacting the Kansas adverse medical outcome transparency act**.

The Chairman requested that conferees who desired to appear on **SB 142** and **HB 2069** to express their comments and testimony in support of, or opposition to, the bills when first recognized.

Jason Thompson, Staff Revisor, reviewed **SB 142**. He noted that the during the 2010 Legislative Interim the Special Committee on Judiciary endorsed the concept contained in **SB 142**, which is based upon the law in Hawaii. He stated that the provisions of **SB 142** apply to medical outcomes and certain health care providers.

Jason Thompson, Staff Revisor, reviewed **HB 2069**. He stated the bill was based upon the law in South Carolina. He also noted that it was broader in application than **SB 142**.
Nick Badgerow testified in support of **SB 142** and expressed concern with **HB 2069** (Attachment 4). He stated that under **SB 142**:

- The evidentiary exclusion does not extend to outright admissions of fault.
- The evidentiary exclusion is not limited to health care providers.
- The court has the discretion to exclude or include mixed expressions of apology and fault.

Mr. Badgerow's greatest concern with **HB 2069** is that admissions of fault, liability, mistake or error would be excluded from evidence.

Bob Williams testified in support of **SB 142** (Attachment 5).

Whitney Damron testified in support of **SB 142** and in opposition to **HB 2069** (Attachment 6). He concurred with the comments of Mr. Badgerow and added that the exclusion provided under **SB 142** is limited to statements in which the declarant is a participant.

Callie Jean Denton testified in support of **SB 142** and in opposition to **HB 2069** (Attachment 7). She stated that **SB 142** strikes an appropriate balance between encouraging open communication and heart-felt apologies while at the same time allowing juries to consider truthful and relevant evidence.

Mitzi McFatrich testified in support of **SB 142** and in opposition to **HB 2069** (Attachment 8).

Cynthia Smith testified in support of **HB 2069** and in opposition to **SB 142** (Attachment 9). She stated that doctors and lawyers feel that an apology is an admission of guilt, and therefore, they do not apologize. She stated that **HB 2069** is based on South Carolina law. She expressed concern with the House amendments. Ms. Smith included suggested amendments to **HB 2069** in her testimony.

Ms. Smith stated that **SB 142** would not reduce litigation and would not change behavior.

Chad Austin testified in support of **HB 2069** (Attachment 10). He also supported the amendments suggested by Cynthia Smith.

Written testimony in support of **HB 2069** was submitted by Shelley Koltnow, VP Corporate Responsibility, Via Christi Health (Attachment 11), William Sneed, Legislative Counsel, University of Kansas Hospital Authority (Attachment 12) and Thomas Theis (Attachment 13).

Senator King stated that he did not believe that an apology law is necessary, but he is concerned that the bill does not provide that a statement or gesture that implies fault is not excluded.

Senator Vratil asked if the following statements would be excluded under the bills:
- "I'm sorry for the outcome and to the extent to which I contributed to that outcome."

Mr. Badgerow responded, " It is not admissible."
- "I'm sorry. I'll never use that procedure again."

Mr. Badgerow responded, " It is admissible."

The Chairman called the committee's attention to the fiscal notes for **SB 142** and **HB 2069**.

The Chairman closed the hearings on **SB 142** and **HB 2069**.

Committee Action:
The Chairman turned the committee's attention to **HB 2028 -- Uniform trust code; insurable interest of trustee**.

Senator King distributed copies of a proposed amendment that strikes the language concerning the requirement that the substantial interest be engendered by love and affection (Attachment 14).

MINUTES OF THE Senate Judiciary Committee at 9:35 A.M. on March 7, 2011, in Room 548-S of the Capitol.

Senator King moved, Senator Vratil seconded, that the proposed amendment be adopted. The motion was adopted.

Senator Haley moved, Senator King seconded that **HB 2028** be passed as amended. The motion was adopted.

Meeting adjourned at 10:29 A.M. The next meeting is scheduled for March 8, 2011.

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: Mon. March 7, 2011

NAME	REPRESENTING
Mitzi McFatrich	KABC
Derek Hein	Hein Law Firm
Callie J Denton	KS Assn for Justice
Jim Clark	HCSF
Nick Badgerow	Judicial Council
Nancy Strouse	Judicial Council
Kathy Damron	KU
Patrick Vogelsberg	KCDAA
Marta C [illegible]	GBA
Joe Molina	KS Bar Assn
Bill Sneed	UKHA
Whitney Damron	KS Bar Assn
Dan Morin	KS Medical Society
Barb Conant	KABC
Robert Stiles	KDHE
Bob Williams	Ks Assoc. Osteopathic Medicine
TED HENRY	C.S.
Sarah Fertig	KSC

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: Mon, March 7, 2011

NAME	REPRESENTING
Chad Austin	KHA
Mike Hutchs	St. Luke's

Division of Health
Bureau of Local and Rural Health
1000 SW Jackson, Suite 340
Topeka, KS 66612

Phone: 785-296-1200
Fax: 785-296-1231
http://www.kdheks.gov/olrh/pc.htm

Robert Moser, MD, Acting Secretary | Department of Health & Environment | Sam Brownback, Governor

Written Testimony on House Bill 2029

Presented to
Senate Judiciary Committee
By
Robert Stiles, Primary Care Director
Kansas Department of Health and Environment

March 7, 2011

Chairman Owens and members of the committee, I am Robert Stiles, the Primary Care Director in the Kansas Department of Health and Environment. Thank you for the opportunity to provide written testimony on House Bill 2029.

This bill proposes to include a new profession in the definition of "charitable health care provider" in KSA 75-6102, ultrasound technologists. This addition would allow enrolled ultrasound technologists to enter into an agreement with the Secretary of the Kansas Department of Health and Environment to receive coverage under the Kansas Tort Claims Act when gratuitously providing care to medically indigent individuals. Medically indigent individuals include uninsured individuals in a family unit earning less than 200 percent of the federal poverty level and individuals enrolled in Medicaid or HealthWave.

Current professions eligible to participate as Charitable Health Care Providers include all professions licensed by the Kansas Board of Healing Arts, nurses, dentists, dental hygienists, mental health technicians, optometrists, pharmacists, and licensed mental health practitioners. The addition of ultrasound technologists to the list of eligible professions would require only minor modifications to Charitable Health Care Provider Program procedures and materials and would not require additional staffing or costs to KDHE.

Thank you for the opportunity to provide testimony to the committee today.

KU MEDICAL CENTER
The University of Kansas

Written testimony from
Barbara F. Atkinson, MD
Executive Vice Chancellor, University of Kansas Medical Center
Executive Dean, University of Kansas School of Medicine
before the
Senate Judiciary Committee
March 7th, 2011

Dear Committee Members:

This letter is in support of HB 2029, which would amend the definition of Charitable Health Care Providers under the Kansas Tort Claims Act (K.S.A. 75-6102(e)) to include ultrasound technologists. The Charitable Health Care Provider program allows health care providers who provide volunteer health care services to the medically indigent to be included for liability purposes under the Kansas Tort Claims Act. Currently, ultrasound technologists are not included.

Our students at the University of Kansas Medical Center operate two charitable care clinics in Kansas City and one in Wichita that would benefit from passage of HB 2029 and expanded tort protections for ultrasound technologists.

JayDoc Free Clinic, which operates in Kansas City, is a student-run safety net clinic that provides preventive and non-urgent medical care, including prenatal care, to the uninsured of the Kansas City metropolitan area at no cost to the patients. JayDoc Free Clinic operates general clinics two nights a week, staffed by more than two dozen volunteers, including physicians, medical students, allied health students, interpreters and community volunteers. Like other safety net clinics, JayDoc patients may be referred to other area medical providers or JayDoc-operated specialty clinics for continued care.

Unlike other safety clinics, however, JayDoc is unique in that it is entirely governed by a board of KU medical students. Students also provide patient care, under the supervision of volunteer faculty physicians. Last spring, JayDoc began offering limited, monthly radiology services to qualified patients and hope to expand this capability by offering on-site ultrasound diagnostic imaging as needed to improve their acute care services.

Also unlike other clinics, JayDoc does not screen patients for ability to pay. All care provided by the clinic is free to every patient. JayDoc, which is funded entirely by donations and local grants, is the only completely free clinic in the Kansas City area.

Each year, more than 2,000 people (mostly residents of Wyandotte County) depend on the medical care they receive from JayDoc volunteer physicians and students, while our students receive valuable hands-on training in their medical disciplines.

KU medical students in Wichita operate a similar clinic, the JayDoc Community Clinic, which offers free care every Saturday to more than 500 patients each year. KU Health Partners also provides care to the uninsured and underinsured through Silver City Health Center in Kansas City. We believe that extending protections to ultrasound technologists providing charitable care through HB 2029 could help our clinics and students better meet the needs of more patients.

The Kansas tort claims act helped to ensure that many health care providers could continue to provide charitable care, and we believe that expanding the same protections to ultrasound technologists will ensure that more Kansans have access to high-quality health care. We urge you to pass HB 2029 favorably and without amendment.

Sincerely,

Barbara Atkinson MD

Barbara F. Atkinson, MD
Executive Vice Chancellor, KUMC
Executive Dean, KU School of Medicine

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

To: Senator Tim Owens, Chairman
Members of the Senate Judiciary Committee

From: Callie Jill Denton
Director of Public Policy

Date: March 7, 2011

Re: HB 2029 Concerning the Tort Claims Act (Written Only)

The Kansas Association for Justice (KsAJ) is a statewide, nonprofit organization of trial lawyers. KsAJ members support protection of the right to trial by jury and fair laws that protect all parties in a dispute.

HB 2029 amends the Kansas Tort Claims Act by expanding the definition of "charitable health care provider" to include ultrasound technologists working under the supervision of a person licensed to practice medicine and surgery. The House Judiciary Committee amended HB 2029 to require that ultrasound technologists covered by the Act be currently registered in any area of sonography credentialed through the American registry of radiology technologists, the American registry for diagnostic medical sonography or cardiovascular credentialing international.

The Tort Claims Act is a law requiring the State to be accountable for negligent or harmful conduct of state employees, which includes "charitable health care providers". Under the act, the maximum liability of the State relating to any single occurrence or accident, for both economic and non-economic damages, is $500,000. In addition, the State is not liable for punitive damages or prejudgment interest. The Act also contains a number of exceptions, which are specific circumstances when the State bears no liability at all.

The Kansas Association for Justice opposes proposals to amend the Kansas Tort Claims Act by adding exceptions or expanding remedies

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to include private citizens. Such proposals increase the State's legal and financial liability and reduce protections for Kansans.

Financial liability of the State for private acts of negligence. When an employee of the State is alleged to have been negligent and caused injury, the job of defending the employee falls to the Attorney General. The State's litigation and defense costs increase as more private citizens and entities are defined as state "employees." If the employee is negligent, the State pays damages to the injured party. All costs are passed on to taxpayers.

The State assumes increased risk management costs, litigation defense costs, and potentially the costs of settlements and damages for all new private citizens it defines as "employees" under the Tort Claims Act. However, it is speculation that these costs will be outweighed by a reduction in costs elsewhere in the state budget.

In addition, the Tort Claims Act already applies to indigent health care clinics and health departments and their employees. So the State has already "bargained for" the costs of liability insurance in a contract with charitable health care providers, or perhaps paid for insurance premiums to cover liability. It is unreasonable for the State to pay twice.

Growth in government. Adding private citizens and entities to the Tort Claims Act forces the State to underwrite the costs of litigation and any damages awarded injured persons. Right now, these costs are appropriately paid for by private liability insurance coverage. In addition, increasing the State's liability and risk management accountabilities is a slippery slope. It is difficult to know where to draw the line once more and more private citizens are defined as state "employees."

Less protection for Kansas citizens. The purpose of the Act is to provide relief to citizens that are injured by a negligent act of the State. But it is a disservice to taxpayers for the State to expand its liabilities by assuming the responsibilities of private citizens. At the same time, injured Kansans should not be deprived from seeking justice because private citizens have been granted the protection of the limited remedies of the Act.

Lawsuit protection for charitable medical professionals is already the law. Medical professionals providing free or reduced cost care may *already* have limited immunity for medical errors or negligence. The current protections are found in the Tort Claims Act and also at KSA 60-3601, which provides for limited immunity for volunteers for certain non-profit organizations.

Claims brought directly to the Legislature instead of a jury. The State is free to waive its immunity and subject itself to greater liability than provided in the Tort Claims Act. If a citizen feels that Tort Claims Act immunity barred or limited their claim unjustly, he or she may seek introduction of legislation to address their specific case. KsAJ believes the civil justice system and citizen juries are the most appropriate venue for resolving such disputes. The purpose of the Tort Claims Act is to provide an effective, responsive remedy for citizens; the Legislature is not meant to serve as a jury.

The Kansas Association for Justice opposes proposals to amend the Kansas Tort Claims Act by expanding its remedies to private citizens. We respectfully request the Committee's opposition to HB 2029.

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: **March 7, 2011**
RE: **Judicial Council Testimony on 2011 SB 142 Relating to the Admissibility of Expressions of Apology to Prove Liability**

2011 SB 142 is identical to 2010 SB 374, which was drafted by the Judicial Council Civil Code Advisory Committee and subsequently recommended by the 2010 Special Committee on Judiciary, after holding hearings on the matter.

In 2009, Sen. Jim Barnett introduced SB 32 at the request of the Sisters of Charity of Leavenworth Health System. SB 32 contained what is commonly known as an "apology law." Specifically, the bill would have excluded 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." After referral to the Public Health and Welfare Committee, and then 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 then-current 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 unanimously concluded:

(a) public policy favors apologies,

(b) it would be consistent with public policy to exclude for purposes of proving liability an *apology or expression of sympathy*, but

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(c) statements or expressions of *fault* should not be the excluded from evidence;[1] and

(d) the exclusion of apologies should not be limited to health care providers.[2]

The Council agrees that there are benefits to open communication, and that *apologies* can be both cathartic, potentially even healing. Viewed against the public policy which approves these benefits, however is the long-standing and well-based reasoning for holding admissions of *fault* to be admissible.

> Admissions against interest made by a party are the strongest kind of evidence and override other factors. (*Hiniger v. Judy,* 194 Kan. 155, 165, 398 P.2d 305; *Reeder v. Guaranteed Foods, Inc.,* 194 Kan. 386, 393, 399 P.2d 822; and see *Green v. Higbee,* 176 Kan. 596, 272 P.2d 1084; *Stewart v. Gas Service Company,* 252 F.Supp. 385 (D.Kan.1966); and K.S.A. 60-460(g) and (h).)[3]

The Committee reviewed apology statues 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 (now SB 142), approving of both the statute's substance and its simplicity. Haw. Rev. Stat. §626-1, Rule 409.5 (2007).

SB 142 is simple and straightforward and meets the Committee's primary objectives:

- The evidentiary exclusion created by the bill does not extend to outright admissions of fault.[4] 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 bill 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.

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[1] An apology bill from the House, House Sub. for HB 2069, would exclude, inter alia, statements of "mistake" or "error."

[2] Both apology bills heard in the House, House Sub. for HB 2069 and HB 2123, limit the exclusion to statements or actions by a "health care provider, an employee or agent of a health care provider."

[3] *Kraisinger v. C. O. Mammel Food Stores*, 203 Kan. 976, 986, 457 P.2d 678 (1969).

[4] See, e.g. K.S.A. 60-460(g), (h) and (i) (hearsay is admissible if it represents an admission by a party or its representative, an authorized or adopted admission, or a vicarious admission). *Pape v. Kansas Power and Light Co.*, 231 Kan. 441, 647 P.2d 320 (1982); *State v. Stano*, 284 Kan. 126, 159 P.3d 931 (2007);

- 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.

While the proponent of the original HB 2069 touts the success of apologies reported by a study at the University of Michigan, that success says nothing about whether admissions of liability or statements of fault should be excluded from evidence at trial. Indeed, under Michigan law, any admissions or statements against interest *are still admissible*. Rule 804, Michigan Rules of Evidence, states:

> *Statement against interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.

See, e.g. *People v. Washington*, 650 N.W.2d 708 (Mich. App. 2002). Thus, the University of Michigan experiment is a brave one, and any benefits to making an apology have been derived not only without an apology law, but in spite of the *absence* of an apology law.

The proponent of the original HB 2069 also argues that a bill excluding admissions of fault or liability would make physicians more likely to speak with their patients. But our longstanding rules governing admissibility of evidence are not the root cause of the problem and therefore should not be amended as an attempted solution. A culture of nondisclosure is deeply engrained in the medical profession. "Apology laws do nothing to change these norms and habits. As long as they are present, physicians will continue to remain as silent as before." [5] The Michigan program was successful because it was a systemic overhaul of the doctor-patient communication model. Any legislative changes would be better focused on that dynamic. Patients are already at a tremendous disadvantage due to their physicians' refusal to engage in open dialogue. A malpractice action is often the only recourse to obtain the explanation that has been denied. Excluding admissions of fault and liability from evidence further disadvantages patients and does nothing to address physicians' practice of nondisclosure.

The House Substitute for HB 2069 does not resolve these problems. Under that bill, if there is a "facilitated" conference, "*any* verbal statements" made at the conference "*shall be inadmissible* as evidence." (Emphasis added.) This means that admissions of fault and liability, as well as admissions of fact would be held inadmissible – even if the health care provider testifies at the trial under oath with facts and statements which are directly contrary to those admissions. That is not fair or appropriate under any fair system of justice.

It is the opinion of the Committee and the Judicial Council that SB 142 is a superior approach to an apology statute in Kansas. SB 142 fairly meets the objective of codifying the public policy favoring apologies without limiting the immunity to health care providers or extending it to admission of fault.

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[5] M. Wei, *Doctors, Apologies, and the Law: and Analysis and Critique of Apology Laws*, 40 J. Health L. 107, 155 (Winter, 2007).

JUDICIAL COUNCIL CIVIL CODE ADVISORY COMMITTEE

The members of the Judicial Council Civil Code Advisory Committee who participated in the study of 2009 SB 32 and the draft of 2010 SB 374 (now 2011 SB 142) were:

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

Kansas Association of Osteopathic Medicine
1260 SW Topeka Boulevard
Topeka, Kansas 66612
Phone (785) 234 5563
Fax (785) 234 5564

WRITTEN TESTIMONY

Senate Judiciary Committee
SB 142

The Kansas Association of Osteopathic Medicine is in support of SB 142.

Many Doctors of Osteopathic Medicine practice in a family practice setting and frequently in rural communities. In some cases they have been providing health care to a family over several generations and are therefore very connected to the family. When an "adverse outcome" occurs, the natural human response is to provide condolences, be it an apology or an expression of sympathy. Given the adversarial nature of our legal system, when an "adverse outcome" occurs, health care providers have been advised, and in some cases prohibited, from communicating or expressing any type of condolence to families for fear it will be used against them in a legal proceeding. This prohibition can result in external and internal conflict for both the family and health care provider as they do their best to cope with the "adverse outcome".

As was stated by a KAOM member regarding HB 2069, "It's rather sad that our legal system has evolved to a point whereby we need a law passed to allow us to express our condolences to patients and their families." HB 2069 will go far in allowing health care providers, their patients, and families to obtain closure.

KAOM encourages you to vote in favor of SB 142.

Thank you.

Bob Williams, M.S.
KAOM Executive Director

KANSAS BAR ASSOCIATION

1200 S.W. Harrison St.
P.O. Box 1037
Topeka, Kansas 66601-1037
Phone: (785) 234-5696
Fax: (785) 234-3813
E-mail: info@ksbar.org
Website: www.ksbar.org

TESTIMONY

TO: **The Honorable Tim Owens, Chair**
And Members of the Senate Committee on Judiciary

FROM: **Whitney Damron**
On behalf of the Kansas Bar Association

RE: **SB 142 - An Act concerning evidence in civil actions; expressions of apology, sympathy, commiseration or condolence not admissible as evidence of an admission of liability or as evidence of an admission against interest.**

Sub. For HB 2069 - 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 or health care administrators not admissible as evidence of an admission of liability or as evidence of an admission against interest.

DATE: **March 7, 2011**

Good morning Chairman Owens and Members of the Senate Committee on Judiciary. I am Whitney Damron and I appear before you today on behalf of the Kansas Bar Association to offer our comments on SB 142 (proponent) and HB 2069 (opponent), both often referred to as "apology bills."

By way of background, the Legislature first considered similar legislation during the 2009 session (SB 32). SB 32 was introduced into the Senate Committee on Public Health and Welfare, but later re-referred to the Senate Committee on Judiciary. The Senate Committee on Judiciary did not act on the bill, but rather requested a review of the proposal by the Kansas Judicial Council.

The Legislature often refers complex legal issues to the Kansas Judicial Council for review and recommendations before enacting changes in statutes. The Judicial Council is composed of practicing attorneys from the plaintiff and defense bar, law professors and judges (district court, appellate and Kansas Supreme Court).

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In 2009, the Civil Code Advisory Committee of the Judicial Council reviewed apology statutes enacted in 35 other states before drafting its own version of the apology bill, which was presented to the Legislature in 2010 the form of SB 374.

The KBA did not take a position on SB 374 as originally introduced. However, a substitute bill was adopted by the Senate Committee on Judiciary at the request of the leading proponent of this legislation and advanced out of Committee. The KBA and others expressed strong concerns with the amended bill before it was scheduled for floor debate and it was eventually returned to Committee with no further action taken.

Following the 2010 session, the proponents of Substitute for HB 2069 sought a review of their proposal in the form of an interim study. The Special Committee on Judiciary heard from a number of conferees during the 2010 interim hearing process and recommended the Judicial Council version from the 2010 session be adopted, which is one of the two apology bills before you today – SB 142.

In testimony provided to the House Judiciary Committee earlier this year, the Sisters of Charity of Leavenworth Health System extolled the virtues of The University of Michigan Health System and how they (The University) "reduced malpractice claims by 55 percent between 1999 and 2006 and reduced litigation costs by greater than 50 percent. Average claims processing time dropped from 20 months to about 8 months."

What is often overlooked is the fact that the University of Michigan accomplished these results without an apology statute. The State of Michigan does not have an apology statute or a law similar to HB 2069.

Of note in the 2010 interim hearing was testimony from a disclosure training consultant (Mr. Douglas Wojcieszak) from *Sorry Works*, a company that promotes their consulting services related to disclosure, apology and upfront compensation. During his testimony, Mr. Wojcieszak stated "legislation is not necessary to effectuate a policy to make a person feel whole and to focus on customer service."

Translation: Health care providers do not need the Legislature to mandate how they tell a patient they are sorry when an adverse medical outcome occurs, but rather providers are capable of developing their own internal policies and procedures to insure the rights and well-being of both the care giver and the patient are considered.

Advantages of SB 142:

- General apology statute in nature and does not create a special exemption limited only to health care providers.
- Reviewed and recommended by Judicial Council; thoroughly compared, contrasted and vetted against 35 other state apology acts.
- Does not exempt statements of "mistake" or "error" from admission; leaves discretion to the court.
- Exemption is limited to statements in which the declarant was a participant.

Concerns with HB 2069:

- Allows admission of fault to be precluded from admission into a court proceeding:
    - Section 1. (a), line 13 excludes admissions including "mistake" and "error" in addition to other general expressions sympathy. This is a dramatic change in the rules of evidence in Kansas and shifts the balance of law in favor of one party over the other.
- Facilitated Conference.
    - Under HB 2069, a facilitated conference is convened by a health care administrator or their designee. Who might this person be? A well-trained, sophisticated health care professional or even a staff attorney? Attorneys can be precluded from the facilitated conference unless all parties agree. But what if the "health care administrator or their designee" is an attorney?
    - HB 2069 creates the untenable situation where a health care provider can admit mistake or error (i.e., fault) and at subsequent proceedings, is allowed to deny such statements ever occurred.
- Broad Immunity.
    - Immunity is not limited to only health care providers who were declarants.

The proponents of an apology bill have long suggested that health care providers simply want the ability to express sympathy to a patient for an outcome that is less than what all parties would have liked to achieve without fear that their expression of sympathy could be used against them in a legal proceeding as an admission of fault. SB 142 accomplishes that objective.

Substitute for HB 2069 goes far and beyond that objective and attempts to provide blanket immunity to a health provider who admits fault. Whether such expressions or utterances are admissible appropriately belong with the trial court as a matter of fairness to all parties concerned.

In closing, the Kansas Bar Association supports the work product of the Judicial Council, which facilitates an expression of apology or sympathy between parties that is not limited exclusively to health care providers. We support SB 142 and oppose Substitute for HB 2069.

On behalf of the Kansas Bar Association, I thank you for your time and consideration of our position on these two bills and would be pleased to stand for questions at the appropriate time.

WBD

The Kansas Bar Association (KBA) was founded in 1882 as a voluntary association for dedicated legal professionals and has more than 6,900 members, including lawyers, judges, law students, and paralegals.

www.ksbar.org

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

To: Senator Tim Owens, Chairman
Members of the Senate Judiciary Committee

From: Callie Jill Denton
Director of Public Policy

Date: March 7, 2011

RE: SB 142 (Support) and Sub for HB 2069 (Oppose)

The Kansas Association for Justice is a statewide, nonprofit organization of trial lawyers. KsAJ members support protection of the right to trial by jury and fair laws that protect all parties in a dispute.

KsAJ appreciates the opportunity to offer testimony on SB 142 and Sub for HB 2069 relating to health care apology and changes to the rules of evidence. KsAJ has testified before the Committee in previous sessions on the same topic.

KsAJ's position on "apology" legislation, generally, is unchanged:

- **"Open communication" means disclosure *and* accountability.** Apology bills that protect written medical records, communications between the provider and third parties, or that permit wrongdoing and negligence to be protected by an insincere apology, go too far.

- **No special rules of evidence are needed for health care providers to say "I'm sorry" or to express heart-felt sympathy to their patients.** The current law in Kansas is that an unanticipated or adverse health care outcome is presumed to be the result of a cause other than wrongdoing by a physician or surgeon. "[I]t has long been recognized in medical malpractice actions the physician or surgeon is presumed to have carefully and skillfully treated or operated on his patient and ***there is no presumption of negligence from the fact of injury or adverse result."*** *Webb v. Lungstrum,* 223 Kan. 487, 575 P.2d 22, 25 (1978).

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- **As a matter of public policy, apology laws must not protect gross negligence and intentional wrongful acts, permit concealment of relevant and truthful evidence, or discourage accountability.** Appropriate and fair laws must promote the truth, rather than conceal it.

- **Apology laws must not create an advantage or disadvantage in the rules of evidence for either the patient or the health care provider.** The rules of evidence must be balanced and fair to all sides of a dispute so that the judge and jury can fairly consider both sides of a case.

KsAJ supports the Judicial Council recommendations in SB 142. KsAJ testified before the Senate Judiciary Committee in 2010 in support of 2010 SB 374, which is the same bill as 2011 SB 142. SB 142 was drafted by the Kansas Judicial Council and it was also recommended to the 2011 Legislature by the Interim Judiciary Committee.

The Judicial Council is the appropriate expert body to make neutral policy recommendations to the Legislature regarding the rules of evidence. The Council's Civil Code Committee contains attorneys with experience representing patients, hospitals, and doctors. In 2009, at the request of the Senate Judiciary Committee, the Civil Code Committee conducted an exhaustive review of previous Kansas bills, academic and law review articles, and apology laws enacted in 30+ other states. After completing its research, the Civil Code Committee drafted and recommended changes to the rules of evidence relating to statements of apology. The recommendations are the basis of 2010 SB 374/2011 SB 142.

SB 142 strikes an appropriate balance between encouraging open communication and heart-felt apologies while at the same time allowing juries to consider truthful and relevant evidence. SB 142 applies to all types of civil disputes and is not limited to disputes involving health care providers. SB 142 does not protect apologies that are intended to conceal evidence of wrongdoing, gross negligence, or medical errors. SB 142 is reasonable and fair to all parties, and offers increased protection to sincere apologies than the current law.

Sub for HB 2069 has not been reviewed by the Judicial Council. As with any changes to the rules of evidence, the implications to both parties of a dispute should be carefully weighed to assure that neither side is advantaged or disadvantaged, the rules are fair to all, and the jury is able to consider relevant and truthful evidence.

- **Sub for HB 2069 creates a special rule of evidence for health care providers.** The Judicial Council unanimously opposed limiting an apology law to health care providers; SB 142 is not limited to health care or health care providers.

- **Sub for HB 2069 protects confessions of gross negligence or intentional wrongdoing.** During a facilitated conference, health care administrators and health care providers may disclose mistakes or errors that constitute gross negligence or intentional wrongdoing. Under Sub for HB 2069, a jury would not be permitted to consider evidence of such statements.

  There is no merit in protecting admissions of egregious conduct. Protecting such admissions delays settlement in the most meritorious cases and aggravates the patient's acrimonious feelings. It also encourages the development of disclosure programs that are meant to conceal wrongdoing and malpractice.

If the Committee chooses to adopt changes to the rules of evidence, KsAJ recommends the Committee support the changes recommended by the Kansas Judicial Council (SB 142).

On behalf of the Kansas Association for Justice, thank you for the opportunity to offer our comments on SB 142, Sub for HB 2069 and changes to the rules of evidence.

Kansas Advocates for Better Care

"Advocating for Quality Long-Term Care" since 19..

March 7, 2011

Dear Chairman Owens and Members of the Senate Judiciary Committee

I here to testify today on behalf of the members, volunteers and Board of Directors of Kansas Advocates for Better Care. We are a citizen group whose mission for 35 years is to support public policies that will improve health and safety for frail elders and vulnerable adults who receive long-term care in nursing homes, assisted living and their own homes.

We respectfully oppose Sub for HB 2069.

We are not opposed to legislation that allows for statements of apology, and we support SB 142 which contains provisions introduced by the Judicial Council.

Adults living in long-term care settings rely on legislators and legislation; regulators and regulation to vigorously protect their health and safety. Many vulnerable adults do not possess the mental capacity or physical ability to advocate for their needs with health care providers, or other service providers. Many do not have family to advocate for them. For those who do have family, members are often consumed by providing care for a loved one or they live out of state, and they too rely on legislators to safeguard the interests of loved ones.

Reports of poor care, abuse, neglect and exploitation were confirmed in 132 adult care homes in the past year or about 39% of all nursing facilities. In the last year we've responded to residents and families who have called seeking help for serious concerns including sexual abuse by staff, being dropped by care staff and not receiving medical attention, being given prescription medications past their expiration date including insulin and psychotropic meds, among others.

Providing an apology is an important step in the healing process for persons who have suffered abuse or inadequate care, but it should not be exculpation for the person whose has accepted the responsibility and money to provide that care. A significant percentage of elders who are victimized by fraud or abuse die within 18 months. Depriving a person the opportunity to seek redress through the courts because an apology has been offered, including one that contains a statement of fault, is a further exposure of the vulnerabilities of frail adults. For a health care provider to be shielded from a lawsuit because s/he has offered an apology for error or wrong-doing is an over protection of health care workers at the expense of someone already harmed.

Sub for HB 2069 allows protection for statements related to intentional wrongdoing and gross negligence. Kansas Advocates for Better Care asks that you offer frail elders the protection that they deserve and that is contained in SB 142.

Thank you,

Mitzi E McFatrich

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913 Tennessee Suite 2 Lawrence, Kansas 66044-6904
phone: 785.842.3088 fax: 785.749.0029 toll-free: 800.525.1782 e-mail: info@kabc.org website: www.kabc.org

Sisters of Charity of Leavenworth Health System

Senate Judiciary Committee
State of Kansas
March 7, 2011

Testimony on Senate Bill 142 and Substitute House Bill 2069

The Sisters of Charity of Leavenworth Health System **opposes** the passage of Senate Bill 142, and **supports** an amended Substitute House Bill 2069 the Kansas Adverse Medical Outcome Transparency Act, with suggested amendments as provided.

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 Sisters of Charity of Leavenworth 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 care 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.

SCLHS has spearheaded the effort for Kansas to codify public policy which would allow expressions of apology or compassion and other benevolent acts by health care providers when a patient experiences an adverse medical outcome without fear of it being used as evidence of liability.

In 2009, the Sisters of Charity of Leavenworth Health System requested a bill to establish an apology law in Kansas. Per our request, Senate Bill 32 was introduced and referred to the Senate 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 issued a report in December 2009, and in 2010 requested Senate Bill 374, an alternate version of an apology and disclosure law, which is the same as Senate Bill 142.

SCLHS asserted the Judicial Council's logic was flawed and, joined by other Kansas hospital systems, asked for a substitute version of the bill. You adopted our language as 2010 Substitute Senate Bill 374 and passed it favorably to the full Senate, but it was returned and referred to interim study. The interim committee recommendation was to start over again with Senate Bill 374 as introduced in 2010.

Senate Bill 142 is the same as 2010 Senate Bill 374 as introduced. House Bill 2069 *as introduced* was the same as 2010 Substitute Senate 374. We oppose adoption of Senate Bill 142, and request the committee amend and pass Substitute Senate Bill 2069.

Public Policy purpose and results

The logic of the public policy of "sorry works" 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 will not need to wait for legal counsel to advise them, 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 – we assert that evidence of an apology statement isn't needed and ***what is gained far outweighs what is lost.***

Anecdotally, we know some patients would be understanding when things do not go as anticipated, but sue only because the doctor never said he or she was sorry or even talked to the patient about what happened. We also know doctors fail to do that because their lawyers counsel them not to say anything, even when what happened was not anyone's fault.

Thirty-four states have apology laws in statute. Much has been written about the success of these laws, and studies have confirmed their effectiveness for patients and health care providers.

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.

An empirical study on *"The Impact of Apology Laws on Medical Malpractice"* by economists Benjamin Ho PhD of Cornell University and Elaine Liu PhD of University of Houston was released in December 2009, with follow-up in 2010. They found:

> When doctors apologize for adverse medical outcomes, patients are less likely to litigate. However, doctors are socialized to avoid apologies because apologies admit guilt and invite

lawsuits. Apology laws specify that a physician's apology is inadmissible in court, in order to encourage apologies and reduce litigation. Using a difference-in-differences estimation, we find that **State-level apology laws expedite time to resolution and increase the closed claim frequency by 15% at the State level. Using individual level data, we also find such laws have reduced malpractice payments in cases with the most severe outcome by nearly 20%.** Such analysis allows us to quantify the effect of apologies in medical malpractice litigation.

An article in the *New York Times* in 2008 discusses cases where "sorry" worked to avoid costly litigation. **The *New York Times* investigator reports that even trial lawyers are realizing they like the "sorry works" approach because injured clients are compensated quickly.**

Senate Bill 142

When the Senate Judiciary Committee referred the apology bill to the Kansas Judicial Council for study in 2009, we communicated with the Judicial Council and offered our expertise. We suggested they consider the language of the South Carolina law on adverse medical outcomes.

Instead, the Judicial Council advisory committee decided the Hawaii law was preferred. **We respectfully disagree with the conclusion of the Judicial Council.**

First, Hawaii law is not limited to health care providers. Perhaps there are other circumstances where an apology law would be good public policy. We cannot supply evidence supporting that, but are here to address the relationship between a doctor and his or her patient, and how apologies are proven to work in the health care setting. **We are all concerned about rising health care costs and understand the importance of attracting good doctors and other health care workers to Kansas, and this bill moves us in the right direction.** In fact, apology laws are held up by Republicans in Congress as a desirable model of medical liability reform.

Second, the Hawaii law offers no assurance to doctors 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 142 require that whether an apology will be excluded from evidence must be – *in each case*, *after the fact* – decided in court.

The Judicial Council report was flawed because it asserted that apologies could be successfully dealt with that way, denying physicians any assurance whatsoever, saying "Hawaii's approach leaves that decision squarely in the capable hands of the trial judge..."

Hawaii's law does not -- and the Judicial Council's Hawaii model in SB 142 would not -- do anything to improve communication or reduce unnecessary litigation. It would be useless. We have to wonder if that is exactly what is wanted by the segment of the legal community advocating for the Hawaii language.

In hearings in 2010, SCLHS -- joined by **Via Christi Health System, Saint Luke's Health System, and Shawnee Mission Medical Center** -- asserted that under a law based on the Hawaii law, health care providers would not be able to rely on protection under the law. **Doctors would instead 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.**

In 2010 you agreed with us and voted to substitute the South Carolina-based language suggested by SCLHS and referred Substitute for Senate Bill 374 to the full Senate favorably for passage. We were disappointed when the bill was later returned to the committee despite widespread support. The bill was referred to interim study, which had a good line-up of witnesses but a disappointing turnout of legislators and, equally disappointing, a vote recommending the legislature start over again with the Judicial Council's Hawaii model.

We urge you to reject Senate Bill 142, as you rejected 2010 Senate Bill 374 as introduced, before it was substituted.

Substitute House Bill 2069

SCLHS requested House Bill 2069 in the House Judiciary Committee, with language that was identical to that which was passed by the Senate Judiciary Committee in 2010. It was re-drafted during markup by Representative Joe Patton. The re-draft was passed out of the committee as a substitute with some of clean-up amendments it needed, but not all. On February 25, it passed the House 118-1. I think it is fair to say that members of the House hoped the Senate would "clean it up."

Rep. Patton preferred to limit the apology and disclosure process to a "facilitated conference." In South Carolina law – which we used as our model -- it is called a "designated meeting." Our view was that such a structured approach might delay communication between a doctor and a patient or patient's family, but we are willing to accept the "facilitated conference" approach to disclosure and apology.

However, Substitute House Bill 2069 as passed by the House deliberately limited the operation of an apology law to hospitals. It would therefore not benefit a patient who experiences an adverse medical outcome outside the hospital, in a doctor's office or outpatient satellite, for example. It would not apply to doctors who do not treat patients in hospital settings. As a result, too many patients would not receive the benefit of apology and disclosure. The amendments we request would restore the bill to have it original reach outside the hospital. Briefly, the suggested

consequences. We believe that Substitute House Bill 2069 with our amendments would be a good bill, and would give Kansas the most effective law in the United States and serve patients best.

Law vs. Policy

The University of Michigan Health System was able to achieve success with a policy which demands disclosure and apology. SCLHS also has such a policy, which we have provided.

An important difference is that the doctors and other care providers at the Michigan health system are employees of the University. Most doctors serving patients in hospitals are not hospital employees. We still intend for them to follow our policies. **In reality, if a patient experiences an adverse medical outcome, the doctors involved will follow their lawyers' advice to ignore the policy and not conduct the disclosure and apology we expect of them.**

An apology law is necessary because not only do we want doctors to know they can apologize, but also to make their lawyers comfortable with their clients communicating with the patient and apologizing. A policy is not enough, we need new law.

This is a common sense tort reform policy which would reduce health care costs, has no cost to the state, and would likely preserve Health Care Stabilization Fund dollars. **We urge the Committee to reject Senate Bill 142. We also urge the committee to adopt suggested amendments to Substitute House Bill 2069 and refer it favorably for passage.**

Respectfully submitted,
Cynthia Smith, JD
Advocacy Counsel

Attachments:

- Suggested Amendments to Substitute HB 2069, the Kansas Adverse Medical Outcome Transparency Act.
- List of 34 state apology laws, www.sorryworks.net.
- Anna C. Mastroianni, et al., The Flaws In State 'Apology' And 'Disclosure' Laws Dilute Their Intended Impact On Malpractice Suits, *Health Affairs*, September 2010
- Benjamin Ho, PhD, and Elaine Liu, PhD, The Impact of Apology Laws on Medical Malpractice, Cornell University and University of Houston, September 2010.
- 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* 2:2, January 2009.
- SCLHS disclosure policies
- Editorial coverage of apology bill in Kansas, 2010
- Sack, Kevin, "Doctors Say 'I'm Sorry' Before 'See You in Court'," *The New York Times*, May 18, 2008.

amendments would eliminate references to where the adverse medical outcome occurred and more clearly identify the participants of the apology and disclosure conference.

The suggested amendments would eliminate the requirement that patients and health care providers give their written permission to allow counsel in the facilitated conference. We believe it would only cause delay of the apology and disclosure to have to prepare and exchange these documents. Our legal team believes it probably would not even be legal to deny a patients the opportunity to have his or her lawyers there.

Substitute HB 2069 also contains several obvious drafting mistakes and superfluous words, which we correct in the suggested amendments.

Fault

While it was not an issue during discussions in the House, the question has been raised about whether statements of "mistake" or "error" (fault) should be excluded from evidence. Substitute House Bill 2069 would exclude such statements from evidence.

We assert that a bill that carves these statements out of an apology law would render it impotent. **When a doctor says "I'm sorry," is that a statement of fault, or not?** We envision every such statement would then have to be examined by a judge after the fact to determine whether it was an admissible statement of fault.

Best case scenario: statements of apology will occur, but be so carefully scripted as to be unsatisfactory to either the patient or the doctor.

Worst case scenario: lawyers will find the protections under the law unreliable, and continue to advise silence.

Further, if there is mistake or error involved in an adverse event, and statements of mistakes or errors (fault) are not excluded from evidence, those will be the exact circumstances in which a sincere apology may not happen. That would be an unfortunate result.

An intentional criminal act would not be a mistake or error. We assert that any statements about such acts would not be covered by Substitute House Bill 2069.

Other Interim issues

SCLHS considered revising the language we have supported to address issues which emerged during the interim hearings, but ultimately we believed the bill was best left alone. For example, we considered requiring that Apology and Disclosure be mandated as an alternative for Continuing Medical Education, but were advised that it would not be good precedent to put into statute. We considered allowing an exception for impeaching a witness, but were advised that there would then always be a demand for an exception and so would have unintended

AMENDMENTS REQUESTED BY SCL HEALTH SYSTEM 3/7/11

Session of 2011

Substitute for HOUSE BILL No. 2069

By Committee on Judiciary

2-22

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 or health care administrators 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) A health care provider, representative of a health care provider, or health care administrator may convene a facilitated conference for the purpose of expressing sorrow, regret, mistake, error, sympathy, apology, commiseration, condolence, compassion or a general sense of benevolence to a patient, family of a patient, or representative of a patient allegedly experiencing an adverse medical outcome. Attorneys for the health care administrator, health care provider, patient, patient's family or patient's representative may attend the facilitated conference. The facilitated conference shall not be electronically recorded.

(c) In any claim or civil action concerning an alleged adverse outcome of medical care:

(1) Any statements, activities or conduct in such facilitated conference shall not be discoverable or admissible at trial as evidence and shall not constitute an admission of liability or an admission against interest. The fact that a facilitated conference was or was not convened shall not be discoverable or admissible as evidence at trial.

(2) waiver of charges for medical care provided shall be inadmissible as evidence and shall not constitute an admission of liability or an admission against interest.

(d) A defendant in a medical malpractice action may waive the inadmissibility of statements, activities or conduct attributable to such defendant by expressly stating, in writing, the intent to make such a waiver. If a defendant waives such inadmissability of a statement, activity or conduct, such waiver shall not be construed to be a failure to assist with such defendant's medical malpractice insurance carrier in the defense of the claim.

(e) As used in this section:

Deleted: or such administrator's designee

Deleted: the health care provider or providers and the health care administrator

Deleted: benevolence,

Deleted: patient's family or patient's representatives

Deleted: of medical care in a medical care facility

Deleted: if there is a prior written agreement signed by all participants in the facilitated conference approving of such attorney's attendance.

Deleted: in a medical care facility

Deleted: verbal

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9-7

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

(2) "Health care administrator" means the individual directly responsible for planning, organizing, directing and controlling the operation of a medical care facility as defined in K.S.A. 65-425, and amendments thereto.

(3) "Adverse medical 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 or procedure.

(4) "Facilitated conference" means a conference arranged by a health care provider, representative of a health care provider, or health care administrator with a patient, patient's family or patient's representatives for the purpose of facilitating an open and compassionate dialogue among the participants regarding an adverse medical outcome.

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

Deleted: specially called

Deleted: or such administrator's designee with a health care provider or providers and the

Deleted: in the facilitated conference

Deleted: (5) "Medical care facility" means a general hospital, special hospital, ambulatory surgery center or recuperation center, as defined by K.S.A. 65-425, and amendments thereto, and any psychiatric hospital licensed under K.S.A. 75-3307b, and amendments thereto.¶

Deleted: (6) "Verbal statements" means any statements, affirmations, gestures, activities or conduct.

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
- 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, Title 19 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

http://www.sorryworks.net/default/resource-center/states-with-apology-laws

Tom Bell
President and CEO

March 7, 2011

TO: Senate Judiciary Committee

FROM: Chad Austin, Vice President of Government Relations

RE: Substitute for House Bill 2069 - Kansas Adverse Medical Outcomes Transparency Act

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 strongly believes that a health care provider or a representative of a health care facility should be able to express benevolence, regret, mistake, error, sympathy, apology, commiseration, compassion and condolence 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.

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 respectfully requests the Committee to support Substitute for House Bill 2069 as proposed by the Sisters of Charity of Leavenworth.

Thank you for your consideration of our comments.

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Via Christi
HEALTH

Date: March 7, 2011

To: Senator Tim Owens
Senate Judiciary Committee
Members of the Senate Judiciary Committee

From: Shelley Koltnow, JD
VP, Corporate Responsibility
Via Christi Health

Re: Substitute for HB 2069

Testimony on Substitute for House Bill 2069

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

Via Christi Health supports the Substitute for HB 2069 and urges the Committee to recommend its passage. Substitute for HB 2069 would establish the "Kansas Adverse Medical Outcome Transparency Act" to encourage open and honest dialogue between physicians and other health care providers and their patients when an adverse event occurs. We believe passage of this bill is a good first step in fostering communication between health care providers and their patients. However, we also believe the amendments offered by the Sisters of Charity at Leavenworth represent valid changes necessary to clarify the bill's intent.

The premise of an "apology law" is that medical mistakes do happen and a health care provider's expression of apology, sympathy, compassion or benevolent act should not be used as evidence of negligence or wrongdoing in a subsequent civil malpractice claim. However, Substitute for HB 2069 does allow a health care provider who is a defendant in a malpractice claim the option to surrender the inadmissibility of such statements if request is made in writing.

Substitute for HB 2069 offers physicians and other health care providers some assurance that if they do express a statement of sympathy, it will not equate to an admission of wrongdoing. Human gestures such as saying, "I'm Sorry", reinforce the fact that health care providers are human. Having this reassurance will help foster trust between the two parties.

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Studies have shown that many patients pursue legal remedies to an adverse outcome simply because they want to know what happened. Knowing they can ask questions of a provider with the expectation of receiving a response, helps many patients achieve closure. Some legal experts even suggest that those health care providers who offer patients a simple "I'm sorry", make a more sympathetic defendant in any subsequent malpractice lawsuit than those who say absolutely nothing.

Proponents of apology laws maintain that having a state apology law is one way to address the high cost of medical malpractice claims which contribute to the rising cost of health care in the United States. In fact, the "Patient Protections and Affordable Care Act of 2010 (ACA) offers grants to states to develop alternative approaches to settle disputes between providers and patients other than through civil litigation. Having a state apology law could contribute to such an effort in Kansas.

Opponents of apology laws point to the lack of evidence showing such laws actually help reduce the number of civil lawsuits against health care providers or that they help reduce the cost of settlements. But in 2001, the University of Michigan Health Service conducted a study following their adoption of an apology and disclosure program and found that their payments for each case dropped by 47% while the time involved in their settlements also dropped from 20 months to 6 months.[1]

Via Christi Health encourages its health care providers to communicate openly with patients and we urge the adoption of the amendments offered by the Sisters of Charity of Leavenworth and the Committee's favorable recommendation for Senate passage of Substitute for HB 2069. Doing so would not harm either providers or patients but could go a long way in facilitating transparency.

Via Christi Health's rich history of serving the people of Kansas and the surrounding region dates back more than 100 years to the healing ministries of our founding congregations. Today, Via Christi Health is the largest provider of health care services in Kansas. We serve Kansas and northeast Oklahoma through our 10-owned or co-owned medical centers, 12 senior services villages and programs, and our retail (home-based) and outpatient services.

In FY 2010, Via Christi Health provided $82.8 million in benefit to the communities we serve. This included more than $48.5 million in charity care and more than $17 million in unpaid costs of Medicaid services provided. Via Christi Health employed more than 10,000 and generated $989 million in revenue in 2009. We are affiliated with the Marian Health System and Ascension Health.

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[1] Boothman, M., A. Blackwell, D. Campbell, E. Commiskey and S. Anderson (2009): "A better approach to medical malpractice claims? The University of Michigan experience." *Journal of Health Life Science Law*, Jan(2), 125-59.

Polsinelli Shughart PC

Memorandum

TO: The Honorable Tim Owens, Chairman
Senate Judiciary Committee

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

SUBJECT: Substitute for H.B. 2069

DATE: March 7, 2011

Mr. Chairman, Members of the Committee: My name is Bill Sneed and I am Legislative Counsel for 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 Substitute for H.B. 2069.

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. Open communication is important in our commitment to patient safety and can improve teamwork.

By encouraging honest, open communication, bills like Substitute for H.B. 2069 facilitate the continuation of the patient-health care provider relationship following an adverse event.

We are aware that the main proponent of this bill is going to offer clarifying amendments to the substitute bill. We encourage the Committee to accept the amendments and act favorably on the bill.

We appreciate the opportunity to present this testimony, and we will be happy to answer questions.

Respectfully submitted,

William W. Sneed

WWS:kjb

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

Senate Judiciary
3-7-11
Attachment 12

Kansas Senate Judiciary Committee
March 2011

Testimony on Substitute House Bill 2069 and Senate Bill 142

I have defended well over a thousand cases alleging medical malpractice during my career, likely as much or more cases than any other currently active lawyer in Kansas, plaintiff or defendant. What the system has consistently overlooked is the emotional impact of these cases on the parties involved, both plaintiffs and defendants. Invariably, the lawsuit postpones the emotional "healing process" for the plaintiff and the threat of it prevents the participation in that process by the health care provider involved in the adverse outcome. While that side effect may be a necessary adjunct to those meritorious cases that should or need to be filed, that is not the case if the lawsuit could have been avoided in the first place.

Medical malpractice lawsuits are born from adverse unintended or unexpected outcomes related to medical treatment. I frequently hear when taking the deposition of plaintiffs that they pursued litigation in the first place to "get answers" related to the adverse outcome. The same health care providers who commonly assist patients in confronting their health problems frequently freeze up and become distant in the setting of an adverse unintended outcome. The fear by the health care providers that they will say something that will be misinterpreted or misconstrued before a jury by an attorney pursuing a medical negligence action later on, clearly plays a role in the disconnect that often occurs following adverse unintended outcomes.

As a result, many lawsuits are filed that likely never would or should have been filed and the adversarial process takes over, clouding the search for and delaying the patient's receipt of an "answer". As important, the pursuit of the lawsuit creates additional emotional burdens for the patient and patient's family and the health care providers involved, regardless of the outcome. Insulating the conversations and interactions between health care providers and patients and patients' families from use as evidence in the litigation process eliminates the barriers to free and open discussion between them with little, if any, damage to the pursuit of meritorious malpractice claims. The need to completely insulate these discussions (regardless of whether

what is said is interpreted as a statement of fault or guilt or otherwise) from use in evidence is essential rather than leaving it up to the uncertainty of a judge's decision in the future based upon a judge's own subjective conclusion as to the meaning and intent of what was said at the time. Such a provision would prevent the statute from having any beneficial effect because of the uncertainty associated with it. There is a reason that experienced defense lawyers seldom, if ever, agree to waive a jury trial to allow a judge to be the sole fact finder in a medical malpractice case.

As other witnesses point out there is empirical data that provides evidence for the beneficial effect of an open, candid and supportive exchange that is fostered by statutes such as that proposed in Substitute House Bill 2069. Regardless of one's conclusions as to the significance or reliability of that data, the undeniable fact is that Substitute House Bill 2069 at least has the potential to lessen unnecessary litigation and the financial and emotional burdens such litigation bring with it, with little if any harm to the pursuit of legitimate claims. The evidentiary use of statements made during a mediation or settlement conference are likewise prohibited and the policy reasons supporting that are no more important than those supporting the proposed substitute.

While probably not as significant as the "lottery" decision now pending before the Kansas Supreme Court (also known as the "cap" constitutionality case), Sub HB 2069 would likely play an important role in reducing non-meritorious litigation. For these reasons I would urge the committee to recommend Sub HB 2069 favorably for passage.

Respectfully submitted,

Thomas L. Theis

Foulston Siefkin LLP

Bank of America Tower, Suite 1400

534 South Kansas Ave.

Topeka, Kansas 66603-3436

Senate Judiciary
3-7-11
Attachment 14

(Corrected)
Amended by House Committee

Session of 2011

HOUSE BILL No. 2028

balloon_King_hb2028.pdf
RS - JThompson - 03/03/11

By Committee on Judiciary

1-18

AN ACT concerning trusts; relating to insurable interests of trustees.

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

Section 1. (a) In this section, "settlor" means a person that executes a trust instrument. The term includes a person for which a fiduciary or agent is acting.

(b) A trustee of a trust has an insurable interest in the life of an individual insured under a life insurance policy that is owned by the trustee of the trust acting in a fiduciary capacity or that designates the trust itself as the owner if, on the date the policy is issued:

(1) The insured is:

(A) A settlor of the trust; or

(B) an individual in whom a settlor of the trust has, or would have had if living at the time the policy was issued, an insurable interest; and

(2) the life insurance proceeds are primarily for the benefit of one or more trust beneficiaries ~~that have~~:

Strike

That have

(A) An insurable interest in the life of the insured; or

(B) ~~a substantial interest engendered by love and affection in the continuation of the life of the insured and,~~ if not already included under subparagraph (A), who are:

Strike

(i) Related within a third degree or closer, as measured by the civil law system of determining degrees of relation, either by blood or law, to the insured; or

(ii) stepchildren of the insured, **or children of the insured's stepchild, either by blood or law**

(c) This section shall be part of the supplemental to the Kansas uniform trust code.

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