KANSAS JUDICIAL COUNCIL

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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