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.

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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

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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.

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(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