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