

## **MINUTES**

### **SPECIAL COMMITTEE ON JUDICIARY**

October 25, 2010  
Room 548-S—Statehouse

#### **Members Present**

Senator Thomas C. (Tim) Owens, Chairperson  
Representative Lance Kinzer, Vice-chairperson  
Senator David Haley  
Senator Dwayne Umbarger  
Representative Sydney Carlin  
Representative David Crum  
Representative Melody McCray-Miller

#### **Staff Present**

Athena Andaya, Kansas Legislative Research Department  
Lauren Douglass, Kansas Legislative Research Department  
Iraida Orr, Kansas Legislative Research Department  
Laura Younker, Kansas Legislative Research Department  
Jason Thompson, Office of the Revisor of Statutes  
Doug Taylor, Office of the Revisor of Statutes  
Sean Ostrow, Office of the Revisor of Statutes  
Matt Sterling, Office of the Revisor of Statutes  
Karen Clowers, Committee Assistant

#### **Members Absent**

Representative Aaron Jack  
Representative Scott Schwab

#### **Others Attending**

See attached list.

## Morning Session

The meeting was called to order by Chairperson Owens at 10:10 a.m.

The hearing on 2010 SB 374 and 2010 Sub. for SB 374 was opened.

Chairperson Owens called on Lauren Douglass, Kansas Legislative Research Department, to brief the Committee on 2010 SB 374 and 2010 Sub. for SB 374 ([Attachment 1](#)). Ms. Douglass also provided an article addressing flaws in state apology and disclosure laws ([Attachment 2](#)).

Nick Badgerow testified on behalf of the Judicial Council Civil Code Advisory Committee in support of 2010 SB 374, as introduced, and reviewed the development of SB 374 following a request to study the issue by the Legislature. He advised the Committee that the Judicial Council Civil Code Advisory Committee is comprised of plaintiff and defense attorneys who practice in the field, trial judges, appellate judges, and law professors. He further stated that the Judicial Council has no client in this issue. Mr. Badgerow indicated he had two specific concerns regarding Sub. for SB 374. The first would exclude, among other things, statements of mistake or error. The second concern is Sub. for SB 374 limits the exclusion to statements or actions by a "health care provider, employee or agent of a health care provider." It is the opinion of the Advisory Committee that the original SB 374 is a superior approach to an apology statute in Kansas by fairly meeting the objective of creating an apology law without limiting the immunity to health care providers or extending it to admission of fault ([Attachment 3](#)).

Gary White testified on behalf of the Kansas Association for Justice in support of SB 374, as introduced in 2010. Mr. White indicated the Association does not oppose changing the rules of evidence relating to apologies as long as such changes are fair and equitable to all parties. Sub. for SB 375 skews the results of evidence, favors one party, permits concealment of truthful evidence, or allows negligent or intentional acts to be hidden from a jury ([Attachment 4](#)).

Mitzi McFatrigh, Executive Director, Kansas Advocates for Better Care, testified in support of 2010 SB 374, as introduced. Ms. McFatrigh represents the people in long-term care who, often times, do not have an abundance of financial resources. Ms. McFatrigh stated it is unfair to deprive a person of the opportunity to seek redress through the courts because an apology has been offered, including one that contains fault. Allowing a health care provider to be shielded from a lawsuit because of an apology is an over protection of health care workers ([Attachment 5](#)).

Joseph Molina testified on behalf of the Kansas Bar Association (KBA) indicating the KBA supports 2010 SB 374, as introduced. Mr. Molina indicated the KBA Legislative Committee conducted a detailed review of both SB 374 and Sub. for SB 374, and determined the recommendations forwarded by the Kansas Judicial Council should be supported ([Attachment 6](#)).

Ed Barker testified on behalf of the Sisters of Charity of Leavenworth Health System, detailing the request for an apology law in Kansas, and the subsequent alternate version which became Sub. for SB 374. The intention of Sub. for SB 374 is to codify public policy allowing expressions of apology or compassion without fear of it being used as evidence of liability when a patient experiences an adverse medical outcome. He argued that SB 374, as introduced had a chilling effect on speech because there is no protection upon which doctors can rely. Doctors will not need to wait for legal counsel to advise them before they can freely express compassion to their patients. Sub. for SB 374 is a simple, common sense tort reform policy which would reduce health care costs by lowering litigation ([Attachment 7](#)).

Douglas Wojcieszak, a disclosure training consultant for Sorry Works, appeared in support of Sub. for SB 374 stating disclosure can be an alternative solution to the medical malpractice crisis. Mr. Wojcieszak said apologies for medical errors reduce anger in patients and families which leads to a reduction in medical malpractice lawsuits and associated litigation expenses. In response to questioning by a Committee member, Mr. Wojcieszak stated legislation is not necessary to effectuate a policy to make a person feel whole and to focus on customer service (Attachment 8).

Dr. Barry Solomon, citizen, testified in support of Sub. for SB 374, stating that for health care professionals, the standard procedure is to never talk to anyone without representation and to call their insurer or their attorney first. Sub. for SB 374 would go a long way to changing that mindset (No written testimony provided).

Shelly Koltnow, Vice-president of Corporate Responsibility, Via Christi, spoke in favor of Sub. for SB 374 stating it would encourage open and honest dialogue between physicians, other health care providers, and their patients when an adverse event occurs. Medical mistakes do happen and an expression of apology, sympathy, compassion, or a benevolent act should not be used as evidence of negligence or wrongdoing in a subsequent malpractice claim. Sub. for SB 374 would be one way to address the rising costs of healthcare by lowering civil malpractice and could go a long way in facilitating transparency between patients and providers (Attachment 9).

Dan Morin, Kansas Medical Society, testified in support of Sub. for SB 374, stating unanticipated, adverse medical outcomes happen. As a result, healthcare providers are reluctant to express concern or sympathy for fear such statements will be used against them later in a civil suit. Sub. for SB 374 would foster better communication between healthcare providers and patients while reducing the number of medical liability claims files (Attachment 10).

The Committee recessed for lunch and reconvened at 1:15 p.m.

### **Afternoon Session**

Gregory Dennis, Executive Vice-president, Kansas Veterinary Medical Association, appeared requesting that the Committee consider adding veterinarians to the apology bill. Mr. Dennis indicated veterinarians would benefit from the same protection (Attachment 11).

Bob Harvey spoke on behalf of the American Association of Retired Persons (AARP), indicating AARP is not opposed to SB 374, but is opposed to Sub. for SB 374. Any efforts to address medical malpractice concerns should begin with a patient-centered focus on reducing errors and promoting fair compensation (Attachment 12).

Written testimony in support of Sub. for SB 374 was submitted by:

William Sneed (Attachment 13); and  
Deborah Stern, Kansas Hospital Association (Attachment 14).

Chairperson Owens closed the hearing on SB 374 and Sub. for SB 374.

*Melody McCray-Miller moved, Senator Haley seconded, to recommend the Kansas Judicial Council approach to an apology law, 2010 SB 374, as introduced, be adopted.*

Following further discussion, Representative Kinzer requested copies of the South Carolina statute be distributed to the Committee (Attachment 15).

*Following further discussion, Senator Umbarger called the question. Motion carried.*

Chairperson Owens called on Athena Andaya, Kansas Legislative Research Department, to review the Committee's hearing on criminal background checks for potential employees of adult care homes.

Following discussion, the Committee recommended, by consensus, to request the Senate Public Health and Welfare Committee provide a status report during the Legislative Session to a joint meeting of the House and Senate Judiciary Committees on the newly enacted legislation (2010 HB 2323) to determine if additional recommendations are needed relating to criminal background checks on individuals and entities associated with adult care home facilities.

Chairperson Owens reopened the discussion regarding recommendations on the Kansas Open Records Act exemptions.

*Representative Kinzer moved, and Representative Crum seconded, to recommend introduction of a house bill on the renewal of all of the Kansas Open Records Act exceptions scheduled for expiration in 2011, with the additional recommendation that the language in KSA 12-5611 needs to clarify what types of agency actions are covered and should look at penalty provisions for breach of confidentiality in KSA 44-1132, 75-457, and 75-723. Motion carried.*

Chairperson Owens announced the final report and minutes of the Special Committee on Judiciary will be submitted electronically for approval.

*Representative Carlin moved, and Representative Crum seconded, to approve the Committee minutes of September 13, 2010. Motion carried.*

The meeting adjourned at 4:02 p.m.

This is the last scheduled meeting of the 2010 Special Committee on Judiciary.

Prepared by Karen Clowers  
Edited by Athena Andaya

Approved by Committee on:

December 6, 2010

(Date)