

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).

- **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.

