KANSAS BAR ASSOCIATION

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TESTIMONY

TO: **The Honorable Tim Owens, Chair**
And Members of the Senate Committee on Judiciary

FROM: **Whitney Damron**
On behalf of the Kansas Bar Association

RE: **SB 142 - An Act concerning evidence in civil actions; expressions of apology, sympathy, commiseration or condolence not admissible as evidence of an admission of liability or as evidence of an admission against interest.**

Sub. For HB 2069 - 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.

DATE: **March 7, 2011**

Good morning Chairman Owens and Members of the Senate Committee on Judiciary. I am Whitney Damron and I appear before you today on behalf of the Kansas Bar Association to offer our comments on SB 142 (proponent) and HB 2069 (opponent), both often referred to as "apology bills."

By way of background, the Legislature first considered similar legislation during the 2009 session (SB 32). SB 32 was introduced into the Senate Committee on Public Health and Welfare, but later re-referred to the Senate Committee on Judiciary. The Senate Committee on Judiciary did not act on the bill, but rather requested a review of the proposal by the Kansas Judicial Council.

The Legislature often refers complex legal issues to the Kansas Judicial Council for review and recommendations before enacting changes in statutes. The Judicial Council is composed of practicing attorneys from the plaintiff and defense bar, law professors and judges (district court, appellate and Kansas Supreme Court).

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In 2009, the Civil Code Advisory Committee of the Judicial Council reviewed apology statutes enacted in 35 other states before drafting its own version of the apology bill, which was presented to the Legislature in 2010 the form of SB 374.

The KBA did not take a position on SB 374 as originally introduced. However, a substitute bill was adopted by the Senate Committee on Judiciary at the request of the leading proponent of this legislation and advanced out of Committee. The KBA and others expressed strong concerns with the amended bill before it was scheduled for floor debate and it was eventually returned to Committee with no further action taken.

Following the 2010 session, the proponents of Substitute for HB 2069 sought a review of their proposal in the form of an interim study. The Special Committee on Judiciary heard from a number of conferees during the 2010 interim hearing process and recommended the Judicial Council version from the 2010 session be adopted, which is one of the two apology bills before you today – SB 142.

In testimony provided to the House Judiciary Committee earlier this year, the Sisters of Charity of Leavenworth Health System extolled the virtues of The University of Michigan Health System and how they (The University) "reduced malpractice claims by 55 percent between 1999 and 2006 and reduced litigation costs by greater than 50 percent. Average claims processing time dropped from 20 months to about 8 months."

What is often overlooked is the fact that the University of Michigan accomplished these results without an apology statute. The State of Michigan does not have an apology statute or a law similar to HB 2069.

Of note in the 2010 interim hearing was testimony from a disclosure training consultant (Mr. Douglas Wojcieszak) from *Sorry Works*, a company that promotes their consulting services related to disclosure, apology and upfront compensation. During his testimony, Mr. Wojcieszak stated "legislation is not necessary to effectuate a policy to make a person feel whole and to focus on customer service."

Translation: Health care providers do not need the Legislature to mandate how they tell a patient they are sorry when an adverse medical outcome occurs, but rather providers are capable of developing their own internal policies and procedures to insure the rights and well-being of both the care giver and the patient are considered.

Advantages of SB 142:

- General apology statute in nature and does not create a special exemption limited only to health care providers.
- Reviewed and recommended by Judicial Council; thoroughly compared, contrasted and vetted against 35 other state apology acts.
- Does not exempt statements of "mistake" or "error" from admission; leaves discretion to the court.
- Exemption is limited to statements in which the declarant was a participant.

Concerns with HB 2069:

- Allows admission of fault to be precluded from admission into a court proceeding:
    - Section 1. (a), line 13 excludes admissions including "mistake" and "error" in addition to other general expressions sympathy. This is a dramatic change in the rules of evidence in Kansas and shifts the balance of law in favor of one party over the other.
- Facilitated Conference.
    - Under HB 2069, a facilitated conference is convened by a health care administrator or their designee. Who might this person be? A well-trained, sophisticated health care professional or even a staff attorney? Attorneys can be precluded from the facilitated conference unless all parties agree. But what if the "health care administrator or their designee" is an attorney?
    - HB 2069 creates the untenable situation where a health care provider can admit mistake or error (i.e., fault) and at subsequent proceedings, is allowed to deny such statements ever occurred.
- Broad Immunity.
    - Immunity is not limited to only health care providers who were declarants.

The proponents of an apology bill have long suggested that health care providers simply want the ability to express sympathy to a patient for an outcome that is less than what all parties would have liked to achieve without fear that their expression of sympathy could be used against them in a legal proceeding as an admission of fault. SB 142 accomplishes that objective.

Substitute for HB 2069 goes far and beyond that objective and attempts to provide blanket immunity to a health provider who admits fault. Whether such expressions or utterances are admissible appropriately belong with the trial court as a matter of fairness to all parties concerned.

In closing, the Kansas Bar Association supports the work product of the Judicial Council, which facilitates an expression of apology or sympathy between parties that is not limited exclusively to health care providers. We support SB 142 and oppose Substitute for HB 2069.

On behalf of the Kansas Bar Association, I thank you for your time and consideration of our position on these two bills and would be pleased to stand for questions at the appropriate time.

WBD

The Kansas Bar Association (KBA) was founded in 1882 as a voluntary association for dedicated legal professionals and has more than 6,900 members, including lawyers, judges, law students, and paralegals.

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