

SESSION OF 2011

SUPPLEMENTAL NOTE ON SENATE BILL NO. 142

As Amended by Senate Committee on
Judiciary

Brief*

SB 142 would provide that evidence of statements or gestures expressing apology, sympathy, commiseration or condolence, or waivers of charges for medical care provided, concerning the consequences of an event in which the declarant participated is not admissible as evidence to prove liability for any claim arising from the event. The bill clarifies that this provision would not require the exclusion of any apology or other statement or gesture that admits fault, even if such admission is made as part of a statement or gesture that is otherwise excludable under this provision.

Background

In 2009, at the request of the Sisters of Charity of Leavenworth Health System (Sisters of Charity), Senator Jim Barnett introduced SB 32, which was based on a Colorado statute. The bill would have prohibited a court from admitting oral or written statements or notations, affirmations, gestures, conduct, or benevolent acts made by a health care provider relating to the unanticipated outcome of medical care as evidence of an admission of liability in civil actions. Included in this prohibition were waivers of charges for medical care and expressions of apology, fault, sympathy, or condolence. The bill had a hearing in the Senate Judiciary Committee and subsequently was referred to the Judicial Council for study.

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

The Judicial Council's Advisory Committee (Advisory Committee) considered similar laws from other states, relevant academic and law review articles, and the testimony submitted to the Senate Judiciary Committee and found it did not support the approach taken by SB 32. Specifically, the Advisory Committee agreed that the statements or expressions of fault should not be excluded and the law should apply more broadly than just to health care providers.

Further, the Advisory Committee discussed the approaches taken by other states to determine whether a mixed statement of apology and liability is inadmissible and adopted Hawaii's stance. Its statute provides that exclusion is not required when an apology or other statement acknowledging or implying fault is part of a statement or gesture that is inadmissible. Haw. Rev. Stat. § 626-1, Rule 409.5. This provision gives trial court judges discretion on that issue.

In the 2010 Legislative Session, SB 374, which was based on the Hawaii statute, was introduced as recommended by the Advisory Committee. It would have provided that evidence of statements or gestures that express apology, sympathy, commiseration, or condolence concerning the consequences of an event in which the declarant was a participant is not admissible to prove liability for any claim growing out of the event. The language described above giving judges discretion to determine the admissibility of mixed statements also was included in the bill. In the Senate Judiciary Committee, Sisters of Charity proposed alternative language based on a South Carolina law, which was ultimately adopted as a substitute bill by the Committee.

The substitute bill was rereferred by the Senate Committee of the Whole to the Senate Judiciary Committee, where no further action was taken. The 2010 Special Committee on Judiciary looked at all three versions of the apology bill and adopted the Kansas Judicial Council's approach to an apology law, 2010 SB 374, as introduced.

SB 142, as introduced, was identical to 2010 SB 374, as introduced.

The Senate Committee on Judiciary held a joint hearing on SB 142 and Sub. for HB 2069, which would allow for a facilitated conference with a patient allegedly experiencing an adverse medical care outcome to allow a health care provider or administrator to express benevolence, sorrow, regret, mistake, error, sympathy, apology, commiseration, condolence, compassion, or a general sense of benevolence. Any verbal statements made in the conference or waiver of medical charges would be inadmissible as evidence. As introduced, HB 2069 contained the language requested by the Sisters of Charity and contained in 2010 Sub. for SB 374.

At the Senate Committee hearing, representatives of the Kansas Judicial Council, Kansas Association of Osteopathic Medicine, Kansas Bar Association, Kansas Association for Justice, and Kansas Advocates for Better Care testified in support of SB 142. A representative of the Sisters of Charity testified in opposition to SB 142.

The Senate Committee amended the bill to allow the admission of any apology, other statement, or gesture that “admits” fault. As introduced, the bill would have allowed the admission of any apology, other statement, or gesture that “acknowledges or implies” fault. The Senate Committee also added “waivers of charges for medical care provided” to the list of inadmissible evidence.

The fiscal note on the bill, as introduced, states the bill would have no fiscal effect.