The Judiciary, State of Hawai‘i

Testimony to the Senate Committee on Judiciary & Labor
Senator Gilbert S. C. Keith-Agaran, Chair
Senator Maile S. L. Shimabukuro, Vice Chair

Monday, February 23, 2015 9:00 AM
State Capitol, Conference Room 016

WRITTEN TESTIMONY ONLY

by
Judge Glenn J. Kim, Chair
Supreme Court Committee on the Hawai‘i Rules of Evidence

Bill No. and Title: Senate Bill No. 116, Senate Draft 1 Relating to the Hawai‘i Rules of Evidence

Purpose: Establishes a rule of evidence to exclude the admissibility of medical apologies to prove liability.

Judiciary's Position:

The Hawai‘i Supreme Court’s Committee on Rules of Evidence respectfully opposes Senate Bill No. 116, Senate Draft 1 that would add a new rule governing medical apologies and admissions of fault to the Hawai‘i Rules of Evidence (HRE).

With broad support, which included the Committee on Rules of Evidence, the 2007 Hawai‘i Legislature adopted Hawai‘i Rule of Evidence 409.5, entitled “Admissibility of expressions of sympathy and condolence,” and reading as follows:

> Evidence of statements or gestures that express 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. This rule does not require the exclusion of an apology or other statement that

acknowledges or implies fault even though contained in, or part of, any statement or gesture excludable under this rule.

Rule 409.5 strikes the proper balance between expressions of sympathy and condolence, which may be desirable in physician-patient and other, comparable professional relationships that are sustained and nurtured by good communication, and admissions of fault, which are highly probative of fault and liability. Our committee does not believe that a health care provider should be entitled to defend a malpractice lawsuit by asserting absence of fault and simultaneously gaining exclusion of his or her own prior admissions of fault. Senate Bill No. 116, Senate Draft 1 not only permits, but indeed appears specifically designed to countenance, such a result. The Hawaii Rules of Evidence were adopted “to the end that the truth may be ascertained and proceedings justly determined,” see HRE 102.

Nor has the case been made for a special rule for physicians and other health care providers. The preamble to Senate Bill No. 116, Senate Draft 1 asserts that “Medical apology laws are designed to encourage communication between patients and health care providers.” But the narrow applicability of this measure disregards entirely comparable needs of other professionals, such as accountants, lawyers, and psychologists, to maintain healthy communication with their clients. There is no principled basis for a special rule of apology for doctors, and HRE 409.5 appropriately applies to any declarant who expresses sympathy, or fault, concerning the consequences of an event in which he or she participated.

Thank you for the opportunity to testify on this bill.

HAWAII HEALTH SYSTEMS
C O R P O R A T I O N

"Quality Healthcare for All"

Senate Committee on Judiciary and Labor
Senator Gilbert S. C. Keith-Agaran, Chair
Senator Maile S. L. Shimabukuro, Vice Chair

February 23, 2015
Conference Room 016
Hawaii State Capitol
9:00 a.m.

Testimony Supporting Senate Bill 116, SD1 Relating to the Hawaii Rules of Evidence.

Linda Rosen, M.D., M.P.H.
Chief Executive Officer
Hawaii Health Systems Corporation

On behalf of the Hawaii Health Systems Corporation (HHSC) Corporate Board of Directors, thank you for the opportunity to present testimony in **SUPPORT** of SB 116, SD1. The measure precludes the introduction of an apology into evidence in order to prove liability, when the apology was made by a health care provider or the provider's employee. Hawaii's existing law precluding the introduction of expressions of sympathy does not protect all statements made in the conversation. The consequence is that health care providers are reticent to have open dialogue with their patients about what went wrong. This reluctance results in ineffectual statements being made to the patients, such as, "I am sorry that you are in pain", which do not help the patient understand why the injury occurred.

Studies have shown that apologies are effective in reducing medical error. "An apology facilitates patients emotional healing. Access to information helps patients regain a sense of control and empowerment, as well as a voice in the process." Jonathan Todres, *Toward Healing and Restoration for All: Refraining Medical Malpractice Reform*, 39 CONN.L.REV. 667, 686 (2006).

It is clear that many are not in favor of expanding the existing rule to protect physician apologies. One reason is that it reduces lawsuits and some people gain from malpractice lawsuits. Mr. Todres states in the law review article cited above that, "As many as 37% of medical malpractice plaintiffs reported that they would not

have filed their lawsuits if their doctors had sincerely apologized instead of stone-walling." Furthermore, Christopher J. Robinette, in *The Synergy of Early Offers and Medical Explanations/Apologies*, 103 NW. U. L. REV. COLLOQUY 514, 517 (2009) cited research that establishes patients file suit for medical malpractice for the following reasons: "(1) to get information and understand their injury and the circumstances surrounding it; (2) to prevent future injuries; and (3) to determine accountability." Wouldn't open and full discussions be a more effective manner of addressing those needs than costly and antagonistic litigation?

This bill does not preclude a patient from bringing a malpractice action and obtaining legal redress. However, it will give some assurance to health care providers that they can have an open dialogue with patients without fear of having those words used against them in court. The resulting positive effects on the patient healing process, the physician/patient relationship, and the possible reduction in litigation are all reasons to support this measure.

We respectively request the Committees' support of this measure. Thank you for the opportunity to testify.

TESTIMONY OF ROBERT TOYOFUKU ON BEHALF OF THE HAWAII ASSOCIATION FOR JUSTICE (HAJ) IN OPPOSITION TO S.B. NO. 116, SD 1

DATE: Monday, February 23, 2015
TIME: 9:00 am

To: Chairman Gilbert Keith-Agaran and Members of the Senate Committee on Judiciary and Labor:

My name is Bob Toyofuku and I am presenting this testimony on behalf of the Hawaii Association for Justice (HAJ) in OPPOSITION to S.B. No. 116, SD 1 relating to The Hawaii Rules of Evidence.

The purpose of this measure is to create a new section in the Evidence Code to make admissions of negligence by doctors inadmissible in court. HAJ opposes this measure because: 1) this measure should submitted to the Judiciary's Standing Committee on Evidence which exists for the purpose of reviewing proposals for changes to the Evidence Code; and 2) Hawaii's existing apology law is more than adequate with other states having similar laws experiencing dramatic success in reducing the number of malpractice claims, the cost of processing and paying claims and the length of time to resolve claims.

This measure is essentially the same as S.B. 2052 which was heard by this committee last session and was not passed out of the Senate. This measure should deferred for the following reasons.

<u>This Measure Should Be Submitted To The Judicial Standing Committee On Evidence</u>

The Supreme Court's Evidence Committee is comprised of Judges and experienced lawyers who practice in different fields of law, as well as Professor Addison

Bowman who authored Hawaii's Rules of Evidence. It is preferable that proposed changes to the Evidence Code be first submitted to the Evidence Committee because it is that body which possesses the expertise, responsibility and institutional knowledge needed for consideration of such changes. It has been an informal practice for many years for proposals to amend evidence rules to be submitted to the Evidence Committee prior to legislative action. Because the Evidence Committee is composed of judges, professors and attorneys who practice in other areas of the law (and therefore have no vested interest in this proposal) and attorneys for both defense and plaintiffs it is able to fairly and objectively consider the merits of this proposal as well as its integration within the entirety of the Evidence Code. It is suggested that the changes requested in this measure be first submitted to the Judiciary's Standing Committee on Evidence for an unbiased evaluation and consideration by judges and experience attorneys whose function and responsibility is to consider proposed changes like this one.

Hawaii Already Has A Fair Apology Law

The Legislature enacted Act 88 in 2007 which addressed the admissibility of apologies and acknowledgements of fault in the Evidence Code. That measure was originally drafted to cover only doctors, but was amended to cover all admissions on the recommendation of the Judiciary's Standing Committee on Evidence. In short, apologies, expressions of sympathy or benevolent gestures are not admissible in subsequent litigation, however, acknowledgements of fault are admissible under Evidence Rule 409.5:

> **[Rule 409.5] Admissibility of expressions of sympathy and condolence.** Evidence of statements or gestures that express 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. This rule does not require the exclusion of an apology or other statement that acknowledges or implies fault even though contained in, or part of, any statement or gesture excludable under this rule.

Hawaii's evidence rule is the same as Michigan's evidence rule which provides that expressions of sympathy, compassion, commiseration or benevolence are not admissible, but statements of fault, negligence or culpable conduct are admissible:

> **600.2155 Statement, writing, or action expressing sympathy, compassion, commiseration, or benevolence; admissibility in action for malpractice; "family" defined.**
>
> (1) A statement, writing, or action that expresses sympathy, compassion, commiseration, or a general sense of benevolence relating to the pain, suffering, or death of an individual and that is made to that individual or to the individual's family is inadmissible as evidence of an admission of liability in an action for medical malpractice.
>
> (2) This section **does not apply to a statement of fault, negligence, or culpable conduct** that is part of or made in addition to a statement, writing, or action described in subsection (1).
>
> (3) As used in this section, "family" means spouse, parent, grandparent, stepmother, stepfather, child, adopted child, grandchild, brother, sister, half brother, half sister, father-in-law, or mother-in-law.

Michigan has experienced dramatic results under the same law Hawaii has had for many years. The University of Michigan Medical School website explains:

> "You may have heard something about our policy of "saying sorry", or apologizing and having an open discussion, when clinical care does not go as planned. And while apologies are certainly part of our approach, there's much more to it than that. Communication, full disclosure, and learning from our experiences are all vital.
>
> You may have also heard that we have steadily reduced the number of malpractice claims pending against us and our doctors, slashed our malpractice expenses, dramatically dropped the amount paid to plaintiffs as a result of judgments or settlements, and cut the time it takes to handle a claim. All of this is true.

* * *

> **The number of claims and lawsuits has dropped dramatically.** In July, 2001 we had more than 260 pre-suit claims and lawsuits pending, already an enviable number in our region. We currently have just over 100.
>
> **Our legal costs appear to be down dramatically, with the average legal expense per case down by more than 50 percent since 1997.**"

The long term results of Michigan's experience shows that it is honesty and full disclosure that earns the trust and respect of patients, which in turn results in dramatically fewer and less costly claims that is most important – not concealing the truth by making it inadmissible.

That the simple act of acknowledging fault and apologizing for it is the most effective way to prevent malpractice claims from being filed in the first place, and to reduce the cost of those that are filed, is now beyond debate. The experiences of hospitals and medical practices that have adopted the "Sorry Works" approach are overwhelmingly positive. Hawaii's medical community needs to embrace the principle that honesty is the best policy, not seek to subvert the truth by making it inadmissible. Where medical professionals know they have erred and have openly admitted it to patients, there is simply no public interest that is served by making that acknowledgment of fault inadmissible and instead forcing patients through the expensive and time consuming process of proving fault through the court process. Otherwise, the practical effect of this measure will be to allow healthcare providers to hide, deny or obfuscate the true facts of medical negligence. Honesty is the best policy; and that should apply whether or not healthcare providers are called upon to be responsible for their own negligence.

For these reasons, it is respectfully requested that this measure be held and that the proposed changes to the Evidence Code be first submitted to the Judiciary's Standing Committee on Evidence.

Thank you for the opportunity to testify on this measure. Please feel free to contact me should there be any questions.

Healthcare Association of Hawaii

Monday, February 23, 2015 – 9 a.m.
Conference Room #016

Senate Committee on Health

To: Sen. Gilbert Keith-Agaran, Chair
Sen. Maile Shimabukuro, Vice Chair

From: George Greene
President & CEO
Healthcare Association of Hawaii

Re: Testimony in Support
SB116 SD1 — Relating to Hawaii Rules of Evidence

The Healthcare Association of Hawaii's 160 member organizations include all of the acute care hospitals in Hawaii, all public and private skilled nursing facilities, all the Medicare-certified home health agencies, all hospices, all assisted living facilities, durable medical equipment suppliers and home infusion/pharmacies. Members also represent other healthcare providers from throughout the continuum including case management, air and ground ambulance, blood bank, dialysis, and more. In addition to providing quality care to all of Hawaii's residents, our members contribute significantly to Hawaii's economy by employing over 20,000 people statewide.

Thank you for the opportunity to testify in **support** of SB116 SD1, which would establish a rule of evidence to exclude the admissibility of medical apologies to prove liability.

Under current Hawaii rules of evidence, statements of sympathy or apology made by healthcare providers to a patient who experiences an unanticipated medical outcome may be admissible to establish liability for such statements. A total of 41 states have enacted apology laws protecting health care providers from liability for expressing sympathy or apologizing to patients or patients' families. Hawaii adopted an apology law in 2007, but it is considered to be a "partial" apology law because it protects only statements of sympathy. "Full" apology laws protect all statements, including mistakes, errors, and liability. It is important to note that all statements and actions made before and after an expression of apology would still be admissible in a court of law.

Thank you for the opportunity to testify in support of SB116 SD1.

Phone: (808) 521-8961 | Fax: (808) 599-2879 | HAH.org | 707 Richards Street, PH2 - Honolulu, HI 96813

HAWAII MEDICAL ASSOCIATION
1360 S. Beretania Street, Suite 200, Honolulu, Hawaii 96814
Phone (808) 536-7702 Fax (808) 528-2376 www.hmaonline.net

TO: Committee on Judiciary and Labor
Senator Gilbert S.C. Keith-Agaran, Chair
Senator Maile S.L. Shimabukuro, Vice Chair

DATE: Monday, February 23, 2015
TIME: 9:00 A.M.
PLACE: Conference Room 016

FROM: Hawaii Medical Association
Dr. Christopher Flanders, DO, Executive Director
Lauren Zirbel, Community and Government Relations

Re: SB 116

Position: SUPPORT

The Hawaii Medical Association supports this effort to codify public policy which would allow expressions of apology or compassion and other benevolent acts by health care providers without fear of it being used as evidence of liability when a patient experiences an adverse medical outcome.

The logic of the public policy of "sorry works" is that, when there is an adverse outcome of a medical procedure or treatment, compassion and benevolence is warranted regardless of fault. By keeping open the lines of communication between a patient and his or her doctors and hospital during that difficult time, and adversarial relationship and potentially costly lawsuits can be avoided. Doctors will not need to wait for legal counsel to advise them, or for fault to be investigated, before they can freely express compassion to their patients.

This policy limits evidence if a case goes to trial. If fault is clear – such as a wrong limb being operated on, or something left inside a patient – we assert that evidence of an apology statement isn't needed and what is gained far outweighs what is lost.

Anecdotally, we all know some patients would be understanding when things do not go as anticipated, but sue only because the doctor never said he or she was sorry or even talked to the patient about what happened. Quite likely doctors fail to do that because their lawyers counsel them not to say anything, even when what happened was not anyone's fault.

Thirty-four states have apology laws in statute. Much has been written about the success of these laws, and studies have confirmed their effectiveness for patients and health care providers.

The University of Michigan Health System reduced malpractice claims by 55 percent between 1999 and 2006, and reduced average litigation costs by greater than 50 percent. Average claims processing time dropped from 20 months to about 8 months.

An empirical study on "*The Impact of Apology Laws on Medical Malpractice"* by economists Benjamin Ho PhD of Cornell University and Elaine Liu PhD of University of Houston was released in December 2009, with follow-up in 2010. They found:

> When doctors apologize for adverse medical outcomes, patients are less likely to litigate. However, doctors are socialized to avoid apologies because apologies admit guilt and invite lawsuits. Apology laws specify that a physician's apology is inadmissible in court, in order to encourage apologies and reduce litigation. Using a difference-in-differences estimation, we find that the State-level apology laws expedite time to resolution and increase the closed claim frequency by 15% at the State level. Using individual level data, we also find such laws have reduced malpractice payments in cases with the most severe outcomes by nearly 20%. Such analysis allows us to qualify the effect of apologies in medical malpractice litigation.

An article in the *New York Times* in 2008 discusses cases where "sorry" worked to avoid costly litigation. The New York Times investigator reports that even trial lawyers are realizing they like the "sorry works" approach because injured clients are compensated quickly.

Hawaii's current apology law does nothing to improve communication or reduce unnecessary litigation. Under the current law, doctors follow their lawyers' advice not to communicate with patients or acknowledge an adverse event. This does nothing to reduce medical liability litigation.

An apology law is necessary because not only do we want doctors to know they can apologize, but we also want to make their lawyers comfortable with their clients communicating with the patient and apologizing.

This is a common sense reform policy, which would reduce health care costs and has no cost to the state.

Thank you for introducing this bill and for the opportunity to provide testimony.

THE QUEEN'S HEALTH SYSTEMS

SB 116 SD1, Relating to the Hawaii Rules of Evidence
Senate Committee on Judiciary and labor
Hearing—February 23, 2015 at 9:00 AM

Dear Chairman Agaran and Members of the Senate Committee on Judiciary and Labor:

My name is Paula Yoshioka and I am a Senior Vice President at The Queen's Health Systems. I would like to provide my support for SB 116 SD1, and also for the Healthcare Association of Hawaii's testimony.

There are providers who would like to express sympathy to families without the fear of having that admissions used against them. This legislation would allow physicians to express apology or fault when discussing an unanticipated medical outcome to not have that admission used to prove liability.

Thank you for your time and attention to this matter.