

**REPORT OF THE JUDICIAL COUNCIL  
CIVIL CODE ADVISORY COMMITTEE ON 2009 SB 32**

**DECEMBER 4, 2009**

BACKGROUND

In March, 2009 Senator Tim Owens requested that the Judicial Council review and make recommendations on 2009 Senate Bill 32, which concerns admissibility of expressions of apology by health care providers. At its June 4, 2009 meeting, the Judicial Council assigned the study to the Civil Code Advisory Committee. The Committee considered the bill at its September 25, 2009 meeting.

COMMITTEE MEMBERSHIP

The members of the Judicial Council Civil Code Advisory Committee are:

**J. Nick Badgerow**, Chairman, practicing attorney in Overland Park and member of the Kansas Judicial Council

**Hon. Terry L. Bullock**, Retired District Court Judge, Topeka

**Prof. Robert C. Casad**, Distinguished Professor of Law Emeritus at The University of Kansas School of Law, Lawrence

**Prof. James M. Concannon**, Distinguished Professor of Law at Washburn University School of Law

**Hon. Jerry G. Elliott**, Kansas Court of Appeals Judge, Topeka

**Hon. Bruce T. Gatterman**, Chief Judge in 24<sup>th</sup> Judicial District, Larned

**John L. Hampton**, practicing attorney in Lawrence

**Joseph W. Jeter**, practicing attorney in Hays and member of the Kansas Judicial Council

**Hon. Marla L. Luckert**, Kansas Supreme Court, Topeka

**Hon. Kevin P. Moriarty**, District Court Judge in 10<sup>th</sup> Judicial District, Olathe

**Thomas A. Valentine**, practicing attorney, Topeka

**Donald W. Vasos**, practicing attorney, Fairway

## INTRODUCTION

SB 32 was introduced on January 15, 2009 by Sen. Jim Barnett at the request of the Sisters of Charity of Leavenworth Health System and contains what is commonly known as an “apology law.” SB 32 excludes a health care provider’s apology or admission of fault under certain circumstances from admissibility “as evidence of an admission of liability or as evidence of an admission against interest” in a trial relating to an “unanticipated outcome of medical care.” The bill was first referred to the Public Health and Welfare Committee, but was then withdrawn and referred on January 20, 2009 to the Judiciary Committee. Hearings were held on January 28, 2009 and the bill was subsequently referred to the Judicial Council for study.

## BACKGROUND

The first apology law was passed in Massachusetts in 1986. The daughter of a Massachusetts state senator was killed in the 1970's when she was struck by a car while riding her bike. The senator was angry that the driver never apologized, and he was told that the driver dared not do so because the apology could constitute an admission in the trial over the girl’s death. Following his retirement, the senator and his successor presented a bill designed to offer some protection to apologizers. Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 Yale L.J. 1135, 1151 (2000).

The Massachusetts statute provides in part that “[s]tatements, writings or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering or death of a person involved in an accident and made to such person or to the family of such person shall be inadmissible as evidence of liability in a civil action.” Mass. Gen. Laws Ann. ch 233, § 23D. It was the only statute of its kind in the country for many years. Texas then passed an apology law in 1999, and by 2007 apology laws had been enacted in 35 states.

In general, apology laws are based on the theory that apologies are healing for both sides and should not be discouraged by the fear of legal ramifications. Debate has raged over the last decade concerning the relationship of apology and the law. See, *e.g.*, the extensive list of articles cited in Runnels, *Apologies All Around: Advocating Federal Protection For the Full Apology in Civil Cases*, 46 San Diego L. Rev. 137, FN 13 (Winter 2009). While all apology laws exclude for purposes of

proving liability at least some expression of apology or sympathy, there are many variations. Although the Massachusetts statute refers to “an accident,” approximately two-thirds of states opted to restrict the exclusion of apologies to cases involving health care providers. The vast majority of states do not extend the exclusion to admissions of fault. There are four states that explicitly include statements of responsibility or liability (Arizona, Colorado, Connecticut, and Washington) and a few others that may, but it is not as clearly stated (Georgia, Indiana, South Carolina, and Vermont).

## DISCUSSION

In its consideration of HB 32, the Committee reviewed apology laws from other states, academic and law review articles on the topic, and the written testimony submitted to the Senate Judiciary Committee.

HB 32 applies only to health care providers and does explicitly exclude from admissibility expressions of fault. The text of the bill is as follows:

(a) No oral or written statements or notations, affirmations, gestures, conduct or benevolent acts including waiver of charges for medical care provided, expressing apology, fault, sympathy, commiseration, condolence or compassion which are made by a health care provider or an employee of a health care provider to a patient, a relative of the patient or a representative of the patient and which relate to the discomfort, pain, suffering, injury or death of the patient as the result of the unanticipated outcome of medical care shall be admissible as evidence of an admission of liability or as evidence of an admission against interest.

(b) As used in this section:

(1) “Health care provider” has the meaning prescribed in K.S.A. 65-4915, and amendments thereto.

(2) “Relative” means a patient’s spouse, parent, grandparent, stepfather, stepmother, child, grandchild, brother, sister, half-brother, half-sister or spouse’s parents. The term includes such relationships that are created as a result of adoption and any person who has a family-type relationship with a patient.

(3) “Representative” means a legal guardian, attorney, person designated to make decisions on behalf of a patient under a medical power of attorney or any person recognized in law or custom as a patient’s agent.

(4) “Unanticipated outcome” means the outcome that differs from the

anticipated outcome of a treatment or procedure.

At the outset, the Committee was in agreement with the underlying premise that public policy favors apologies, and that it would be consistent with public policy to exclude for purposes of proving liability an apology or expression of sympathy.

In spite of that common ground, the Committee did not agree with the approach taken in HB 32. The Committee was unanimous in its determination that statements or expressions of fault should not be the subject of an evidentiary exclusion. Further, although the primary proponent of HB 32 operates hospitals and clinics and drafted the bill to apply solely to health care providers, the Committee was unanimously opposed to that limitation.

After reaching unanimous agreement that it would not support HB 32 as written, the Committee did a comprehensive review of apology laws passed in other states. The Committee noted that most states had reached the same conclusion as the Committee had regarding the issue of extending the exclusion to admissions of fault. The Committee also noted that under many apology laws, it was unclear whether a mixed statement of apology and liability would be deemed inadmissible under the law.

Some states have opted to answer that question by specifically providing that statements of fault that are part of, or in addition to, an apology that would be inadmissible under the applicable apology provision would not likewise be deemed inadmissible. Hawaii has taken a different approach, providing that the apology 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.” Haw. Rev. Stat. § 626-1, Rule 409.5 (2007). This provision directly responds to concerns that uncertainty about whether the words “I’m sorry” are an apology or an admission of fault make it impossible for physicians to believe they can rely on an apology law unless expressions of fault or liability are specifically covered by the statute. Hawaii’s approach leaves that decision squarely in the capable hands of the trial judge, allowing the court to weigh the probative value against the risk of undue prejudice as it routinely does on questions of admissibility.

The Committee agreed to propose an alternative to SB 32 that is based on the Hawaii apology law.

## COMMITTEE'S CONCLUSIONS

The Committee is unanimously opposed to SB 32. While it supports an apology law for Kansas, the Committee does not support legislation limited to health care providers and specifically rejects extending the immunity to admissions of fault.

## COMMITTEE RECOMMENDATION

The Committee proposes an alternative to SB 32 that is based on Hawaii's apology law. The provision is not limited to health care providers. In addition, the provision deals with mixed expressions of apology and fault by rendering them neither specifically included nor excluded from the immunity granted, instead leaving the decision on such expressions to the court. Finally, this proposed statute is consistent with the Kansas approach to offers of compromise that include express admissions of facts. See K.S.A. 60-452.

The Judicial Council Civil Advisory Committee proposes that the following statute be presented to the legislature:

**Admissibility of expression of apology, sympathy, commiseration, or condolence.** 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. This section does not require the exclusion of any apology or other statement or gesture that acknowledges or implies fault even though contained in, or part of, any statement or gesture excludable under this section.