

JAN 24 2013

A BILL FOR AN ACT

RELATING TO HEALTH CARE PROVIDERS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The legislature finds that the physician-
2 patient relationship is essential to the practice of medicine
3 and the proper diagnosis and treatment of illness and disease.
4 A good physician-patient relationship facilitates the transfer
5 of information between the physician and patient, enhances
6 accuracy of the diagnosis, and increases the patient's knowledge
7 about the patient's diagnosis and treatment. A patient should
8 feel comfortable to confide in the physician and in return a
9 physician should be honest and provide reassurance and comfort
10 to the patient.

11 Historically, physicians have been advised, and sometimes
12 are even required, to stay silent when an unanticipated medical
13 care event occurs that results in pain and suffering for, or
14 even death, of the patient. In absence of any laws that shield
15 physicians, an apology in which the physician admits fault may
16 be considered an admission against interest and may be
17 admissible in a malpractice proceeding as evidence of
18 acknowledgment of fault. However, medical standards require



1 that health care providers disclose to patients any
2 unanticipated event, including details of, reasons for, and any
3 consequences of the unanticipated event. This type of
4 conversation can be difficult to conduct with a patient without
5 expressing sympathy or regret for unanticipated and sometimes
6 negative outcomes.

7 The physician-patient relationship is threatened by the
8 rising number of medical malpractice lawsuits and increasing
9 medical malpractice insurance premiums. Physician apology laws
10 enable candid communication between a physician and the
11 physician's patient following an unanticipated medical care
12 outcome, and appear to reduce overall medical malpractice
13 liability costs by reducing the number of lawsuits and
14 consequent attorneys' fees and claim costs. Studies show that
15 patients are far less likely to sue when provided a full
16 explanation and apology.

17 In response, states have passed legislation to create
18 apology exemptions. Massachusetts was the first state to adopt
19 a physician apology law to protect physicians from statements
20 they might make to their patients regarding complications their
21 patients may have suffered while under their care. More
22 recently enacted apology laws specifically declare that a



1 statement of apology by a physician to a patient is inadmissible
2 as evidence of liability in court.

3 In Hawaii, rule 409.5, Hawaii Rules of Evidence, allows
4 individuals and entities to express sympathy and condolence
5 concerning the consequences of an event in which the declarant
6 was a participant without the expression being used to establish
7 liability. However, this rule does not specifically protect
8 communication that amounts to an apology, which could be
9 admissible as evidence to establish liability. Under rule 104,
10 Hawaii Rules of Evidence, the court is authorized to determine
11 whether the utterance amounts to an expression of sympathy or an
12 acknowledgement of fault. Furthermore, rule 409.5, Hawaii Rules
13 of Evidence, generally applies to individuals and entities and
14 fails to specifically address the communications with health
15 care providers regarding the consequences of an unanticipated
16 medical care outcome involving pain, suffering, or death.

17 The purpose of this Act is to remove the obstacles that may
18 discourage physicians from apologizing by establishing that
19 statements of apology made by a health care provider concerning
20 an unanticipated medical care outcome are inadmissible to prove
21 liability for any claim growing out of the event.



1 SECTION 2. Section 626-1, Hawaii Revised Statutes, is
2 amended by adding a new rule to article IV to be appropriately
3 designated and to read as follows:

4 "Rule Inadmissibility of unanticipated medical
5 outcomes; health care provider apologies. Evidence of
6 statements, affirmations, gestures, or conduct that expresses
7 apology, fault, sympathy, commiseration, condolence, compassion,
8 or a general sense of benevolence that are made by a health care
9 provider or an employee of a health care provider concerning the
10 consequences of an unanticipated outcome of medical care
11 resulting in discomfort, pain, suffering, injury, or death is
12 not admissible to prove liability for any claim growing out of
13 the event."

14 SECTION 3. This Act does not affect rights and duties that
15 matured, penalties that were incurred, and proceedings that were
16 begun before its effective date.

17 SECTION 4. New statutory material is underscored.

18 SECTION 5. This Act shall take effect upon its approval.

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INTRODUCED BY: John Mue MD

Robert P. Lee
Clarence A. Tschirner
Elizabeth Ann Akelak



Randy H. Beck



S.B. NO. 1308

Report Title:

Evidence; Apology; Health Care Providers

Description:

Establishes a new rule of evidence that statements or conduct that expresses apology that are made by a health care provider concerning an unanticipated medical care outcome are inadmissible to prove liability for any claim growing out of the event.

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