

TESTIMONY OF ROBERT TOYOFUKU ON BEHALF OF THE HAWAII ASSOCIATION FOR JUSTICE (HAJ) IN OPPOSITION TO S.B. NO. 2052

DATE: Monday, January 27, 2014

TIME: 1:30 pm

To: Chairman Josh Green and Members of the Senate Committee on Health:

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. 2052, 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 be 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 Should Be Submitted To The Judicial Standing Committee On Evidence

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 that do not acknowledge any fault, 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.

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.



HAWAII MEDICAL ASSOCIATION

1360 S. Beretania Street, Suite 200, Honolulu, Hawaii 96814

Phone (808) 536-7702 Fax (808) 528-2376 www.hawaiimedicalassociation.com

DATE: Monday, January 27, 2014
TIME: 1:30PM
PLACE: Conference Room 229

TO:

COMMITTEE ON HEALTH

Senator Josh Green, Chair

Senator Rosalyn H. Baker, Vice Chair

FROM:

Hawaii Medical Association

Dr. Walton Shim, MD, President

Dr. Linda Rasmussen, MD, Legislative Co-Chair

Dr. Ron Kienitz, DO, Legislative Co-Chair

Dr. Christopher Flanders, DO, Executive Director

Lauren Zirbel, Community and Government Relations

RE: SB 2052 RELATING TO THE HAWAII RULES OF EVIDENCE

In 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

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TREASURER – BRANDON LEE, MD EXECUTIVE DIRECTOR – CHRISTOPHER FLANDERS, DO

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.

From: mailinglist@capitol.hawaii.gov
To: [HTHTestimony](#)
Cc: jlakin@hah.org
Subject: Submitted testimony for SB2052 on Jan 27, 2014 13:30PM
Date: Sunday, January 26, 2014 12:54:37 PM
Attachments: [SB 2052 Physicians" Apologies.pdf](#)

SB2052

Submitted on: 1/26/2014

Testimony for HTH on Jan 27, 2014 13:30PM in Conference Room 229

Submitted By	Organization	Testifier Position	Present at Hearing
Jeremy Lakin	Individual	Support	Yes

Comments: Testifying in person in support will be: George Greene President & CEO Healthcare Association of Hawaii

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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Monday – January 27, 2014 – 1:30pm
Conference Room 229

The House Committee on Health

To: Senator Josh Green, Chair
Senator Rosalyn H. Baker, Vice Chair

From: George Greene
President & CEO
Healthcare Association of Hawaii

Re: **Testimony in Support**
SB 2052 — Relating to the Hawaii Rules of Evidence

The Healthcare Association of Hawaii (HAH) is a 116 member organization that includes all of the acute care hospitals in Hawaii, the majority of long term care facilities, all the Medicare-certified home health agencies, all hospice programs, as well as other healthcare organizations including durable medical equipment, air and ground ambulance, blood bank and respiratory therapy. In addition to providing quality care to all of Hawaii's residents, our members contribute significantly to Hawaii's economy by employing nearly 20,000 people statewide.

Thank you for the opportunity to testify in support of SB 2052, which would exclude from evidence apologies and expressions of sympathy made by physicians to patients and their families after an unanticipated medical outcome. Medical apology laws are designed to encourage communication between patients and physicians, and permit healthcare providers to express personal sympathy to patients and their families to allow the healing process to begin.

While current Hawaii law excludes from evidence "statements or gestures that express sympathy, commiseration, or condolence" by a person involved in an event, the "rule does not require the exclusion of an apology." (§626-1, Hawaii Rules of Evidence, Rule 409.5, Hawaii Revised Statutes.) Under the current law, a physician who would like to apologize to a patient is unlikely to make an apology because apologies can be used as evidence against the physician. SB 2052 would remedy this by allowing physicians who would like to make an apology to patients and family members to do so without fear of liability for expressing sympathy.

Thank you for the opportunity to testify in support of HB 2052.



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