



The Judiciary, State of Hawai‘i

Testimony to the Senate Committee on Health

Senator Josh Green, Chair
Senator Glenn Wakai, Vice Chair

Friday, February 6, 2015 2:30 PM
State Capitol, Conference Room 414

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 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 S.B. No. 116 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.



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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. S.B. No. 116 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 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 Health
Senator Josh Green, Chair
Senator Glenn Wakai, Vice Chair

February 6, 2015
Conference Room 414
Hawaii State Capitol
2:30 p.m.

**Testimony Supporting Senate Bill 116 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. 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 stonewalling.” 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 respectfully request the Committees’ support of this measure. Thank you for the opportunity to testify.



HAWAII MEDICAL ASSOCIATION

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TO:

COMMITTEE ON HEALTH

Senator Josh Green, Chair

Senator Glenn Wakai, Vice Chair

DATE: Friday, February 06, 2015

TIME: 2:30PM

PLACE: Conference Room 414

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

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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, Relating to the Hawaii Rules of Evidence
Senate Committee on Health
Hearing—February 6, 2015 at 2:30 PM**

Dear Chairman Green and Members of the Senate Committee on Health:

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, 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.

The mission of The Queen's Health Systems is to fulfill the intent of Queen Emma and King Kamehameha IV to provide in perpetuity quality health care services to improve the well-being of Native Hawaiians and all of the people of Hawai'i.



Friday, February 6, 2015 – 2:30 p.m.
Conference Room #414

Senate Committee on Health

To: Sen. Josh Green, MD, Chair
Sen. Glenn Wakai, Vice Chair

From: George Greene
President & CEO
Healthcare Association of Hawaii

Re: **Testimony in Support**
SB116 — 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, 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.