

MEMORANDUM

TO: The Honorable Tim Owens
Senate Judiciary Committee

FROM: Anne M. Kindling
Past President, Kansas Association of Defense Counsel

DATE: January 28, 2009

RE: SB 32

Chairman Owens and Members of the Committee:

My name is Anne Kindling and I submit this written testimony in support of SB 32 on behalf of the Kansas Association of Defense Counsel. The KADC consists of more than 220 practicing attorneys who devote a substantial portion of their professional time to the defense of civil lawsuits, including the representation of hospitals, physicians, and other health care providers throughout the state.

SB 32 will facilitate communication between health care providers and patients and family members regarding outcomes of care, including unanticipated or adverse outcomes. It may reduce the occurrence of lawsuits, but it will not eliminate a legal remedy for patients injured due to the negligence of a health care provider, as discussed below.

In today's era of medical care, complicated but life-saving procedures are regularly performed for conditions which just a few decades ago meant early death. Prevention, early diagnosis, and intervention are the norm. With advances in medicine, however, expectations for optimal results – indeed, perfect results – are often high. Of course, health care providers are human. They have the same emotions as the rest of us, including sympathy, empathy, and compassion. They care about the patients they treat. They are also not perfect, and they cannot always obtain perfect results. They even sometimes make mistakes. Sometimes less than optimal results are obtained, and unanticipated or adverse outcomes can occur. Such outcomes can occur even in the absence of negligence or fault of the provider.

As an attorney in private practice representing health care providers in medical malpractice lawsuits for over 11 years, and in my current employment in the Risk Management Department of a hospital, I have seen first-hand the value of communication between health care providers and patients/family members. I have attended, and given, numerous presentations addressing why patients sue health care providers, and among the top reasons that lawsuits are filed is a breakdown in communication between the provider and his or her patient about the outcomes of care. Patients want to know why unanticipated outcomes occurred, whether the outcome was avoidable, and what is being

done to prevent it in the future. They want an apology when mistakes are made. Adjustment of bills goes hand-in-hand with this. Patients who do not feel they received adequate explanations, or who do not feel the provider has taken responsibility for the outcome, are more likely to file a lawsuit; this often occurs because the patient is angry, even if the outcome was not the result of negligence. Lawsuits are less likely to be filed, on the other hand, when there is a free exchange of information about the care provided, including complications, and expressions of sympathy and compassion.

Certainly, full discussion of outcomes of care is right and ethical. Since 2001, any health care facility that is accredited by The Joint Commission is required to have a policy in place for discussions of unanticipated outcomes. The open discussion of outcomes of care goes beyond unanticipated or adverse outcomes, however. Patients deserve frank conversations about their medical care, regardless of whether the outcome was expected or unexpected.

Unfortunately, my experience has also shown that sometimes health care providers are hesitant to engage in discussions or expressions of sympathy or compassion for fear of such expressions being construed as an admission of fault or being used against them in a lawsuit. Providers are wary of the ramifications of such expressions in potential litigation, even if they agree that it is the right and ethical thing to do.

SB 32 would facilitate the open discussion of unexpected outcomes by removing the barrier that arises when providers fear such conversations will be used against the provider if a lawsuit is filed. The bill prevents such discussions, or write-off of bills, from being used as admissions against interest or admissions of liability. Providers would be free to show compassion, even apologize, and freely communicate with their patients when the “perfect” result the patient (and provider) expected does not occur. Frank discussions, and apologies where appropriate, helps eliminate anger in patients, can assure patients that the provider has learned from the experience, can help prevent such events from happening again – and may reduce the occurrence of lawsuits.

SB 32 does not stand alone in preventing a potential defendant’s actions from being construed as evidence of negligence while facilitating the goals of making reparations and of learning from past events to help avoid future injury. K.S.A. 60-451 prevents subsequent remedial measures from being used to prove negligence. Similarly, K.S.A. 60-452 states that offers to compromise are not admissible to prove liability. The evidentiary protection afforded by SB 32 is no different.

Notably, SB 32 will not eliminate legal remedies for patients who suffer adverse outcomes as a result of the negligence of a health care provider. SB 32 does not preclude a patient or family from filing suit, and it does not change the elements or type of evidence required to prove such claims or the burden of proof. A provider cannot escape liability and prevent a plaintiff’s recovery simply by apologizing. A claim of medical malpractice will proceed just as it always has, with the testimony of qualified expert witnesses to assist the jury in determining negligence or fault.

Frank communication between health care providers and patients improves patient care, improves patient satisfaction, and *may* reduce the occurrence of lawsuits. SB 32 allows providers to be human and show compassion, and it facilitates frank communication with patients without fear of ramifications in a potential lawsuit, while still preserving all of the remedies available to a patient injured due to the negligence of a health care provider.

KADC respectfully urges this Committee to pass SB 32 favorably.