

2009 DRAFTING REQUEST

Bill

Received: **10/12/2009**

Received By: **rnelson2**

Wanted: **As time permits**

Identical to LRB:

For: **Chuck Benedict (608) 266-9967**

By/Representing: **Kyle F**

This file may be shown to any legislator: **NO**

Drafter: **rnelson2**

May Contact:

Addl. Drafters:

Subject: **Courts - immunity liability**

Extra Copies:

Submit via email: **YES**

Requester's email: **Rep.Benedict@legis.wisconsin.gov**

Carbon copy (CC:) to:

Pre Topic:

No specific pre topic given

Topic:

Medical malpractice apology

Instructions:

See attached 2005 AB1021

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	rnelson2 10/12/2009	bkraft 10/16/2009		_____			
/1			rschluet 10/19/2009	_____	cduerst 10/19/2009		
/2	rnelson2 12/03/2009	bkraft 12/03/2009	mduchek 12/04/2009	_____	cduerst 12/04/2009		
/3	rnelson2	bkraft	jfrantze	_____	cduerst		

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	01/13/2010	01/13/2010	01/13/2010	_____	01/13/2010		

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/3	rnelson2	bkraft	jfrantze	_____	cduerst	cduerst	

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Jacket for the Assembly (RPN)

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1/3 bjk 1/13
1/13
1/13

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Topic:

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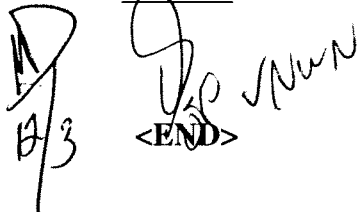
Instructions:

See attached 2005 AB1021

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/?	rnelson2 10/12/2009	bkraft 10/16/2009		_____			
/1		12 bjk 12/3	rschluet 10/19/2009	_____	cduerst 10/19/2009		

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Handwritten signatures and initials, including a large 'D' and 'B/3' signature, and another signature with 'END' written below it.

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FE Sent For:

<END>

Nelson, Robert P.

From: Fischer, Kyle
Sent: Monday, October 12, 2009 10:30 AM
To: Nelson, Robert P.
Subject: Request for drafting of "I'm Sorry" bill from Rep Benedict

Robert,
Representative Benedict's office would like to request a redraft of the 2005 AB1021 physician "I'm Sorry" bill. The changes to the original are just a few word deletions. We would like to erase from Section 1 part 2 the words "fault, liability, responsibility." This way it should read, "A statement, gesture, or conduct of a health care provider or a health care provider's employee or agent, that expresses apology, benevolence, compassion, condolence, or sympathy to a patient..." Everything else would stay the same. I hope that helps. Feel free to contact me if you have any questions.
Thanks,
Kyle Fischer

10/12/09

2005 - 2006 LEGISLATURE

3663/1
LRB 4134/1
FROM 2005 4134/1
RPN: KJf
bjk

2005 ASSEMBLY BILL 1021

SA
x-ref

February 14, 2006 – Introduced by Representatives GIELOW, ALBERS, BIES, HAHN, KRAWCZYK, JESKEWITZ, SHILLING, STRACHOTA, VAN ROY, VOS and GUNDRUM, cosponsored by Senators ROESSLER, GROTHMAN, A. LASEE, OLSEN and REYNOLDS. Referred to Committee on Judiciary.

regen.

1 AN ACT to create 904.14 of the statutes; relating to: inadmissibility of a
2 statement of apology or condolence by a health care provider.

Analysis by the Legislative Reference Bureau

measures

Under current law, certain types of evidence are not allowed to be admitted in a court action for various policy reasons. For example, evidence of measure taken after damage occurred that would have made the damage less likely is not admissible to prove negligence or culpable conduct in connection with the damage. As another example, no written or oral communication relating to a dispute in mediation is admissible or subject to discovery in any judicial proceeding or administrative action.

compassion, benevolence

This bill provides that a statement or conduct of a health care provider that expresses apology, condolence, or sympathy to a patient or patient's relative or representative is not admissible into evidence or subject to discovery in any civil action or administrative hearing regarding the health care provider as evidence of liability or as an admission against interest.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

3 SECTION 1. 904.14 of the statutes is created to read:
4 904.14 Inadmissibility of statement by health care provider of apology
5 or condolence. (1) In this section:

ASSEMBLY BILL 1021

146.34(1)

153.01(4)

1

(a) "Health care provider" has the meaning given in s.

2

(b) "Relative" has the meaning given in s. 146.34 (1) (j).

3

(2) A statement, gesture, or conduct of a health care provider or a health care

4

provider's employee or agent, that expresses apology, benevolence, compassion,

5

condolence, fault, liability, responsibility, or sympathy to a patient or to his or her

6

relative or representative is not admissible into evidence or subject to discovery in

7

any civil action or administrative hearing regarding the health care provider as

8

evidence of liability or as an admission against interest.

9

SECTION 2. Initial applicability.

10

(1) This act first applies to statements, gestures, or conduct that occur on the

11

effective date of this subsection.

12

(END)

Nelson, Robert P.

From: Sweet, Richard
Sent: Thursday, December 03, 2009 10:30 AM
To: Machtan, Ken
Cc: Nelson, Robert P.
Subject: RE: LRB 3663/1- I'm Sorry legislation

Ken,

I just talked to Bob and I think that what he is suggesting is reasonable. He would keep gestures both in the general rule and the exception. This seems to be consistent with what Matt said in his e-mail, since he (approvingly) cited laws in 6 states that cover statements and gestures.

Dick

From: Sweet, Richard
Sent: Thursday, December 03, 2009 10:12 AM
To: Machtan, Ken
Cc: Nelson, Robert P.
Subject: RE: LRB 3663/1- I'm Sorry legislation

Ken,

Deleting statements of fault, liability, and responsibility from the portion of the statute on what is inadmissible, and saying affirmatively that those statements aren't covered by the law, would seem to go a long way to addressing the expressed concern. But I think that since the first portion will only exclude statements (not gestures or conduct), the exception should probably only cover statements. I'd be interested in Bob's take on this, so I cc'ed him.

Dick

From: Machtan, Ken
Sent: Thursday, December 03, 2009 9:59 AM
To: Sweet, Richard
Subject: FW: LRB 3663/1- I'm Sorry legislation

Dick

Make sense?

Ken

From: Nelson, Robert P.
Sent: Thursday, December 03, 2009 9:57 AM
To: Machtan, Ken
Subject: RE: LRB 3663/1- I'm Sorry legislation

Ken,

Based on what the response is from the governor's office, I can see why Dick Sweet is making the

12/03/2009

suggestions for changes. It may difficult in some cases for a court to distinguish a statement of fault (which would be admissible) from a statement of apology (which would not be admissible), but that is what courts do.

I do think that it would be consistent with the governor's position to include gestures in the bill and add language that says the section "...does not apply to statements of, or gestures that indicate, fault, liability....." Often gestures are ways to express apology, and the patient's family is often glad to see such gestures.

I will redraft the bill as Dick suggested unless I hear from you today, and if you want to change it we can do it in another draft.

Bob N

From: Machtan, Ken
Sent: Wednesday, December 02, 2009 2:20 PM
To: Nelson, Robert P.
Subject: LRB 3663/1- I'm Sorry legislation

Robert:

We received the following note from the Governor's Office regarding concerns they have with LRB 3663, a different version of 2005 AB 1021 which he vetoed when it reached his desk.

I spoke with Dick Sweet at the Leg. Council and he suggested amending LRB 3663/1 as follows:

On page 2 line 3, remove the words "gesture or conduct", similarly on line page 2, line 10.

Add a section that states the following: "This section does not apply to statements of fault, liability or responsibility."

Does that make sense to you?

If so, can you do a redraft?

Please call with questions. 266-9967.

Thanks

Ken Machtan
Office of Rep. Chuck Benedict

From: Sweeney, Matthew - GOV [mailto:Matthew.Sweeney@wisconsin.gov]
Sent: Tuesday, December 01, 2009 2:01 PM
To: Machtan, Ken
Subject: RE: I'm Sorry legislation

Ken,

Here is what I got back form my policy and legal folks:

The attached bill draft addresses some of the issues raised in the Governor's veto message for 2005 AB 1021, but does not completely resolve his concerns.

The Governor's veto message for 2005 AB 1021 raised two main concerns. First, the veto message stated that the bill "would make inadmissible statements and conduct that express fault or liability." Second, the veto message stated that the bill "also applies to 'conduct' that expresses fault – conduct that could include the act of malpractice itself."

2005 AB 1021 provided that: "A statement, gesture, or conduct of a health care provider or a health care provider's employee or agent, that expresses apology, benevolence, compassion, condolence, **fault, liability, responsibility**, or sympathy to a patient or

12/03/2009

to his or her relative or representative is not admissible into evidence or subject to discovery" in a malpractice action.

The **rewritten draft** provides: "A statement, gesture, or conduct of a health care provider or a health care provider's employee or agent, that expresses apology, benevolence, compassion, condolence, or sympathy to a patient or to his or her relative or representative is not admissible into evidence or subject to discovery" in a malpractice action. The words "fault, liability, [and] responsibility" are omitted. This partly addresses the Governor's concern that the bill would unfairly bar the admission of statements that *directly* express fault or liability at a malpractice trial.

However, the new draft does not entirely address the concern that the bill might make statements expressing fault inadmissible. A statement of apology, condolence or sympathy may imply fault or responsibility, even if it is not a direct statement of fault. For example, statements such as "I'm sorry, I should have run another test," or "I apologize for not anticipating that outcome" are statements of apology that may imply fault or error. The Governor's veto message from the prior bill suggests that he believes such statement should be admissible in a medical malpractice case.

The Governor's veto message also expressed concern that "conduct that expresses fault" would be inadmissible. Under the rewritten bill, conduct that expresses "apology, benevolence, compassion, condolence, or sympathy" would be inadmissible. Conduct that "expresses fault" would not be deemed inadmissible. The same concerns as to statements apply. A provider's conduct such as crying, shaking the head, wringing the hands, distraught pacing, etc. may, in context, be viewed as "conduct ... that expresses apology, benevolence, compassion, condolence, or sympathy." Such conduct may also, in context, imply the provider's perception of fault or responsibility. The bill draft does distinguish between conduct that could be interpreted in both ways. Thus, there is a risk that relevant evidence of a health care provider's error or fault would become inadmissible under this bill.

There are competing policy interests at stake. As the Governor's veto message to 2005 AB 1021 stated, "encouraging health care providers to openly communicate with their patients, and express apologies and condolences, may well be a legitimate public policy objective." On the other hand, if a patient is injured by a medical error, our legal system allows them to seek compensation for their injuries. The veto message for AB 1021 suggests that the Governor would like to see a balance between encouraging open communication between providers and patients, and allowing injured patients to establish liability and obtain compensation for medical malpractice.

In recent years, many hospitals have adopted policies encouraging open communication with patients when medical errors occur, including apologies for errors. Some hospitals have documented a reduction in malpractice claims or settlement amounts when such policies are adopted. However, some medical malpractice insurers and hospitals instruct providers not to apologize for errors, due to concerns about liability. Several states have adopted "physician apology" laws to support and encourage communication between providers and patients by allaying providers' fears that their statements of apology or sympathy will be used against them in a malpractice claim.

These laws vary considerably from state to state. A few are very broad and closely resemble the vetoed bill. Others are more narrowly drawn. For example, California, Delaware, Florida, Hawaii, Indiana, and Idaho all have laws that make statements or gestures of sympathy, apology, compassion, etc., inadmissible, but provide an exception for statements of fault or liability (which continue to be admissible). The Texas statute provides an example of this approach: "Notwithstanding the provisions of subsections (a) and (b) [providing that statements of apology are inadmissible], a communication, including an excited utterance... which also includes a statement or statements concerning negligence or culpable conduct pertaining to an accident or event, is admissible to prove liability of the communicator." Likewise, the Washington statute excludes "a statement of fault... which is part of, or in addition to, any of the above shall not be made inadmissible." Adding similar language to the proposed bill may better address the Governor's concern that statements that constitute admissions of fault should continue to be admissible in medical malpractice cases. Removing the word "conduct" from the bill likewise would more fully address the Governor's concern that conduct that implies fault should continue to be admissible.

Another approach taken by some states (eg, South Carolina) is to limit the protection to statements of apology made in a "designated meeting" between patient and providers to discuss the outcome of medical care. This approach is similar to protections already recognized in the Wisconsin rules of evidence for statements made in settlement negotiations or mediation (see s. 904.08, 904.085) and offers to pay medical or similar expenses (s. 904.09). Statements made outside the formal meeting would still be admissible, addressing the Governor's concern that statements expressing fault or liability should be admissible.

Matt

From: Machtan, Ken [mailto:Ken.Machtan@legis.wisconsin.gov]
Sent: Tuesday, December 01, 2009 9:52 AM
To: Sweeney, Matthew - GOV
Subject: I'm Sorry legislation

Matt:

12/03/2009

Any progress on possible language your office would be comfortable with per a discussion we had a couple weeks ago on Chuck's "I'm Sorry" legislation?

We need to get something introduced shortly and we'd really like to find a proposal the Governor would support. Or at least not veto.

Thanks

Ken Machtan
Office of Rep. Chuck Benedict
266-9967

Duerst, Christina

From: Vasby, Tara
Sent: Wednesday, January 13, 2010 11:14 AM
To: LRB.Legal
Subject: Draft Review: LRB 09-3663/3 Topic: Medical malpractice apology

Please Jacket LRB 09-3663/3 for the ASSEMBLY.



2
stays

2009 BILL

SA

1 AN ACT ^{regem.} to create 904.14 of the statutes; relating to: inadmissibility of a
2 statement of apology or gesture or condolence by a health care provider.

Analysis by the Legislative Reference Bureau

Under current law, certain types of evidence are not allowed to be admitted in a court action for various policy reasons. For example, evidence of measures taken after damage occurred that would have made the damage less likely is not admissible to prove negligence or culpable conduct in connection with the damage. As another example, no written or oral communication relating to a dispute in mediation is admissible or subject to discovery in any judicial proceeding or administrative action.

> This bill provides that a statement or gesture ~~conduct~~ of a health care provider that expresses apology, condolence, compassion, benevolence, or sympathy to a patient or patient's relative or representative is not admissible into evidence or subject to discovery in any civil action or administrative hearing regarding the health care provider as evidence of liability or as an admission against interest.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

3 SECTION 1. 904.14 of the statutes is created to read:

4 904.14 Inadmissibility of statement by health care provider of apology

5 or condolence. (1) In this section:

NO Under the bill a statement or gesture that expresses fault, liability or responsibility would be admissible.

BILL

1 (a) "Health care provider" has the meaning given in s. 146.81 (1).

2 (b) "Relative" has the meaning given in s. 146.34 (1) (j).

3 (2) A statement, ^{or} gesture, or conduct of a health care provider or a health care
4 provider's employee or agent, that expresses apology, benevolence, compassion,
5 condolence, or sympathy to a patient or to his or her relative or representative is not
6 admissible into evidence or subject to discovery in any civil action or administrative
7 hearing regarding the health care provider as evidence of liability or as an admission
8 against interest.

9 **SECTION 2. Initial applicability.**

10 (1) This act first applies to statements, gestures, or conduct that occur on the
11 effective date of this subsection.

12 (END)

A (B) (3) This section does not apply to a statement or gesture that expresses fault, liability, or responsibility.

Basford, Sarah

From: Vasby, Tara
Sent: Wednesday, January 13, 2010 9:38 AM
To: LRB.Legal
Subject: Draft Review: LRB 09-3663/1 Topic: Medical malpractice apology

Please Jacket LRB 09-3663/1 for the ASSEMBLY.



1/13
State of Wisconsin
2009 - 2010 LEGISLATURE

LRB-3663/1
RPN:bjk:rs

3
RMR

FROM
3663/1

LPS - Please
note version

2009 BILL

SA
D-note

gesture or conduct expressing

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11 effective date of this subsection.

12 (END)

↙
D-N
Date
LRB - 3663/3
RPN: bjk:
A This draft is the same as
LRB-3663/10

**DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-3663/3dn
RPN:bjk:jf

January 13, 2010

This draft is the same as LRB 09-3663/1.

Robert P. Nelson
Senior Legislative Attorney
Phone: (608) 267-7511
E-mail: robert.nelson@legis.wisconsin.gov