H.B. 7

Opponent Testimony of Michael D. Shroge, Esq.

Chair of the Ohio Assoc. for Justice Patient Advocacy Task Force

to the

Ohio House of Representatives Civil Justice Committee

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Good afternoon Chair Butler, Vice Chair Hughes, Ranking Member Boggs and Committee members. My name is Michael Shroge and I am the Chair of the Ohio Association for Justice Patient Advocacy Task Force and a partner with the law firm of Plevin & Gallucci. I am here to offer testimony in opposition to part of proposed HB 7 – the extension of the Apology Statute to include admissions of fault and error.

I believe I bring a unique perspective to this issue as a result of my background as a practicing attorney in the area of medical negligence for the last 18 years. I started my career as a law clerk and then associate and ultimately an elected partner at the Reminger Law Firm. After devoting 8 years exclusively defending doctors, hospitals, and other care providers I was hired away from my firm to join The Cleveland Clinic as Associate Counsel in the Office of the General Counsel again devoting my time to the issues of medical negligence. For the last 9 years I have now practiced with my current firm prosecuting claims of medical negligence on behalf of those who have been injured and impacted by acts of medical negligence. As such, I have seen the issues surrounding medical negligence from all three sides: the defense, the corporate and the plaintiff perspectives.

The Ohio Association for Justice will have several witnesses testify today on several elements of HB 7 as this bill covers approximately 10 different areas of proposed changes to current medical negligence law. My objective is to discuss opposition to the changes proposed for Section 2317.43 of the Ohio Revised Code; better known as the apology statute. Currently Sec. 2317.43 excludes from evidence in a medical negligence claim any and all statements, affirmations, gestures, or conduct expressing apology, sympathy, commiseration, condolence, compassion, or a general sense of benevolence that are made by a health care

provider or, an employee of a health care provider, to the alleged victim, a relative of the alleged victim, or a representative of the alleged victim, and that relate to the discomfort, pain, suffering, injury, or death of the alleged victim as the result of the unanticipated outcome of medical care are inadmissible as evidence of an admission of liability or as evidence of an admission against interest. More simply put, the current law allows a care provider to make a statement of apology and express sympathy and compassion to an injured patient or family member without concern that any of those statements will be used against them as a statement or admission of liability in a subsequent medical negligence claim.

HB 7 seeks to add admissions of error and fault to the current list of protected statements that cannot be used against a care provider if they are made to an injured patient or grieving family member. If enacted, this bill would offer unique protections to a class of individuals not recognized anywhere else in the codified laws of Ohio nor afforded any other individual or member of any other profession. Furthermore, the enactment of this bill would turn upside down the basic tenants of strict liability and negligence law as we currently know it to exist in Ohio.

Therefore, it would be imperative that we discuss the question of why this change is needed if you are going to consider changing the basic tenants of negligence in Ohio in the unique setting of medical negligence. During proponent testimony you heard that the need for this change is rooted in the necessity for care providers to have free and open communication with their patients to discuss unanticipated outcomes. What you did not hear from the proponents is that physicians and other care providers already have an ethical obligation to discuss unanticipated outcomes with their patients. The American Osteopathic Association's Code of Ethics, section 2, states, "The physician shall give a candid account of the patient's condition to the patient or to those responsible for the patient's care." Similarly, the American Medical Association's Code of Medical Ethics provides, "It is a fundamental ethical requirement that a physician should at all times deal honestly and openly with patients. … Concern regarding legal liability which might result following truthful disclosure should not affect the physician's honesty with a patient." The American College of Physicians sets forth a similar position, and the National Patient Safety Foundation's Board of Directors approved a statement of principle with regard to explanations of errors. Even the Joint Commission on Health Accreditation requires institutions to have a process in place to inform patients and their families of unanticipated medical outcomes.

In his proponent testimony Tim Maglione, on behalf of the Ohio State Medical Association said, "[o]ur thought on this was that the statute would allow a

physician to show empathy by explaining, and taking responsibility for, unanticipated outcomes related to medical care." Mr. Maglione went on to testify that the , "amended apology statute will further open the lines of communication between patient and physician, provide clarity, stability and predictability to our medical and legal communities, and reduce overall lawsuits. These are certainly worthy objectives." Attorney Bobbie Sprader testified before this committee that, "Without this change, R.C. § 2317.43 will never achieve its original purpose of encouraging medical providers to be able to freely and openly express their feelings of empathy to patients and their families, thereby providing much needed emotional support." Dr. Michael McCrea, in recounting what we would all agree is a tragic medical case, stated to this committee that he "had been instructed "not to talk to anyone" about this case, especially the family." If doctors and care providers are ethically bound to discuss unanticipated outcomes, why do they argue that a law is needed to have these discussions with their patients?

Nicole Saitta, MS, in an article she co-authored in the Journal of the American Osteopathic Association, said that, "[p]sychological, emotional and financial benefits clearly flow between the parties to an apology. Monetarily, an apology decreases the financial consequences that result from litigating a medical malpractice claim." She went on to cite all of the hospital systems and insurance companies that have learned that apologies and admission of error and fault are just good business, not only for the psychology of the physician and patient, but also for the bottom line. There exists clear and convincing evidence that apologizing and admitting error is not only a pillar of ethical conduct of a physician, but also helps reduce the overall cost of litigation.

The enactment of this section of HB 7 would result in some easily imagined unjust outcomes. For example, assume Dr. Smith comes to the waiting room to share with Mr. Jones that due to his error and fault he wants to apologize for the death of his wife undergoing a minor surgical procedure. Imagine further that Dr. Smith is testifying in trial years later and is asked, in front of judge and jury, if his error and fault caused the death of Mr. Jones' wife. Imagine further that Dr. Smith denies his errors and fault were the cause of the death of Mr. Jones' wife. In that scenario, under the language of this bill, Dr. Smith's prior admissions of error and fault cannot be used to impeach his later denial. Mr. Jones would be caused to suffer twice; initially at the time of his wife's death and then later when the very doctor who admitted error and fault is allowed to deny his admissions in open court. This is not the outcome our system of justice envisions, nor should it.

The current language proposed in HB 7 to extend the apology statute to include admissions of error and fault has one glaring omission; the rights of the patient

suffering the unanticipated outcome. Without any notice to the patient or the patient's representative, a care provider can make a statement knowing that those statements are inadmissible should a lawsuit occur down the road. However, the patient listening to the care provider has no idea that partaking in that conversation is effecting their legal rights. In our system of justice, even an alleged criminal is advised of his rights before a conversation occurs. Why are we not considering the same right of notice to a seriously injured patient or a grieving family member? OAJ has offered an amendment to Section 2317.43 of HB 7. We have proposed a notice provision that has been enacted in other states such as Iowa. The notice provision accomplishes exactly what the proponents of this bill want – an opportunity to openly discuss unanticipated outcomes. At the same time it allows for the injured patient or grieving family an opportunity to know that they are entering a process that gives up certain rights and have the right to counsel to advise them about the process. In addition the amendments offered by OAJ allow for the admission of the statements of error and fault should a physician later give contradictory or inconsistent statements in a claim. This is better known as the right of impeachment.

HB 7, specific to the proposed change to the apology statute, is questionable as to its constitutionality. This proposed change to the fundamental Ohio Rules of Evidence is within the sole constitutional jurisdiction of Ohio Supreme Court.

OAJ and the OAJ Patient Advocacy Taskforce, oppose HB 7 as it relates Section 2317.43 including admissions of error and fault. I want to thank this committee for its time and attention and would be happy to answer any questions you may have.