

### Efficacy of a Physician's Words of Empathy: An Overview of State Apology Laws

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**Apology laws are gaining traction in the United States, prompting health care professionals to offer words of condolence for adverse medical outcomes without the fear of being sued for malpractice. Although these laws vary by jurisdiction, they have been shown to reduce the financial consequences of a medical malpractice lawsuit. The authors provide an overview of the laws regarding this issue and discuss apologies as a means to reduce medical malpractice claims.**

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Despite your best efforts, a patient dies after an unexpected medical complication. You wish to apologize to the patient's family members for their tragic loss, but you say nothing, sensing that your words could be misconstrued as an admission of fault. What should a physician do when torn between empathetic sensibilities and the innate need for self-preservation? Welcome to the practice of medicine in the 21st century.

Children are taught to say "I'm sorry" when they cause harm to one another. An apology is a fairly routine expression and is valuable because of its ability to diffuse a difficult situation. Similarly, individuals are encouraged to "own up" to mistakes and accept responsibility for their actions.<sup>1</sup> This dynamic is equally applicable in the medical arena. A physician who is emotionally invested in a patient often feels compelled to express condolences after a poor medical outcome. In addition, a physician's integrity and honesty serve as compelling reasons for apologizing. Lawyers, however, usually advise health care professionals to remain silent in these situations because of the potential adverse consequences in offering condolences, such as a malpractice lawsuit.<sup>2</sup> This dichotomy places the physician in a moral dilemma—wanting to soothe the feelings of the patient or family while simultaneously wishing to avoid having an apology used against him or her in court. A number of states have passed apology laws that prohibit the use of a physician's apology as an admission of fault in court. With these laws, an apology now has the ability to mitigate the results of an unanticipated or poor medical outcome.<sup>1,2</sup>

#### Medical Community's Stance on Apologies

The value of honest communication, including apologies, is nothing new in the medical community; in fact, a number of medical organizations have stressed the importance of honesty between patient and physician. 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."<sup>3</sup> 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."<sup>4</sup> This code suggests that "in the wake of a medical error, patients have a right to know what happened."<sup>5</sup> The American College of Physicians espouses a similar position, and the National Patient Safety Foundation's Board of Directors approved a statement of principle with regard to explanations of errors.<sup>4</sup> Even the Joint Com-

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mission requires institutions to have a process in place to inform patients and their families of unanticipated medical outcomes.<sup>2,5</sup>

### Benefits of an Apology

Psychological, emotional, and financial benefits clearly flow between the parties to an apology.<sup>2</sup> Monetarily, an apology decreases the financial consequences that result from litigating a medical malpractice claim. For instance, 1 study<sup>6</sup> determined that an apology gave the patient a sense of satisfaction and closure, which led to faster settlements and less demand for damages. In addition, the study found that accepting responsibility was more effective than expressing sympathy.<sup>6</sup> When apologies contain admissions of fault, individuals report that they have a greater respect for their counterparts, which reduces the amount of money demanded and increases the willingness to settle.<sup>6</sup>

Some hospitals in Pennsylvania<sup>7</sup> and Kentucky<sup>8</sup> have found that effective apology and disclosure programs reduce malpractice payments.<sup>1</sup> In addition, the University of Michigan Health System reported faster settlement times and decreased payments by 47% per case with the advent of its apology and disclosure agreement.<sup>9</sup> In fact, Cornell University and the University of Houston analyzed health care facilities in those states that have adopted apology laws and found that statements of regret facilitated faster settlement times and a decrease in malpractice claims.<sup>10</sup> In essence, this study shows that apology laws work by reducing monetary damages for cases that go to court as well as lowering settlements and costs for those physicians who apologize.<sup>10</sup>

The correlation between apologies and lower payouts in malpractice cases was confirmed by a 6-year study at the Lexington Veterans Affairs Medical Center in Kentucky.<sup>8</sup> Steve Kraman, MD, manager of this program, found that if a bad outcome was followed by the appropriate reaction by the health care provider, such as disclosure of the facts, apology, and remuneration, the media reports focused on the reaction rather than the bad behaviors.<sup>11</sup> This study also showed that the medical center, after implementing an apology program, paid less per claim than those hospitals without apology policies.<sup>11</sup> However, Wei<sup>12</sup> criticizes these findings, stating that there are major differences to be considered when comparing Veterans Affairs hospitals to nongovernment hospitals.

Despite this criticism, several other health care facilities and insurance providers have implemented apology and disclosure programs. In the past 5 years, "Catholic Healthcare West persuaded several insurance companies covering their independent contractor physicians to participate in successful full-disclosure programs."<sup>13</sup>

One of the better known programs, the Early Resolu-

tion Program at the COPIC Insurance Company, a liability insurer directed by physicians in Colorado, has reported success since the implementation of its program known as "Recognize, Respond and Resolve."<sup>14</sup> The program is "no fault" in that it does not tie compensation to evidence of fault on the provider's part.<sup>14</sup> After implementing this measure, the company paid substantially less for claims that it closed, both those that closed with indemnity payment and those that closed without indemnity payment.<sup>14</sup> With data and studies that prove the efficacy of an apology policy, it is not surprising that the implementation of such programs has gained traction. In fact, the founder of the Sorry Works! Coalition, Douglas Wojcieszak, estimates that between 5% and 10% of hospitals have now adopted apology programs.<sup>1,11</sup>

Aside from the purported positive financial consequences of an apology, this expression carries emotional and psychological benefits for all parties. An apology is "an important ritual, a way of showing respect and empathy for the wronged person."<sup>15</sup> An apology can undo the negative effects of an action and defuse an individual's anger, even if it cannot undo the harmful action itself.<sup>15</sup> And, because an individual no longer perceives the offender as a personal threat, emotional healing occurs.<sup>15</sup> Apologizing also helps rid an individual of guilt or self-reproach while simultaneously reducing arrogance and promoting self-respect.<sup>15</sup>

Research shows that malpractice lawsuits often stem from anger,<sup>10</sup> and "numerous case studies suggest that anger is a main motivator for litigation and can overcome the patient's aversion to the legal arena." On the other hand, apologies by physicians reduce a patient's anger, encourage communication, and thus reduce the need to file a lawsuit.<sup>10</sup> Therefore, it is not surprising that honest and open disclosures with patients may decrease the filing of a lawsuit. In fact, juries have been shown to be favorably impressed with these types of caring gestures.<sup>1,16</sup>

In 2001 and 2002, trial consulting firm DecisionQuest conducted a mock trial in which a group of potential jurors was not told about a physician's expressions of sympathy or disclosure of an adverse medical outcome while a different group of jurors was informed that the physician disclosed the medical error.<sup>1</sup> The unpublished research found that, although both juries found the physician liable for malpractice, the damages awarded by the jurors who were told that the physician had disclosed the problem were lower than those awarded by the uninformed jurors. The mock juries based their decisions on the physician's honesty, which made it appear that the physician had "done the right thing," while the nondisclosure physician was perceived as participating in a cover-up. Furthermore, the second group disregarded the subjective element of

an apology that does not necessarily indicate a breach of the appropriate standard of care. This group of jurors who were not told of the disclosure was motivated by wanting vindication for the patient, so it did not determine a causal link between monetary recovery and the true circumstances of the adverse medical outcome.

### Factors Encouraging Silence

Why would a physician remain silent when research clearly shows that an honest and sympathetic discussion with the patient about a mistake or adverse outcome has numerous advantages?<sup>2</sup> Quite simply, the physician may not be aware of the error because other causes for the patient's adverse outcome may be suspected, such as an inevitable consequence of a disease process.<sup>16</sup> Also, physicians may not be comfortable with delivering bad news because of a lack of training in this area.<sup>16</sup> In addition, some physicians may avoid a disclosure and apology because they believe that such statements import fault even when the physician has done nothing wrong.<sup>9</sup>

In this regard, a study by the University of Michigan Health System found that barriers to disclosure include a "deny and defend" strategy by physicians as well as legal and cultural barriers.<sup>9</sup> Physicians naturally worry that, by admitting fallibility, they will undermine the trust patients have in them, especially in the changing environment of medical services.<sup>12</sup> A mask of infallibility has been placed over the medical world, and this perception is perpetuated by both physicians and patients.<sup>12</sup> Thus, considering the high pedestal upon which physicians are placed, one can understand a physician's desire to avoid admittance of fallibility so as not to disappoint the patient.<sup>2</sup>

Some physicians are also afraid of the legal ramifications that may result from innocent and honest disclosure that is taken as an admission of a breach of the appropriate standard of care.<sup>2</sup> This fear was confirmed by a 2000 survey in which almost half of the physicians questioned expressed concern over being named in a lawsuit in the near future.<sup>17</sup> Nevertheless, more current research suggests that physicians generally endorse disclosure of harmful mistakes to patients.<sup>18</sup> These findings are often at odds with the advice of lawyers, insurers, and hospital executives who may serve as a barrier to an apology, for "hospital executives want 'to do the right thing' but their lawyers or insurers are resisting."<sup>19</sup>

The legal considerations of a physician's actions have not always been at the forefront of a physician's mind while treating a patient, but the litigious nature of today's society has changed this dynamic. What has happened to force physicians into a role of practicing defensive medicine? As society has industrialized, a different relationship between physician and patient has emerged, one that does

not freely promote the frank communication that exists between neighbors.<sup>1</sup>

Studies<sup>20-22</sup> also indicate that nonpecuniary motivations to the filing of medical malpractice suits include wanting to prevent a recurrence of a similar situation to someone else, wanting a proper explanation or apology, wishing to be returned to the status quo, and wanting sanctions for duress.<sup>23</sup> While most patients who file lawsuits want to make sure the mistake does not happen to someone else, they also want an explanation and an admission of negligence<sup>12</sup>; they ultimately want a feeling that justice has been served.<sup>2</sup>

### Overview of Apology Laws

In response to the malpractice crisis and the proven benefits of a physician's apology, a majority of states have enacted laws to encourage expressions of sympathy without the statement of condolence being misconstrued as an admission of liability.<sup>1,2</sup> For the full list of state statutes and URLs to each state's apology law, see the *Table*. Massachusetts was the first state to enact an apology law, in 1986<sup>4</sup>; 34 other states along with the District of Columbia have enacted laws that prohibit a physician's apology as admissible evidence in a legal proceeding. Most apology laws apply to statements and gestures of benevolence made to either a patient or that patient's family in the wake of an unanticipated outcome.<sup>24</sup> Although some states do not have apology laws in place, others, including Pennsylvania, currently have legislation pending.<sup>1</sup>

The laws of each state have their own nuances, so physicians must be mindful of the particular jurisdiction in which they practice. For example, North Dakota's and Utah's laws do not state that the expression must be related to the discomfort, pain, suffering, injury, or death of the patient. In addition, in some jurisdictions, apologies made orally or written are covered.<sup>24</sup> Also, some state apology laws do not specifically mention to whom the apology may be given, which can leave the application of the law open for interpretation in a given situation.<sup>1,2</sup> For example, states with apology laws that do not specifically mention the admissibility of expressions of sympathy to a family member, friend, or representative of the patient include Washington, Vermont, Maryland, South Dakota, Indiana, Hawaii, Oregon, and North Carolina. Maine's apology law specifically covers "a domestic partner relationship with an alleged victim."<sup>1,2</sup> The apology laws of Montana and Delaware apply to the patient, the patient's family, or a friend of the patient, while the apology laws of Connecticut, Vermont, and Ohio cover an apology made to any person who has a family-type relationship with the patient.

Some legislatures place a time limit during which an

**Table.  
Apology Laws by State<sup>1,2</sup>**

State	Code	Web Site
Arizona	Ariz Rev Stat §12-2605	<a href="http://www.azleg.gov/ars/12/02605.htm">http://www.azleg.gov/ars/12/02605.htm</a>
California	Cal Evid Code §1160	<a href="http://www.leginfo.ca.gov/cgi-bin/displaycode?section=evid&amp;group=01001-02000&amp;file=1150-1160">http://www.leginfo.ca.gov/cgi-bin/displaycode?section=evid&amp;group=01001-02000&amp;file=1150-1160</a>
Colorado	Colo Rev Stat Ann §13-25-135	<a href="http://www.state.co.us/gov_dir/leg_dir/olls/sl2003a/sl_126.htm">http://www.state.co.us/gov_dir/leg_dir/olls/sl2003a/sl_126.htm</a>
Connecticut	Conn Gen Stat Ann §52-184d	<a href="http://www.cga.ct.gov/2011/pub/chap899.htm#Sec52-184d.htm">http://www.cga.ct.gov/2011/pub/chap899.htm#Sec52-184d.htm</a>
Delaware	Del Code Ann tit 10. §4318	<a href="http://delcode.delaware.gov/title10/c043/sc01/index.shtml">http://delcode.delaware.gov/title10/c043/sc01/index.shtml</a>
District of Columbia	DC Code §16-2841	<a href="http://newsroom.dc.gov/file.aspx/release/13210/02_%20DC%20Acts%20Part%201.pdf">http://newsroom.dc.gov/file.aspx/release/13210/02_%20DC%20Acts%20Part%201.pdf</a>
Florida	Fla Stat §90.4026	<a href="http://www.flsenate.gov/Laws/Statutes/2011/90.4026">http://www.flsenate.gov/Laws/Statutes/2011/90.4026</a>
Georgia	Ga Code Ann §24-3-37.1	<a href="http://www1.legis.ga.gov/legis/2005_06/search/sb3.htm">http://www1.legis.ga.gov/legis/2005_06/search/sb3.htm</a>
Hawaii	Haw Rev Stat §626-1, Rule 409.5	<a href="http://www2.hawaii.edu/~barkai/e/HRE.DOC">www2.hawaii.edu/~barkai/e/HRE.DOC</a>
Idaho	Idaho Code Ann §9-207	<a href="http://www.legislature.idaho.gov/idstat/Title9/T9CH2SECT9-207.htm">http://www.legislature.idaho.gov/idstat/Title9/T9CH2SECT9-207.htm</a>
Illinois	Ill Comp Stat §5/8-1901	<a href="http://www.ilga.gov/legislation/ilcfs/fulltext.asp?DocName=073500050K8-1901-">http://www.ilga.gov/legislation/ilcfs/fulltext.asp?DocName=073500050K8-1901-</a>
Indiana	Ind Code §34-43.5-1-1	<a href="http://www.in.gov/legislative/ic/code/title34/ar43.5/ch1.html#IC34-43.5-">http://www.in.gov/legislative/ic/code/title34/ar43.5/ch1.html#IC34-43.5-</a>
Iowa	Iowa Code §622.31	<a href="http://coolice.legis.state.ia.us/cool-ice/default.asp?category=billinfo&amp;service=iowacode&amp;ga=83&amp;input=622#62">http://coolice.legis.state.ia.us/cool-ice/default.asp?category=billinfo&amp;service=iowacode&amp;ga=83&amp;input=622#62</a>
Louisiana	La Rev Stat Ann §13:3715.5	<a href="http://legis.la.gov/lss/lss.asp?doc=77558">http://legis.la.gov/lss/lss.asp?doc=77558</a>
Maine	Me Rev Stat Ann tit. 24 §2907	<a href="http://www.mainelegislature.org/legis/statutes/24/title24sec2907.html">http://www.mainelegislature.org/legis/statutes/24/title24sec2907.html</a>
Maryland	Md Code Ann, Cts & Jud Proc §10-920	<a href="http://mlis.state.md.us/2005rs/bills/hb/hb0114f.pdf">mlis.state.md.us/2005rs/bills/hb/hb0114f.pdf</a>
Massachusetts	Mass Gen Laws Ann ch 233 23D	<a href="http://www.malegislature.gov/Laws/GeneralLaws/PartIII/TitleII/Chapter233/Section23D">http://www.malegislature.gov/Laws/GeneralLaws/PartIII/TitleII/Chapter233/Section23D</a>
Missouri	Mo Rev Stat §538.229	<a href="http://www.moga.mo.gov/statutes/C500-599/5380000229.HTM">http://www.moga.mo.gov/statutes/C500-599/5380000229.HTM</a>
Montana	Mont Code Ann §26-1-814	<a href="http://data.opi.mt.gov/bills/mca/26/1/26-1-814.htm">http://data.opi.mt.gov/bills/mca/26/1/26-1-814.htm</a>
Nebraska	Neb Rev Stat §27-1201	<a href="http://nebraskalegislature.gov/laws/statutes.php?statute=27-1201">http://nebraskalegislature.gov/laws/statutes.php?statute=27-1201</a>
New Hampshire	NH Rev Stat Ann §507-E:4	<a href="http://www.gencourt.state.nh.us/rsa/html/LII/507-E/507-E-4.htm">http://www.gencourt.state.nh.us/rsa/html/LII/507-E/507-E-4.htm</a>
North Carolina	NC Gen Stat §8C-1, Rule 413	<a href="http://www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_8C/GS_8C-413.html">http://www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_8C/GS_8C-413.html</a>
North Dakota	ND Cent Code §31-04-12	<a href="http://www.legis.nd.gov/assembly/60-2007/session-laws/documents/JPROF.pdf#CHAPTER284">http://www.legis.nd.gov/assembly/60-2007/session-laws/documents/JPROF.pdf#CHAPTER284</a>
Ohio	Ohio Rev Code Ann §2317.43	<a href="http://codes.ohio.gov/orc/2317.43">http://codes.ohio.gov/orc/2317.43</a>
Oklahoma	Okla Stat tit 63 §1-1708.1H	<a href="http://law.justia.com/codes/oklahoma/2006/os63.html">http://law.justia.com/codes/oklahoma/2006/os63.html</a>
Oregon	Or Rev Stat §677.082	<a href="http://www.oregonlaws.org/ors/677.082">http://www.oregonlaws.org/ors/677.082</a>
South Carolina	SC Code Ann §19-1-190	<a href="http://www.scstatehouse.gov/code/t19c001.php">http://www.scstatehouse.gov/code/t19c001.php</a>
South Dakota	SD Codified Laws §19-12-14	<a href="http://legis.state.sd.us/statutes/DisplayStatute.aspx?Statute=19-12-14&amp;Type=Statute">http://legis.state.sd.us/statutes/DisplayStatute.aspx?Statute=19-12-14&amp;Type=Statute</a>
Tennessee	Tenn Code Ann §409.1	<a href="http://www.tncourts.gov/rules/rules-evidence/4091">http://www.tncourts.gov/rules/rules-evidence/4091</a>
Texas	Tex Rev Civ Prac & Rem Code Ann §18.061	<a href="http://www.statutes.legis.state.tx.us/SOTWDocs/CP/html/CP.18.htm">http://www.statutes.legis.state.tx.us/SOTWDocs/CP/html/CP.18.htm</a>
Utah	Utah Rules of Evidence, Rule 409	<a href="http://www.utcourts.gov/resources/rules/ure/0409.htm">http://www.utcourts.gov/resources/rules/ure/0409.htm</a>
Vermont	Vt Stat Ann tit 12 §1912	<a href="http://www.leg.state.vt.us/statutes/fullsection.cfm?Title=12&amp;Chapter=081&amp;Section=01912">http://www.leg.state.vt.us/statutes/fullsection.cfm?Title=12&amp;Chapter=081&amp;Section=01912</a>
Virginia	Va Code Ann §8.01-581.20:1	<a href="http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+8.01-581.20C1">http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+8.01-581.20C1</a>
Washington	Wash Rev Code Ann §5.64.010	<a href="http://apps.leg.wa.gov/rcw/default.aspx?cite=5.64.010">http://apps.leg.wa.gov/rcw/default.aspx?cite=5.64.010</a>
West Virginia	W Va Code §55-7-11a	<a href="http://www.legis.state.wv.us/WVCODE/ChapterEntire.cfm?chap=55&amp;art=7&amp;section=11A#07">http://www.legis.state.wv.us/WVCODE/ChapterEntire.cfm?chap=55&amp;art=7&amp;section=11A#07</a>
Wyoming	Wyo Stat Ann §1-1-130	<a href="http://legisweb.state.wy.us/statutes/titles/Title1/T1CH1.htm">http://legisweb.state.wy.us/statutes/titles/Title1/T1CH1.htm</a>

apology is inadmissible. These time limits are intended to encourage swifter communication by the physician. For example, Washington and Vermont place a 30-day restriction on an admission, while Illinois allows a 72-hour window for the statement to be inadmissible. The general

assemblies of both South Carolina and Georgia have voiced the opinion that expressions of sympathy should be encouraged to promote communication between a physician and the patient who experienced an unexpected outcome. Georgia’s statute states, “General Assembly further finds



that such conduct, statements, or activity should be particularly encouraged between health care providers and patients experiencing an unanticipated outcome resulting from their medical care." South Carolina's statute contains nearly identical wording.<sup>1</sup>

A very important distinction has arisen in some states between a statement of sympathy and an admission of fault.<sup>1,2</sup> For instance, Maine and Louisiana make this particular distinction in their apology laws by stating that nothing in the statute prohibits the admissibility of a statement of fault. The laws of Nebraska, Virginia, Vermont, Louisiana, Maryland, South Dakota, Indiana, Hawaii, California, Florida, Tennessee, Illinois, Missouri, New Hampshire, Idaho, and the District of Columbia include similar language in their statutes. Vermont's wording is a little different, stating "liability protections ... shall not be construed to limit access to information that is otherwise discoverable." Although most apology laws are categorized under rules of evidence pertaining to a medical error, many states protect apologies regardless of whether the outcome results from medical malpractice.<sup>1,2,5</sup>

### Conclusion

A number of studies have demonstrated that apologies in the medical arena have reduced the cost of litigation. A simple apology allows physicians to remain true to their honesty and integrity while exhibiting their humanity and providing some much-needed closure to their patients and their patients' families. It is the amelioration of this anger that leads to less costly litigation. Therefore, we believe that if a physician's jurisdiction has the appropriate legislation, he or she should consider apologizing for an unexpected medical outcome. It may be the best medicine available to soothe the feelings of a patient or family and to avoid a malpractice lawsuit.

**Editor's Note:** The authors are not providing legal advice concerning apology laws and recommend that physicians carefully scrutinize the laws of any particular jurisdiction and consult with an attorney from that state to see which statements are and are not covered.

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