Don't Regret Saying You're Sorry

A Fifty-State Survey of "Apology Laws" and Their Effect on Medical Malpractice Suits

By John Hicks and Courtney McCray

Is saying, "I'm sorry," an admission of fault? In many jurisdictions, it depends.

Learning to apologize is one of the first skills of etiquette children are taught. As children, we are taught that apologizing is important because it displays remorse over our behaviors and acknowledgement that our actions hurt someone else. As adults, we recognize that failing to apologize can often cause more pain than the underlying act. Yet, we find it difficult to say, "I'm sorry," unless we truly believe we are at fault. This can be true even when we know the perceived offense is very real to the other person. The concept of an "apology law" recognizes this dilemma and attempts to make allowances for apologies from healthcare providers, while protecting the healthcare provider from any sympathetic statements being used against him or her in a subsequent lawsuit. In general, apology statutes restrict the admissibility of statements of benevolence, sympathy, commiseration, condolence, or compassion made by a healthcare provider to a patient or patient's representative after an unanticipated outcome of medical care or treatment. However, not all "apology laws"

■ John Hicks is the managing member of Norris Keplinger Hicks & Welder LLC in Overland Park, Kansas. He is an AV-rated trial attorney who practices in both Kansas and Missouri. Mr. Hicks practices all types of civil litigation but specializes in professional malpractice defense. He has handled a wide range of professional negligence claims involving physicians, nursing homes, attorneys, architects, engineers, and accountants. He also defends businesses in the retail and hospitality industry. Courtney McCray joined Norris Keplinger Hicks & Welder LLC in April 2019. Courtney received her law degree from the University of Kansas School of Law in 2019. In law school, Ms. McCray competed in Transactional Law Meet, where she placed first regionally and represented KU national in New York City. She also volunteered in the elder law clinic for Kansas Legal Services, assisting low-income individuals with a variety of legal matters.

are created equal and few provide adequate protection for the truly penitent physician.

The first apology law was enacted in Massachusetts in 1986. Since then, thirty-eight states plus the District of Columbia have enacted some version of an "apology law." This number was previously thirty-nine, but as further discussed below, Illinois declared the apology provision unconstitutional by the state supreme court in 2010. These laws were enacted as part of medical malpractice tort reform, which is a large concern for physicians, lawyers, legislators, and patients because in addition to increased litigation, medical malpractice awards have increased at a quicker rate than any other tort area. The states that have enacted some form of an apology law are: Alaska (Alaska Stat. §09.55.544), Arizona (Ariz. Rev. Stat. Ann. §12-2605), California (Cal Evid Code §1160), Colorado (Colo. Rev. Stat. §12-25-135), Connecticut (Conn. Gen. Stat. §52-184d), Delaware (Del. Code. Ann. Tit. 10, §4318), Florida (Fla. Stat. §90.4026), Georgia (Ga. Code §24-4-416), Hawaii (Hawaii Rev. Stat. §626-1, Rule 409.5), Idaho (Idaho Code §9-2-9-207), Indiana (Ind. Code §34-43.5-1-1 *et seq.*), Iowa (Iowa Code §622.31), Louisiana (La. Rev. Stat. Ann. §13:3715.5), Maine (Me. Rev. Stat. Ann. tit. 24, §2907), Maryland (Md. Courts & Judicial Proceedings Code Ann. §10-920), Massachusetts (Mass. Gen. Laws. Ann. Ch. 233, §79L), Michigan (Mich. Comp. Laws §600.2155), Missouri (Mo. Rev. Stat. §538.299), Montana (Mont. Code. Ann. §26-1-814), Nebraska (Neb. Rev. Stat. §27-1201), New Hampshire (N.H. Rev. Stat. Ann. §507-E:4), North Carolina (N.C. Gen. Stat. §8C-1, Rule 413), North Dakota (N.D. Cent. Code §31-04-12), Ohio (Ohio Rev. Code Ann. §2317.43), Oklahoma (Okla. Stat. tit. 63, §1-1708.1H), Oregon (Or. Rev. Stat. §677.082), Pennsylvania (Pa. Stat. tit. 35, §10228.1 et seq.), South Carolina (S.C. Code Ann. §19-1-190), South Dakota (S.D. Codified Laws Ann. §19-12-14), Tennessee (Tenn Evid. §409.1), Texas (TX Civ Prac & Rem §18.061), Utah (Utah Code Ann. §78B-3-422), Vermont (Vt. Stat. Ann. tit. 12, §1912), Virginia (Va. Code §8.01-52.1), Washington (RCW §5.64.010), West Virginia (W. Va. Code §55-7-11A), Wisconsin (Wis. Stat. §904.14), and Wyoming (Wyo. Stat. §1-1-130).

The apology laws that have been enacted range from broad and far-reaching to narrow and limited. The differences in these statutes have immense evidentiary and legal consequences, and it is important to understand what type of law, if any, is applicable in your state.

Generally, the apologetic statements these laws aim to protect occur out of court—which could make them hearsay and traditionally inadmissible throughout litigation. However, this type of apology is often considered a statement against interest and therefore admissible as an exception to hearsay. These laws aim to counteract the juxtaposition between the law and colloquial speaking—where an apology often expresses remorse for the situation and empathy towards the pain of the injured party, not the intent of imposing liability on the apologizer.

The idea behind enacting these laws is that with an apology and explanation of what caused the unanticipated outcome, a patient would be less likely to seek answers through a medical malpractice claim—reducing anger, insurance premiums, and the cost of healthcare. These apologies also improve communication between parties, resulting in increased feeling of patient safety and satisfaction. This set of laws embodies the American Medical Association's belief that, "a physician should at all times deal honestly and openly with patients."

A common societal misconception is that plaintiffs seek legal action after unanticipated medical outcomes to squeeze every penny they can from the healthcare system. While compensation is one underlying motive, one study found that patients feel the need to hire an attorney when they have not received adequate answers to questions about their outcomes, when they sense the absence of accountability for what happened to them, and when they worry the same mistake could be made in another patient's care. That same study found that 37 percent of respondents said an explanation and an apology would have prevented the lawsuit. Charles Vincent, et al., *Why Do People Sue Doctors? A Study of Patients and Relatives Taking Legal Action*, 343 Lancet 1609–13 (1994). The enactment of an apology law allows a medical provider to make a statement of sympathy to an injured patient without the fear that the statement will be later used against him or her in court.

There is an argument that with an apology, a physician may alert a patient to malpractice he or she would not have otherwise discovered or embolden the patient to conclude that malpractice has occurred when he or she would have been otherwise unsure. Contrary to the aim of apology laws, this could lead to increased malpractice litigation and higher demands of settlements, when the patient would not have otherwise recognized the malpractice. *See* Sandra G. Boodman, *Should Hospitals—and Doctors—Apologize for Medical Mistakes?*, Wash. Post (March 12, 2017), **https://perma.cc/6VUC-TZP6** ("Most patients never learn they are victims of medical error"). However, the University of Michigan Health Service (UMHS) reported that its per case payments decreased, and the settlement time dropped from twenty to six months since the introduction of a 2001 "Apology and Disclosure Program," which required healthcare professionals to apologize to patients who complained of injury under UMHS care.

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legal consequences, and it is important to understand what type of law, if any, is applicable in your state. Across the board of "apology laws," states have taken two general approaches: a total protection of an apology and protection of only partial apologies.

Partial Protection of Apology Laws

The apology statutes that many states have elected to adopt do not offer the apologizer full protection from admissibility. This category of apology statutes preserves the admissibility of apologies that admit fault. These states are: Alaska, Delaware, Hawaii, Indiana, Idaho, Maine, Massachusetts, Michigan, Missouri, Maryland, Nebraska, New Hampshire, Pennsylvania, South Dakota, Utah, and Virginia. For example, in Maryland, the statute reads:

> (b)(1) Except as provided in paragraph (2) of this subsection, in a proceeding subject to Title 3, Subtitle 2A of this article or a civil action against a health care provider, an expression of regret or apology made in writing, orally, or by conduct, is inadmissible as evidence of an admission of liability or as evidence of an admission against interest.
>
> (2) *An admission of liability or fault* that is part of or in addition to a communication made under paragraph (1) of this subsection *is admissible* as evidence of an admission of liability or as evidence of an admission against interest in an action described under paragraph (1) of this subsection.

MD Code §10-920, emphasis added. These statutes protect statements such as, "I am sorry you were injured during surgery." However, "I am sorry you were injured during surgery because I nicked an artery" is only partly inadmissible. The "I nicked an artery" portion of the statement would remain admissible under this category of laws. If within the statement of condolence or the apology, the healthcare provider admits fault in these jurisdictions that statement is admissible.

This partial protection, while stemming from an understandable legislative intent, continues to restrict the communication between the physician and the injured party. It is reasonable that many states want to avoid such a broad protection that a full admission of liability would be excluded from evidence. However, much of the aim of these laws is to promote open communication between a healthcare provider and the injured party. If a healthcare provider is expressing sympathy while tiptoeing around the fault restrictions of the statute, he or she is more likely to produce an apology that appears insincere or suspicious—potentially raising more questions from the injured party.

Total Protection of Apology Laws

In contrast to states offering only a partial protection, a number of jurisdictions' statutes offer total protection of an apology made by a healthcare provider. These states are Arizona, Colorado, Connecticut, Washington D.C., Georgia, Iowa, Louisiana, Montana, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, Vermont, West Virginia, Wisconsin, and Wyoming. For example, the Colorado apology law reads:

> In any civil action brought by an alleged victim of an unanticipated outcome of medical care, or in any arbitration proceeding related to such civil action, any and all statements, affirmations, gestures, or conduct expressing apology, fault, sympathy, commiseration, condolence, compassion, or general sense of benevolence which are made by a healthcare 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 which relate to the discomfort, pain, suffering, injury, or death of the alleged victim as a result of the unanticipated outcome of medical care shall be inadmissible as evidence of an admission of liability or as evidence of an admission against interest.

C.R.S.A. §13-25-135

This category of apology statutes facilitates a much broader protection for the apologizer, in turn promoting more open communication and transparency between the parties. With the entire apology inadmissible as evidence, the healthcare provider is able to provide more explanation of why the unanticipated outcome occurred and fully express sympathy, without the underlying concern of admissibility.

General Apology Statutes

A third category of statutes that have been adopted are generic apology laws that apply beyond the scope of the healthcare field. Instead of specifying that the benevolent or sympathetic statement or gesture must be made by a healthcare provider, this category of laws allows the statute to be expanded to any "accident." For example, California's statute reads:

> (a) The portion of statements, writings, or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering, or death of a person involved in an accident and made to that person or the family of that person shall be inadmissible as evidence of an admission of liability in a civil action. A statement of fault, however, which is part of, or in addition to, any of the above shall not be admissible pursuant to this section."
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> (b) For purposes of this section:
>
> (1) "Accident" means an occurrence resulting in injury or death to one or more persons which is not the result of willful action by a party.
>
> (2) "Benevolent gestures" means actions which convey a sense of compassion or commiseration emanating from humane impulses."
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> (3) "Family" means the spouse, parent, grandparent, stepmother, stepfather, child, grandchild, brother, sister, half-brother, half-sister, adopted children of parent, or spouse's parents of an injured party.

Cal.Evid.Code 1160. While this code only applies in civil actions, not criminal, it is broader than only healthcare and applies broadly to "accidents." There is little caselaw on the application of this statute, but we assume it would apply equally to medical malpractice claims, car accidents, and other negligence claims. States that have adopted this approach to an apology statute are California, Florida, Massachusetts, Texas, Tennessee, and Washington.

Interestingly, one state, Massachusetts, fell into both categories—with a specific healthcare apology law and a separate "accident" law. (*See* M.G.L.A. 233 §79L; M.G.L.A. 233 §23D).

States with No Apology Statute

When you combine specific healthcare laws and "accident" apology laws, thirty-eight states plus the District of Columbia have adopted apology laws. This leaves twelve states that allow the admission of benevolent and sympathetic statements into evidence. These states are Alabama, Arkansas, Illinois, Kansas, Kentucky, Minnesota, Mississippi, New Jersey, Nevada, New Mexico, New York, and Rhode Island. These states have taken a variety of approaches to the treatment of benevolent statements—from overturning previously enacted apology laws to having no notable intent to enact an apology law at all.

One state, Illinois, formerly enacted a two-year "trial period" of an apology statute. Called the "Sorry Works! Pilot Program Act," this act was intended to assess whether prompt apologies by hospitals and physicians for errors in patient care accompanied by prompt offers of fair settlements would have an effect on the costs the hospitals and physicians ultimately expend on healing arts malpractice claims.

One state, Illinois, formerly enacted a two-year "trial period" of an apology statute. Called the "Sorry Works! Pilot Program Act," this act was intended to assess whether prompt apologies by hospitals and physicians for errors in patient care accompanied by prompt offers of fair settlements would have an effect on the costs the hospitals and physicians ultimately expend on healing arts malpractice claims. The act contained provisions for the hospital and physicians to review each incident thoroughly, a meeting between the hospital and the family, and if a mistake was made, offering an apology was the first step, followed by a plan by the hospital and physician to ensure that the mistake would not happen again. This trial was intended to include just one hospital, and if not terminated prior to the end of the first year, one additional hospital would be added for year two. *710 ILCS* 45/405 (West 2006).

This statute was overturned by the Illinois Supreme Court in *Lebron v. Gottlieb Memorial Hospital. Lebron v. Gottlieb Memorial Hospital,* 930 N.E.2d 895 (2010). This case focused primarily on the unconstitutionality of a cap on non-economic damages, which was also a sub-section of the larger medical liability reform statute of which the Illinois apology law was part. An inseverability provision voided the statute in its entirety—eliminating the Illinois apology law, as well. *Id.* at 914. The *Lebron* opinion acknowledges the apology law was deemed invalid solely on inseverability grounds, specifically allowing the legislature to reenact the law if appropriate. *Id.* However, no further apology law has been enacted.

In 2011, Kansas House Bill 2069 (also known as the "apology act") and Senate Bill No. 142 (also known as the "transparency act") were introduced. Both bills sought to prevent a doctor's apology to patients from being used against them in court.

SB 142 would have excluded apologies from being used as evidence in lawsuits, but would not have excluded, "any apology or other statement or gesture that acknowledges or implies fault." HB 2069, in contrast, would exclude all statements made during a special facilitated meeting. This meeting would have similar characteristics of a mediation—allowing parties to negotiate freely for settlement purposes only. Proponents of HB 2069 argued that without blanket protection, doctors would still be reluctant to apologize for fear of "implying fault" during an apology. After hearing arguments for and against both bills, the Senate Judiciary Committee closed hearings on both bills without further action. Kansas remains without an apology law.

The State of Kentucky has attempted to pass an apology law on three occasions. Senator Ralph Alvarado, a doctor serving in the Kentucky General Assembly, sponsored all three bills, but none have been passed into law. Currently, Kentucky has no statute protecting a physician's apology from being used against him or her.

Interestingly, on a related matter, Kentucky has enacted a law regarding reimbursements or payments made to a patient that reads:

(1) In any malpractice action against any health care provider, no payment made or offered by or on behalf of the health care provider to the claimant to meet the reasonable expenses of health care, custodial care, loss of earnings, rehabilitation care, or other essential goods or services, shall constitute or be evidence of an admission of liability on the part of such health care provider, and no such payment or offer shall be admissible in evidence in any such action, except after a verdict for the purpose of offsetting any damages awarded. The court shall reduce the amount of any judgment for damages awarded in such malpractice action by the amount of any advance payment made by any defendant health care provider or malpractice insurer on behalf of such defendant health care provider to the claimant.

(2) In any malpractice action where there is more than one (1) defendant health care provider, and in the event an advance payment made by or on behalf of one (1) or more of said de-

fendants exceeds the respective liability of said defendant making it, the court shall order any adjustment necessary to equate with its percentage liability the amount which said defendant is obligated to pay, exclusive of costs.

(3) In no case shall an advance payment in excess of any award of damages be repayable by the claimant.

Ky. Rev. Stat. Ann. §304.40-280. Similar to the goal of apology laws, this law protects conduct after an unanticipated medical consequence from being used in litigation.

In 2007, Nevada SB 174 discussed the possible addition of an apology statute in Nevada. The bill in question was a full protection from admissibility, with no exception made for admission of fault. On March 23, 2007, in the hearing on this bill, Senator Joseph Heck, the bill sponsor and also a physician, stated,

> Traditionally, physicians have been advised not to apologize to patients for medical errors for fear that the apology would be seen as an admission of negligence and subsequently used against the physician. This advice has come from physician educators, mentors and attorneys. Unfortunately, this advice, which has been heeded by many physicians, results in a chilling and staining of the patient-physician relationship at the very time when the patient is most in need….In the context of medical errors, research has demonstrated that what the typical patient desires most is that the physician acknowledge the error and explain it, take responsibility and apologize, and discover the underlying cause and take steps to prevent a recurrence. An apology meets a primary need of the patient.

In a 4–3 vote along party lines, the Senate Judiciary Committee allowed the bill to move forward, with all four Republicans supporting the proposal and Democrats voting "no." However, this bill was never passed into law, and Nevada remains without any apology statute.

In Rhode Island, similar to Kentucky, two statutes have been implemented that protect admission into evidence that a healthcare provider provided advance payment or failed to bill a patient for healthcare services. RI ST §9-19-36 concerns advance payments in medical malpractice cases. It reads:

> Any advance payment for medical bills by a health care provider or by the insurer of a health care provider shall not be construed as an admission of liability and shall not be admissible in evidence as to liability in any hearing or trial of an action of tort or breach of contract for malpractice, error, or mistake against a health care provider; provided, however, that nothing herein shall be construed to limit the right of a health care provider to introduce in evidence any advance payment for medical bills in diminution of damages.

RI ST §9-19-36. A similar statute protects the admissibility of evidence that a health care provider failed to bill a patient. This statute reads:

> (b) The failure of a health care provider to bill a patient for services rendered shall not be construed as an admission of liability and shall not be admissible in evidence as to liability in any hearing or trial of an action of tort or breach of contract for malpractice, error, or mistake against a health care provider.

RI ST §9-19-35. The caselaw application of this statute has excluded from evidence any failure to bill that gives rise to an inference of some acceptance of responsibility by the healthcare provider. In *Cappuccilli v. Carcieri*, the plaintiff's ovarian vein was lacerated during an emergency cesarean section. *Cappuccilli v. Careieri*, 174 A.3d 722, (R.I. 2017). The plaintiff suffered depression, anxiety, and nightmares following recovery. The hospital's risk management department paid for the plaintiff's antidepressant prescription. The judge determined that admitting the medication payment into evidence could be, "construed by the jury as an admission of liability in the sense that early after this woman's treatment at that hospital, they are paying for medication to treat a symptom that she is not going to argue was proximately caused by what the doctor in the hospital did to her." *Id.* at 735.

Conclusion

The concepts of "what is right" and "what protects from liability and litigation" rarely collide. However, the concept of an apology law is one of the few exceptions. As attorneys, we often seek to reduce the risk of litigation by limiting what our clients say or do. Yet, studies show that plaintiffs sue doctors to understand what happened, to protect the safety of future patients, and from an overall desire to hold caregivers accountable. Monetary compensation often comes secondary to these underlying motives. The range of apology laws that have been enacted by the states attempt to allow transparency between a healthcare provider and his or her patient—ultimately attempting to reduce medical malpractice claims. However, not all lawsuits are preventable.

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As healthcare lawyers, it is important to know how your jurisdiction will handle your client's "apology" when it is not enough to dissuade a patient from filing suit. We also must advise our clients that few, if any, jurisdictions will exclude overt admissions of fault. The line between where the inadmissible apology ends, and the statement of fault begins, is not often black and white. If your state is one of the thirty-eight states with a version of an apology statute, "I'm sorry" will be inadmissible as evidence. Expanding beyond this simple apology is where the line blurs, and a health care provider might regret saying sorry.