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I'm Sorry I'm Scared of Litigation: Evaluating the Effectiveness of Apology Laws

Erika R. Davis

University of Tennessee - Knoxville

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I’M SORRY I’M SCARED OF LITIGATION:
EVALUATING THE EFFECTIVENESS OF APOLOGY LAWS

ERIKA R. DAVIS*

.....
“[A]n apology is remarkably complex, yet simple and
straightforward at the same time.”
- Aaron Lazare, “*On Apology*”
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I. INTRODUCTION

As young children we are taught the golden rule – to treat others how we would like to be treated.¹ When that does not happen we are told to apologize.² It is irrelevant whether our wrongful acts or words were done accidentally or purposefully.³ What matters is that we recognize and acknowledge the aggrieved individual's feelings, express our sympathy, and sincerely apologize. These life lessons we learned in kindergarten are equally important for us to carry with us as adults. Unlike what we may want to believe, adults are not very different from young children in this respect. We like to think that, as adults, we are better communicators than children. The truth is, adults can conjure up just as many excuses not to apologize – no one is around to tell them to apologize. Adults simply have their conscience, which is influenced by what is put into that conscience, to nudge them in the right direction. Long gone are the days when we were yelled at by our parents for giving a backhanded apology to our sibling – which was sometimes worse than giving no apology at all. However, we still like to pass blame, make excuses, and avoid any sense of vulnerability when a mistake occurs. It can seem easier to hide behind a veil of justifications, excuses, and fears.

This veil we hide behind to avoid apologizing is also used by physicians in the medical environment. Although physicians may feel the need to apologize after an adverse medical event, physicians' gut instincts to apologize are often hampered by the fear that their statements will be used against them in court.⁴ This fear is further

* J.D. Candidate, The University of Tennessee College of Law, Concentration in Advocacy and Dispute Resolution (May 2016); B.A. in German and Political Science, The University of Michigan (2013).

¹ See *Matthew 7:12*. See also *Luke 6:31*.

² See Nancy L. Zisk, *A Physician's Apology: An Argument against Statutory Protection*, 18 RICH. J.L. & PUB. INT. 69, 370 (2015).

³ *Id.*

⁴ See Nicole Saitta & Samuel D. Hodge, Jr., *Efficacy of a Physician's Words of Empathy: An Overview of State Apology Laws*, 112 J. AM. OSTEOPATHIC ASS'N, 302, 302 (2012); Robert B. Gibson & Laura A. Del Vecchio, *Does Sorry Work? Effects of "Full Disclosure" on Litigation*, 47 D.R.I. FOR DEF., 41, 42 (2006).

solidified when their attorneys advise them to be careful to not admit fault or liability.⁵ This assumingly well-thought-out strategy to remain silent actually creates an unexpected paradox:⁶ refusing to apologize can precipitate litigation to an even greater extent.⁷ Consequently, this lack of apology can dilute the doctor-patient relationship, hinder patient safety, and increase litigation.⁸

To combat the apologetic barriers in the medical community, states have enacted apology and disclosure laws. Institutions and some states have implemented disclosure programs, and the federal government has attempted to enact disclosure legislation; all with the hope of encouraging apologies by physicians to patients following an adverse medical event.⁹ This essay will explore these proactive responses to combat the apologetic barriers in the medical community by analyzing the components of an effective apology, evaluating the effectiveness of current state apology laws and like-minded programs, and proposing ways to better facilitate doctor-patient communication, improve patient safety, and reduce litigation.

⁵ See Benjamin Ho & Elaine Liu, *Does Sorry Work? The Impact of Apology Laws on Malpractice* 1, 3-4 (2011), <http://irving.vassar.edu/faculty/bh/Ho-Liu-Apologies-and-Malpractice-nov15.pdf>; Saitta & Hodge, Jr., *supra* note 4, at 304.

⁶ See Saitta & Hodge, Jr., *supra* note 4, at 303.

⁷ Anna C. Mastroianni, Michelle M. Mello, Shannon Sommer, Mary Hardy & Thomas H. Gallagher, *The Flaws In State 'Apology' and 'Disclosure' Laws Dilute Their Intended Impact On Malpractice Suits* 29 HEALTH AFF. 1611, 1611 (2010).

⁸ See Sigall K. Bell, Peter B. Smulowitz, Alan C. Woodward, Michelle M. Mello, Anjali Mitter Duva, Richard C. Boothman & Kenneth Sands, *Disclosure, Apology, and Offer Programs: Stakeholders' Views of Barriers to and Strategies for Broad Implementation*, 90 THE MILBANK Q. 682, 684 (2012); Richard Boothman & Margo M. Hoyler, *The University of Michigan's Early Disclosure and Offer Program*, BULL. AM. C. SURGEONS, (2013), <http://bulletin.facs.org/2013/03/michigans-early-disclosure/>; Ho & Liu, *supra* note 4 at 4; Mastroianni, Mello, Sommer, Hardy & Gallagher, *supra* note 6, at 1611; Barbara Phillips-Bute, *Transparency and Disclosure of Medical Errors: It's the Right Thing to Do, So Why the Reluctance?*, 35 CAMPBELL L. REV. 333, 336 (2013); Zisk, *supra* note 2, at 386.

⁹ Gibson & Del Vecchio, *supra* note 4, at 2-10.

II. APOLOGIES AND THE MEDICAL ENVIRONMENT

The problem with apologies by physicians in the medical environment following adverse medical events is that the apologies are either non-existent or ineffective.¹⁰ To evaluate the laws and programs that have been enacted to encourage effective apologies, we must first understand what an effective apology is, and why it matters in the medical community. “[A]n apology is remarkably complex, yet simple and straightforward at the same time.”¹¹ Sincerity is key. Sincerity ignites the flame of truth in the ears of the aggrieved because the emotion behind the apology ties together the offender’s words with the aggrieved individual’s receptiveness to the apology.

A. WHAT IS AN APOLOGY?

To understand whether a sincere apology is being given, it is vital to understand the difference between an apology and an account. An account consists of explanations or excuses that invoke a sense of denial or mitigation on behalf of the offender.¹² Derived from the Greek word “apologia,” the old English term ‘apology’ was defined to be a “justification, explanation, defense or excuse[,]” and no expression of regret was necessary.¹³ The older understanding of an apology would actually be classified as an account today. “[W]hen we resort to excuse, explanation, or justification, we necessarily attempt to distance ourselves from our actions”¹⁴ Quite often, individuals resort to classifying their statements as apologies when they are actually accounts.

Breaking down this shield of excuses and entering into a state of vulnerability is what an apology is about.¹⁵ An apology is a statement by an offender to the offended saying the offender

¹⁰ See Phillips-Bute, *supra* note 8, at 336.

¹¹ AARON LAZARE, ON APOLOGY 23 (Oxford University Press) (2004).

¹² See NICHOLAS TAVUCHIS, MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION 17-18 (Stanford University Press) 1991; See also ERVING GOFFMAN, RELATIONS IN PUBLIC: MICROSTUDIES OF THE PUBLIC ORDER 109-111 (Basic Books, Inc.) (1971).

¹³ LAZARE, *supra* note 11, at 24.

¹⁴ TAVUCHIS, *supra* note 12, at 19.

¹⁵ *Id.* at 18.

acknowledges responsibility for an act and also expresses regret for that act to the offended individual.¹⁶ Unlike accounts, apologies create a state of vulnerability for the offender because, as an offender, you are not justifying or excusing your actions.¹⁷ This state of vulnerability, created by admitting fault, is what makes apologies so effective.

B. COMPONENTS OF AN EFFECTIVE APOLOGY

An effective apology should generally consist of four basic components: (1) acknowledging and accepting responsibility for the offense; (2) expressing remorse with forbearance, sincerity, and honesty; (3) explaining the understanding of the offense; and (4) willingness to make reparations.¹⁸ A more thought-provoking understanding of these components is seen through a self-focus and self-other focus lens.¹⁹ While self-focus reflects on how the offender gives an apology, the self-other focus reflects on how the offender should be cognizant of the offended individual's feelings in order to give an effective apology.²⁰ This deeper lens was developed from an Australian experiment of lay people, each of whom had been in an intimate relationship within which a wrong occurred, who then gave their interpretations of an effective apology.²¹ It was found that effective apologies consist of at least one, if not all, of the following three components: (1) affirmation; (2) affect; and (3) action.²² Within these components, "self" and "self-other" sub-components were found to comprise an effective apology (See Figure 1).²³ Although all three components are unnecessary to create an effective apology, all three may be necessary when the perceived wrongful conduct is serious.²⁴ To better understand these components, the following statement contains all components of an effective apology:

¹⁶ See LAZARE, *supra* note 11, at 23. See also TAVUCHIS, *supra* note 2, at 19.

¹⁷ See TAVUCHIS, *supra* note 12, at 18.

¹⁸ See LAZARE, *supra* note 11, at 25; LAZARE, *supra* note 11, at 107.

¹⁹ See Debra Slocum, Alfred Allan & Maria M. Allan, *An Emerging Theory of Apology*, 63 AUSTL. J. PSYCHOL. 83, 87 (2011).

²⁰ *Id.*

²¹ *Id.* at 85.

²² *Id.* at 86.

²³ *Id.* at 87.

²⁴ *Id.* at 90.

I am so sorry for breaking your vase. I feel terrible. I should have been more careful. I will replace it before we see each other again.

	Affirmation	Affect	Action
Self	Admission	Regret	Restitution
Self-Other	Acknowledgement	Remorse	Reparation

Figure 1: Multi-Dimensional Components of an Authentic Apology adapted from Debra Slocum, Alfred Allan & Maria M. Allan, *An Emerging Theory of Apology*, 63 AUSTL. J. PSYCHOL., 83, 87 (2011).

The first, and most essential, component of an effective apology is “affirmation” because the offender admits his/her wrongful behavior (self-focus) and acknowledges why the offended individual was hurt (self-other focus).²⁵ As one of the Australian experiment’s participants stated, “[a] deep, deep sorry takes lots of words. It’s not just ‘I’m sorry.’ It’s lots of words.”²⁶ It is not just about what the offender says, but how the offended individual perceives this and whether it adequately helps heal the emotional wounds. To do this, the offender must accurately understand the offense from the offended individual’s perspective.²⁷ If the offender is not sure what was offensive, a conversation with the aggrieved individual should occur. In instances where the offender does not have an adequate understanding of the aggrieved individual’s perspective, the apology is often vague, which creates limited satisfaction when it is spoken to the aggrieved individual.²⁸ Further, when admitting one’s wrongful behavior, an individual’s explanation should only be used to “demystify the offenses,” not excuse the offenses.²⁹ To do otherwise would turn the apology into an account. Therefore, the self-other focus factor is invaluable in the affirmation characteristic of an apology.

The second component of an effective apology is “affect,” which reflects the offender’s emotional response by containing an

²⁵ *Id.* at 89; LAZARE, *supra* note 11, at 77.

²⁶ *See* Slocum, Allan & Allan, *supra* note 19, at 86.

²⁷ *See* LAZARE, *supra* note 11, at 77.

²⁸ *Id.* at 86.

²⁹ *Id.* at 120.

expression of regret (self-focus) and an expression of remorse (self-other focus).³⁰

Words can be empty; they can be an apology, but aren't an apology. I thought I needed to hear the words, now I think I needed to see his sorrow and for him to have sorrow, to experience it for the right reasons; for him to truly understand the why of why I was hurt and hurting, and that he joined with me in my hurt, hurting for the same reasons³¹

This participant clearly recognized the need for remorse rather than mere regret. Remorse is professed with “a gnawing distress arising from a sense of guilt for past wrongs.”³² Feeling remorseful and expressing remorse is a part of showing that you accept responsibility. “Such humility contributes to restoring the dignity of the offended party.”³³

The third component of an effective apology is “action,” which consists of restitution (self-focus) and reparation (self-other focus).³⁴ This component is often necessary when words are not enough.³⁵ Restitution alone – where the offender says he or she will not do the act again or is taking steps to prevent himself or herself from doing the act again – is often not enough.³⁶ Restitution often makes the aggrieved individual feel like the offender is merely trying to quickly end the situation, win him/her over, or relieve guilt in a selfishly-motivated fashion.³⁷ Reparation is needed to supplement restitution because reparation demonstrates that the apology is beyond cheap talk and is, instead, a grievance that the offender takes seriously and wishes to repair the wrong.³⁸

³⁰ *Id.* at 87.

³¹ *Id.* at 86.

³² MERRIAM-WEBSTER'S DICTIONARY (2015), <http://www.merriam-webster.com/dictionary/remorse>.

³³ *See* LAZARE, *supra* note 11, at 116.

³⁴ *See* Slocum, Allan & Allan, *supra* note 19, at 89.

³⁵ *See* LAZARE, *supra* note 11, at 44.

³⁶ *Id.* at 90.

³⁷ *Id.* at 90.

³⁸ *Id.* at 127.

When the “affect” component is used absent the “admission” component, a partial apology is born.³⁹ Partial apologies do not admit fault or responsibility. An example of this is: “I am sorry you are hurt” instead of “I am sorry I hurt you.” It has been found that partial apologies can be worse than not apologizing at all.⁴⁰ Furthermore, partial apologies are not as effective as full apologies where fault or liability is admitted, especially in situations where the perceived wrong is serious.⁴¹ Overall, the most effective apology consists of “affirmation,” “affect,” and “action” components while balancing each components’ sub-categorical “self-focus” and “self-other focus” factors.⁴² Unfortunately, apologies within the medical environment are often partial apologies – full apologies with significant restrictions that cause the apologies to be less effective, or apologies that are entirely absent.⁴³

C. APOLOGIES WITHIN THE MEDICAL ENVIRONMENT

Apologies are especially important in the medical environment because they not only help give more understanding to patients and/or patients’ loved ones, but they can allow physicians to learn from their mistakes, create more closure between physicians and patients and/or patients’ loved ones following an unexpected adverse medical event, and also reduce litigation.⁴⁴ Despite these

³⁹ See Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460, 468 (2003).

⁴⁰ *Id.* at 497.

⁴¹ *Id.*

⁴² See Slocum, Allan & Allan, *supra* note 19, at 90.

⁴³ See Victor R. Cotton, *Legal Pitfalls of Medical Apology Laws*, INSIDE MEDICAL LIABILITY 26, 27 (2014); Ho & Liu, *supra* note 5, at 4; Mastroianni, Mello, Sommer, Hardy, & Gallagher, *supra* note 6, at 1611-1615.

⁴⁴ See Bell, Smulowitz, Woodward, Mello, Duva, Boothman, & Sands, *supra* note 8, at 684; Boothman & Margo M. Hoyler, *The University of Michigan’s Early Disclosure and Offer Program*, BULLETIN OF THE AMERICAN COLLEGE OF SURGEONS, (2013), <http://bulletin.facs.org/2013/03/michigans-early-disclosure/>; Mastroianni, Mello, Sommer, Hardy, & Gallagher, *supra* note 6, at 1611; Phillips-Bute, *supra* note 8, at 336; Saitta & Hodge, Jr., *supra* note 4, at 303; C. Vincent, M. Young & A. Phillips, *Why Do People Sue Doctors? A Study of Patients*

benefits, legal concerns may extinguish a physician's decision to apologize to a patient.⁴⁵ This silence is often propelled by the physician's fear of litigation.⁴⁶ Physicians often do not give effective apologies, or apologies in general, to patients during these emotionally-ridden events because they are fearful that an apology will be taken as an admission of guilt or liability and be used against them in court.⁴⁷ Ultimately, "[t]he driving force behind doctors' unwillingness to communicate with patients about medical errors is presumably a concern about the confidentiality and legal discoverability of the information they convey."⁴⁸ Physicians are even advised by legal counsel to avoid admissions of fault and apologies because of the risks of litigation.⁴⁹ Although current laws are in place to encourage apologies, this concern of lawsuits precipitating from apologies remains.⁵⁰

Ironically, choosing to not apologize in an effort to avoid litigation may actually precipitate a lawsuit.⁵¹ Patients often sue their doctors out of anger, or as a way to receive information about what happened to them or their loved ones.⁵² Furthermore, the lack of any type of disclosure that an apology could provide can create disgruntled patients who are more likely to engage in litigation.⁵³ The injured patient's anger often stems from the fact that he/she believes an apology is an appropriate ethical response.⁵⁴

Applying Slocum's multi-dimensional theory of apology, consisting of both self-focus and self-other focus factors, an experiment was done to evaluate this theory following an adverse

and Relatives Taking Legal Action, 343 THE LANCET 1609, 1609-1613 (1994); Zisk, *supra* note 2, at 386.

⁴⁵ See Gibson & Del Vecchio, *supra* note 4, at 4; Saitta & Hodge, Jr., *supra* note 4, at 302.

⁴⁶ *Id.*

⁴⁷ See Robbennolt, *supra* note 39, at 466.

⁴⁸ See Phillips-Bute, *supra* note 8, at 336.

⁴⁹ See Robbennolt, *supra* note 39, at 467. See also Ho & Liu, *supra* note 5, at 3-4.

⁵⁰ See Ho & Liu, *supra* note 5, at 4.

⁵¹ *Id.*

⁵² See Phillips-Bute, *supra* note 8, at 336.

⁵³ See Mastroianni, Mello, Sommer, Hardy, & Gallagher, *supra* note 6, at 1611.

⁵⁴ See Phillips-Bute, *supra* note 8, at 344.

medical event.⁵⁵ The experiment involved 247 individuals, who viewed videos of two professional male actors portraying a surgeon apologizing to a post-operative patient following an adverse medical event.⁵⁶ The participants were asked a series of questions regarding the impact of the apology scenarios.⁵⁷ The results were consistent with Slocum's proposal, that by including the self-other focused elements into an apology would increase the apology's impact.⁵⁸ In fact, including the self-other focus factors made the apologies better received.⁵⁹

Therefore, if a physician gives a full apology with a disclosure of the situation, anger and the need for more information may be subdued, litigation may be reduced, and settlement may be promoted when the injured individual seeks a legal remedy. This type of dialogue would not only save valuable time and money for both patients and doctors, but it would also ensure patients receive an adequate understanding of the circumstance and allow physicians to acknowledge and learn from their mistakes. Patient safety could become a priority over time-consuming medical malpractice allegations in courts of law.

III. RESPONSES TO APOLOGETIC BARRIERS IN THE MEDICAL ENVIRONMENT

It is unfortunate that doctors have felt this pressure to not effectively apologize, or to not apologize in general, to patients simply because they are fearful of having their words used against them in court.⁶⁰ Four particular attempts have been made to alleviate this pressure and to encourage apologies. Apology laws and disclosure laws have been enacted, disclosure programs have been

⁵⁵ See Alfred Allan, Dianne McKillop, Julian Dooley, Maria M. Allana, & David A. Preece, *Apologies Following an Adverse Medical Event: The Importance of Focusing on the Consumer's Needs*, 98 PATIENT EDUC. & COUNS. 1058, 1058 (2015).

⁵⁶ *Id.* at 1059.

⁵⁷ *Id.*

⁵⁸ *Id.* at 1061.

⁵⁹ *Id.*

⁶⁰ See Robbennolt, *supra* note 39, at 466.

implemented, and the federal government has proposed federal legislation.⁶¹ As a whole, disclosure programs have been most successful because these programs have risen to the level of providing full, rather than partial apologies, while keeping the apologies filled with sincere emotion to restore broken relationships and make genuine reparations.⁶² This type of disclosure can help bring the injured patient or injured patient's family as close as possible back to the *status quo*.

A. APOLOGY LAWS

Thirty-seven states and the District of Columbia have enacted apology laws to combat physicians' fears of apologies being used against them in medical malpractice proceedings.⁶³ As shown in

⁶¹ See Gibson & Del Vecchio, *supra* note 4, at 2-10.

⁶² *Id.*

⁶³ See ARIZ. REV. STAT. ANN. § 12-2605 (2015); COLO. REV. STAT. ANN. § 13-25-135 (West 2014); CONN. GEN. STAT. ANN. § 52-184d (West 2015); DEL. CODE ANN. tit. 10, § 4318 (West 2015); D.C. CODE § 16-2841 (2001); FLA. STAT. ANN. § 90.4026 (West 2014); HAW. REV. STAT. § 626-1 (West 2014); IDAHO CODE ANN. § 9-207 (West 2014); 735 ILL. COMP. STAT. ANN. 5/8-1901 (West 2014); IND. CODE ANN. § 34-43.51-4 (West 2014); IOWA CODE ANN. § 622.31 (West 2015); LA. REV. STAT. ANN. § 13:3715.5 (2014); ME. REV. STAT. ANN. tit. 24, § 2907 (2013); MD. CODE ANN., CTS & JUD. PROC. § 10-920 (LexisNexis 2013); MASS. GEN. LAWS ANN. ch. 233, § 79L (West 2014); MICH. COMP. LAWS ANN. § 600.2155 (West 2014); MO. ANN. STAT. § 538.229 (West 2014); MONT. CODE ANN. § 26-1-814 (West 2013); N.C. GEN. STAT. § 8C (West 2014); NEB. REV. STAT. ANN. § 27-1201 (West 2014); N.H. REV. STAT. ANN. § 507-E:4 (2014); N.D. CENT. CODE ANN. § 31-04-12 (West 2013); OHIO REV. CODE ANN. § 2317.43 (West 2014); OKLA. STAT. ANN. tit. 63, § 1-1708.1H (West 2014); OR. REV. STAT. ANN. § 677.082 (West 2014); 35 PA. CONS. STAT. ANN. § 10228.3 (West 2014); S.C. CODE ANN. § 19-1-190 (1976); S.D. CODIFIED LAWS § 19-12-14 (2014); TEX. CIV. PRAC. & REM. CODE ANN. § 18.061 (West 2014); UTAH CODE ANN. § 78B-3-422 (West 2014); VT. STAT. ANN. tit. 12, § 1912 (West 2014); VA. CODE ANN. § 8.01-581.20:1 (West Supp. 2014); WASH. REV. CODE ANN. § 5.64.010 (West 2015); W. VA. CODE ANN. § 55-7-11 a (LexisNexis 2008); WYO. STAT. ANN. § 1-1-130 (West 2014); CAL. EVID. CODE § 1160 (2014); UTAH R. EVID. 409 (2014); TENN. R. EVID. 409.1 (2014). Georgia could be included in the tally as another state that enacted a protective statute but its statute was repealed. See GA. CODE ANN. § 24-3-37.1 (West 2014) (repealed 2013).

Table 1, apology laws have been enacted from 1986 until 2013 – with most apology laws going into effect during the early to mid-2000s. These laws can be divided into two categories: partial and full apology laws.⁶⁴ Thirty states and the District of Columbia protect partial apologies, seven states protect full apologies, and thirteen states do not protect any type of apologies (See Figure 2). Partial apology laws protect statements or expressions of sympathy, commiseration, condolence, and/or compassion.⁶⁵ Full apology laws protect apologies that contain statements or expressions of fault, mistakes, errors, and liability.⁶⁶

Table 1: State Apology Laws- Overview

State	Year Passed	Type	Statute
Massachusetts	1986	Partial	A.L.M. G.L. ch. 233 § 23D
Texas	1999	Partial	Tex. Civ. Prac. & Rem. Code Ann. § 18.061
California	2000	Partial	Cal. Evid. Code § 1160
Florida	2001	Partial	Fla. Stat. § 90.4026
Washington	2002	Full	Rev. Code Wash. § 5.66.010
Tennessee	2003	Partial	Tenn. Evid. R. § 409.1
Colorado	2003	Full	Colo. Rev. Stat. § 13-25-135
Oregon	2003	Partial	Oreg. Rev. Stat. § 677.082
Maryland	2004	Partial	Md. Courts and Judicial Proceedings Code Ann. § 10-920
North Carolina	2004	Partial	N.C. Gen. Stat. § 8C-1, R. 41 3
Ohio	2004	Partial	O.R.C. Ann. §

⁶⁴ See Robbennolt, *supra* note 39, at 468-69.

⁶⁵ See, e.g., OHIO REV. CODE ANN. § 2317.43 (West 2014).

⁶⁶ See, e.g., ARIZ. REV. STAT. ANN. § 12-2605 (2015).

			2317.43
Oklahoma	2004	Partial	63 Okl. St. § 1-1708.1H
Wyoming	2004	Partial	Wyo. Stat. § 1-1-130
Connecticut	2005	Full	Conn. Gen. Stat. § 52-184d
Louisiana	2005	Partial	La. R.S. § 13:3715.5
Maine	2005	Partial	24 M.R.S. § 2907
Missouri	2005	Partial	Mo. Rev. Stat. § 538.229
New Hampshire	2005	Partial	N.H. Rev. Stat. Ann. § 507-E:4
South Dakota	2005	Partial	S.D. Codified Laws § 19-12-14; § 19-19-411.1
Virginia	2005	Partial	Va. Code Ann. § 8.01-581.20:1
Arizona	2005	Full	A.R.S. § 12-2605
Georgia	2005	Full	O.C.G.A. § 24-4-416
Illinois	2005	Partial	735 I.L.C.S. §5/8-1901(b) (reenacted in 2013 P.A. 97-1145, § 5).
Montana	2005	Partial	Mont. Code Ann. § 26-1-814
West Virginia	2005	Partial	W. VA. Code § 55-7-11a
Delaware	2006	Partial	10 Del. C. § 4318
Idaho	2006	Partial	Idaho Code § 9-207
Indiana	2006	Partial	Burns Ind. Code Ann. § 34-43.5-1-4; § 34-43.5-1-5
Iowa	2006	Partial	Iowa Code § 622.31
South Carolina	2006	Full	S.C. Code Ann. § 19-1-190

Utah	2006	Partial	Utah R. Evid. R. 409
Vermont	2006	Full	12 V.S.A. § 1912
Hawaii	2006	Partial	H.R.S. Ch. 626; H.R.S. R. 209.5
Nebraska	2007	Partial	R.R.S. Neb. § 27-1201
North Dakota	2007	Partial	N.D. H.B. 1333
District of Columbia	2007	Partial	D.C. Code § 16-2841
Michigan	2011	Partial	Revised Judicature Act of 1961 § 600.2155
Pennsylvania	2013	Partial	S.B. 379

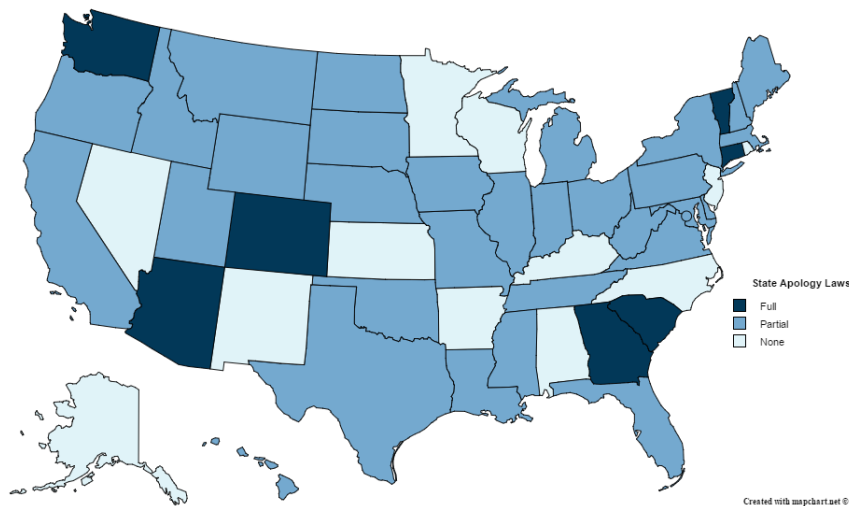


Figure 2: State Apology Laws

I. HISTORY AND PURPOSE

The first state to enact an apology law was Massachusetts, in 1986.⁶⁷ This enactment was fueled by the tragic traffic accident of

⁶⁷ See Zisk, *supra* note 2, at 375.

former Massachusetts Senator William L. Saltontall's daughter.⁶⁸ Senator Saltontall believed the driver who killed his daughter wished to apologize, yet was afraid to do so for fear of liability.⁶⁹ Senator Saltontall recognized the need for protecting apologies in order to facilitate the giving of apologies.⁷⁰ In response, he encouraged the Massachusetts legislature to enact a statute protecting apologies made by a tortfeasor from being admitted in a civil action.⁷¹ The enacted law provided:

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 such person or to the family of such person shall be inadmissible as evidence of an admission of liability in a civil action.⁷²

Shortly thereafter, other states followed suit. However, state apology laws remain different in regards to the types of apologies that are to be protected, who the required recipient must be to receive that protection, and the timeframe in which the apology must occur to remain protected.⁷³

Ultimately, Senator Saltontall's purpose behind Massachusetts' apology law was to ensure that an apology was given to the victim or victim's family to bring about closure and understanding.⁷⁴ As apology laws were extended to protect physicians, this sense of closure and understanding remained important.⁷⁵ The main purpose of current apology laws is to encourage open dialogue between doctors and patients.⁷⁶ This purpose ties back to Senator Saltontall's purpose of closure and understanding because open dialogue between doctors and patients

⁶⁸ *Id.* at 376.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² MASS. GEN. LAWS ANN. ch. 233, § 23D (West 2014).

⁷³ *See* Mastroianni, Mello, Sommer, Hardy, & Gallagher, *supra* note 6, at 1613-16.

⁷⁴ *See* Zisk, *supra* note 2, at 375.

⁷⁵ *See* Bell, Smulowitz, Woodward, Mello, Duva, Boothman, & Sands, *supra* note 8, at 684.

⁷⁶ *Id.*

helps victims and victims' families obtain closure and understanding to either move on from the situation or decide if they have a legitimate legal cause of action to pursue.

II. PARTIAL APOLOGY LAWS

Partial apology laws comprise the majority of apology laws within the United States. Thirty states and the District of Columbia have enacted these laws, which protect expressions or statements that preclude nearly everything but actual liability or fault from being admitted into court.⁷⁷ Most partial apology law states share laws similar to the following:

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 . . . are inadmissible as evidence of an admission of liability⁷⁸

⁷⁷ See DEL. CODE ANN. tit. 10, § 4318 (West 2015); D.C. CODE § 16-2841 (2001); FLA. STAT. ANN. § 90.4026 (West 2014); HAW. REV. STAT. § 626-1 (West 2014); IDAHO CODE ANN. § 9-207 (West 2014); 735 ILL. COMP. STAT. ANN. 5/8-1901 (West 2014); IND. CODE ANN. § 34-43.51-4 (West 2014); IOWA CODE ANN. § 622.31 (West 2015); LA. REV. STAT. ANN. § 13:3715.5 (2014); ME. REV. STAT. ANN. tit. 24, § 2907 (2013); MD. CODE ANN., CTS & JUD. PROC. § 10-920 (LexisNexis 2013); MASS. GEN. LAWS ANN. ch. 233, § 79L (West 2014); MICH. COMP. LAWS ANN. § 600.2155 (West 2014); MO. ANN. STAT. § 538.229 (West 2014); MONT. CODE ANN. § 26-1-814 (West 2013); N.C. GEN. STAT. § 8C (West 2014); NEB. REV. STAT. ANN. § 27-1201 (West 2014); N.H. REV. STAT. ANN. § 507-E:4 (2014); N.D. CENT. CODE ANN. § 31-04-12 (West 2013); OHIO REV. CODE ANN. § 2317.43 (West 2014); OKLA. STAT. ANN. tit. 63, § 1-1708.1H (West 2014); OR. REV. STAT. ANN. § 677.082 (West 2014); 35 PA. CONS. STAT. ANN. § 10228.3 (West 2014); S.D. CODIFIED LAWS § 19-12-14 (2014); TEX. CIV. PRAC. & REM. CODE ANN. § 18.061 (West 2014); UTAH CODE ANN. § 78B-3-422 (West 2014); VA. CODE ANN. § 8.01-581.20:1 (West Supp. 2014); W. VA. CODE ANN. § 55-7-11 a (LexisNexis 2008); WYO. STAT. ANN. § 1-1-130 (West 2014); CAL. EVID. CODE § 1160 (2014); UTAH R. EVID. 409 (2014); TENN. R. EVID. 409.1 (2014).

⁷⁸ OHIO REV. CODE ANN. § 2317.43 (West 2014)

These partial apology laws are not uniform, however. The most noticeable difference is the difference in the persons to whom the apologies must be spoken to in order to remain protected. In a majority of partial apology states, only statements made to the individual harmed, or that individual's family or representative remain protected, and the definition of family varies. Some of these laws include grandparents, grandchildren, adopted relatives, and in-laws. Others only include the patient's immediate family. And some are so broad that they protect apologies that are spoken to anyone related to the injured individual by marriage, blood, or adoption.⁷⁹ These variances are further demonstrated by states like Oklahoma, whose law protects apologies spoken to step-fathers, but not step-mothers.⁸⁰ There are four states, along with the District of Columbia, that extend this protection of statements when they are made to a friend of the injured individual.⁸¹ Furthermore, eight states do not specify which statements are protected when spoken to certain individuals. Most likely, in these states one can presume apologies spoken to the family members, legal representatives, and the actual injured individual are protected.⁸²

These varied stances on the person to whom apologies must be spoken in order to remain protected creates ambiguity for the physician and a pressure to avoid apologizing because physicians would have to ensure certain individuals were out of the room when apologizing. If a non-covered person was in the room during the apology, irrelevant as to whether a protected person was also in the room, the legal protection of the apology might be lost and the apology would be admissible against the doctor in court.

III. FULL APOLOGY LAWS

⁷⁹ See N.D. CENT. CODE ANN. § 31-04-12 (West 2013).

⁸⁰ See OKLA. STAT. ANN. tit. 63, § 1-1708.1H (West 2014).

⁸¹ See DEL. CODE ANN. tit. 10, § 4318 (West 2015); D.C. CODE § 16-2841 (2001); IDAHO CODE ANN. § 9-207 (West 2014); MO. ANN. STAT. § 538.229 (West 2014); UTAH CODE ANN. § 78B-3-422 (West 2014).

⁸² See HAW. REV. STAT. § 626-1 (West 2014); 735 ILL. COMP. STAT. ANN. 5/8-1901 (West 2014); IND. CODE ANN. § 34-43.51-4 (West 2014); MD. CODE ANN., CTS. & JUD. PROC. § 10-920 (LexisNexis 2013); N.C. GEN. STAT. § 8C (West 2014); OR. REV. STAT. ANN. § 677.082 (West 2014); S.D. CODIFIED LAWS § 19-12-14 (2014); TENN. R. EVID. 409.1 (2014).

Full apologies, which most legal scholars believe apology laws are intended to protect, have been enacted in a minority of states. Seven states protect full apologies from being admitted as evidence in a court of law.⁸³ Full apologies go beyond partial apologies because they not only protect statements of sympathy, but also protect statements that admit liability or fault.⁸⁴ Most full apology law states share laws similar to the following:

[A]ll statements, affirmations, gestures, or conduct expressing apology, fault, sympathy, commiseration, condolence, compassion, or a general sense benevolence . . . shall be inadmissible as evidence of an admission of liability.⁸⁵

However, the general idea that full apology statutes cover every type of apology is not true because there are a variety of stringent limitations. For example, all states with full apology laws only protect statements made to immediate family members or the actual victim involved.⁸⁶ If the apology is given to a friend, the apology loses all protection. With regard to limitations imposed by particular state laws, Vermont only protects oral expressions,⁸⁷ and these oral expressions are only protected within thirty days from the date the physician knew or should have known the consequences of the potentially adverse medical outcome.⁸⁸ The state of Washington also has limitations because its law requires physicians to give their apologies at designated meetings, which must be previously identified to be a meeting solely involving the apology in order for the apology to remain protected.⁸⁹

⁸³ See ARIZ. REV. STAT. ANN. § 12-2605 (2015); COLO. REV. STAT. ANN. § 13-25-135 (West 2014); CONN. GEN. STAT. ANN. § 52-184d (West 2015); GA. CODE ANN. § 24-3-37.1 (West 2014); S.C. CODE ANN. § 19-1-190 (1976); S.D. CODIFIED LAWS § 19-12-14 (2014); VT. STAT. ANN. tit. 12, § 1912 (West 2014); WASH. REV. CODE ANN. § 5.64.010 (West 2015).

⁸⁴ *Id.*

⁸⁵ COLO. REV. STAT. ANN. § 13-25-135(1) (West 2014).

⁸⁶ *Id.*

⁸⁷ See VT. STAT. ANN. tit. 12, § 1912 (West 2014).

⁸⁸ *Id.*

⁸⁹ See WASH. REV. CODE ANN. § 5.64.010 (West 2015).

Therefore, full apology laws are filled with a lack of uniformity and large amounts of legalese. Physicians, then, have the burden of determining which individuals are allowed to hear the apology, whether the words they are saying will be protected, and the time period and place in which they must say these words. It would likely be simpler for a doctor to not apologize at all if he or she does not know the state's apology law or if he or she does not know if the circumstance at hand is protected under the state's apology law, both of which seem to be occurring.

IV. EVALUATION

After looking at what partial apology and full apology laws protect, full apologies appear to be more successful at promoting sincere apologies and achieving a balance of encouraging dialogue between doctors and patients, improving patient safety, and reducing litigation.

Although partial apologies, better referred to as sympathy laws, are the majority type of apology laws throughout the United States, these laws do not protect effective apologies.⁹⁰ Consequently, sympathy laws are doubtful to have any real effect, and will not fulfill the original purpose of apology laws.⁹¹ An effective apology should contain the affirmation component—both admission and acknowledgment of the wrongful act—and sympathy laws do not promote this component because sympathy laws do not protect affirmation from being inadmissible in court.⁹² Consequently, “[t]he fundamental flaw of medical sympathy laws is that they provide a type of protection that is in fact unnecessary.”⁹³ Essentially, sympathy laws prevent plaintiff attorneys from using physicians' sympathetic words—which paint them in a good light—against them. Plaintiff attorneys would only have a genuine incentive to use words of liability or fault against physicians.⁹⁴ Why would a plaintiff's attorney want to show that a physician is kind and compassionate?⁹⁵ The idea that sympathy laws are unnecessary is further supported by

⁹⁰ See Cotton, *supra* note 43, at 27-28.

⁹¹ *Id.* at 27.

⁹² See Robbennolt, *supra* note 39, at 505.

⁹³ See Cotton, *supra* note 43, at 27.

⁹⁴ *Id.*

⁹⁵ *Id.*

Pennsylvania's recent enactment of a partial apology law, which faced no resistance.⁹⁶ It was unanimously enacted.⁹⁷ Had the partial apology law truly protected doctors, there would likely have been resistance.⁹⁸ The fact that partial apology laws do not protect the key information that patients want communicated to them—admission and acknowledgement—leads to the conclusion that partial apology laws are ineffective.⁹⁹

Full apology laws, on the other hand, encourage doctors to give patients effective apologies.¹⁰⁰ Consequently, more benefits exist in states with a full apology law in place.

A study done by Jennifer K. Robbennolt, Associate Professor of Law and Senior Fellow at the Center for the Study of Dispute Resolution at the University of Missouri-Columbia School of Law, found that full apology laws carry more benefits over partial apology laws.¹⁰¹ In the study, Robbennolt gave 145 participants a scenario of being involved in a pedestrian-bicycle accident.¹⁰² All participants were told they suffered the same injuries from this accident and received the same settlement offer.¹⁰³ Robbennolt then varied the types of apologies the participants were given between partial and full apologies.¹⁰⁴ Robbennolt also varied the evidentiary rule with each type of apology to see if knowledge of the evidentiary rule protecting or not protecting the apology would influence the apology's effectiveness.¹⁰⁵

This study found that the nature of the apology influenced the recipients' willingness to accept the offer, while the nature of the evidentiary rule did not influence the recipients' willingness to accept the offer.¹⁰⁶ Specifically, when a partial apology was given, 35% of recipients said they would accept the offer, 25% would reject the offer, and 40% were unsure.¹⁰⁷ Similarly, when no apology was

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ See Mastroianni et al., *supra* note 6, at 1614.

¹⁰⁰ See Robbennolt, *supra* note 39, at 486.

¹⁰¹ *Id.* at 495.

¹⁰² *Id.* at 484.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 492.

¹⁰⁷ *Id.* at 486.

given there was a low indication of willingness to accept the offer. In that situation, although 52% of recipients stated they would definitely or probably accept an offer, 42% said they would definitely or probably reject the offer, and 5% were unsure.¹⁰⁸ Therefore, not giving an apology can prove to be more beneficial than giving a partial apology. In regards to full apologies, 73% of recipients stated they would accept the offer, 13-14% stated they would reject the offer, and the remaining percentage remained unsure.¹⁰⁹ Although a change in evidentiary rules in this study did not affect the recipient's acceptance or rejection of an offer, it was recognized that apologies that were not protected by an evidentiary rule were seen to be less likely to have been motivated by desire to avoid a lawsuit.¹¹⁰

It still must be recognized that full apology laws have their flaws. Although full apology laws appear to fulfill the purpose of encouraging effective apologies, the limitations imposed upon some of these full apology laws work against their potential. If these limitations were lifted, full apology law states would be even more effective at fulfilling the ideal purposes of encouraging open dialogue between doctors and physicians along with patient safety.

B. DISCLOSURE: PROGRAMS, LAWS, AND LEGISLATION

I. DISCLOSURE PROGRAMS

Disclosure programs have been on the rise since 2001 in an effort to create a new dispute resolution model that attempts to adequately inform the patient of what occurs after an adverse medical event, express sympathy and apologetic communication, and reduce litigation.¹¹¹ Four Disclosure, Apology, and Offer (DA&O) programs are known to have been especially successful.¹¹² These include

¹⁰⁸ *Id.* at 485-486.

¹⁰⁹ *Id.* at 486.

¹¹⁰ *Id.* at 491.

¹¹¹ See Bell et al., *supra* note 8, at 686; Gibson & Del Vecchio, *supra* note 4, at 2; Phillips-Bute, *supra* note 8, at 339-41; *Mass. Embraces 'Disclosure, Apology, Offer' Approach for Med Mal Cases*, INS. J. (Aug. 7, 2012), <http://www.insurancejournal.com/news/east/2012/08/07/258509.htm>.

¹¹² See Bell et al., *supra* note 8, at 686; Gibson & Del Vecchio, *supra* note 4, at 2; Phillips-Bute, *supra* note 8, at 339-41; *Mass. Embraces 'Disclosure,*

programs by: The University of Michigan Health System, the State of Massachusetts, the Veterans Affairs Health Administration, and COPIC Insurance.¹¹³ These programs share the following principled institutional responses to adverse medical events: “(1) proactively identify adverse events; (2) distinguish between injuries caused by medical negligence and those arising from complications of disease or intrinsically high-risk medical care; (3) offer patients full disclosure and honest explanations; (4) encourage legal representation for patients and families; and (5) offer an apology with rapid and fair compensation when standards” are not met.¹¹⁴

The University of Michigan Health System (UMHS) created an extremely successful dispute resolution model, which other disclosure programs modeled themselves.¹¹⁵ UMHS created this program in 2001 with four basic elements: (1) immediate disclosure of harm; (2) timely expression of sympathy and apology; (3) commitment to investigation and prevention efforts to identify and address the root cause of incidents; and (4) a quick offer of compensation if the event demonstrates potential negligence.¹¹⁶ As a whole, this program was “designed to promote patient safety through principles of honesty, transparency, and accountability.”¹¹⁷ Within this model, the prospective plaintiff must give UMHS six months’ notice prior to filing a medical malpractice lawsuit.¹¹⁸ During this time period, an internal committee assesses the alleged errors through a thorough investigation and review,¹¹⁹ which “dramatically increases the chance that safety problems will be fixed going forward.”¹²⁰ This model was a drastic change in what was previously seen in state

Apology, Offer’ Approach for Med Mal Cases, INS. J. (Aug. 7, 2012), <http://www.insurancejournal.com/news/east/2012/08/07/258509.htm>.

¹¹³ See Bell et al., *supra* note 8, at 686; Gibson & Del Vecchio, *supra* note 4, at 2; Phillips-Bute, *supra* note 8, at 339-41; *Mass. Embraces ‘Disclosure, Apology, Offer’ Approach for Med Mal Cases*, INS. J. (Aug. 7, 2012), <http://www.insurancejournal.com/news/east/2012/08/07/258509.htm>.

¹¹⁴ Bell et al., *supra* note 8, at 684.

¹¹⁵ *Id.* at 686.

¹¹⁶ See Phillips-Bute, *supra* note 8, at 341.

¹¹⁷ See Richard Boothman & Margo M. Hoyler, *The University of Michigan’s Early Disclosure and Offer Program*, BULLETIN OF THE AMERICAN C. OF SURGEONS (Mar. 2, 2013), <http://bulletin.facs.org/2013/03/michigans-early-disclosure/>.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

apology laws because this program shifted from the concept of medical malpractice to the concept of patient safety.

The positive results from this program were monumental. Upon implementation, the rate of lawsuits declined from 2.13 per 100,000 patients per month to .75 per 100,000 patients. Moreover, the rate of new claims decreased from 7 per 100,000 patients to fewer than 5 per 100,000 patients, the time-to-claim resolution dropped from 1.36 years to .95 years, and there was a decrease in the cost rates due to total liability, patient compensation, and legal fees.¹²¹ These positive results prompted other states to follow suit.¹²²

In 2012, the State of Massachusetts replicated UMHS's program.¹²³ The program was implemented in seven hospitals throughout the state.¹²⁴ With this program, healthcare professionals, institutions, and their insurers make disclosures to patients and families when an unanticipated adverse outcome occurs.¹²⁵ These individuals and institutions also investigate the situation, establish systems to improve patient safety and prevent the instance from occurring again in the future, and, where appropriate, apologize and offer fair compensation without legal action.¹²⁶ The main problem with Massachusetts's program is the lack of clarity in its policies.¹²⁷ Specifically, Massachusetts does not define what an "unanticipated outcome" is and from whose perception it comes.¹²⁸ It also does not ensure physicians that their apologies will be protected since it states that apologies will be inadmissible "unless the maker of the statement or defense expert witness when questioned under oath makes a

¹²¹ *Id.*

¹²² Bell et al., *supra* note 8, at 686.

¹²³ See Debra Beaulieu, *Disclosure, Apology and Offer: A New Approach to Medical Liability*, MASS. MED. SOC., (2012), massmed.org/News-and-Publications/Vital-Signs/Back-Issues/Disclosure,-Apology-and-Offer--A-New-Approach-to-Medical-Liability/#.Vsh-9xhH92c.

¹²⁴ *Id.*

¹²⁵ *Mass. Embraces 'Disclosure, Apology, Offer' Approach for Med Mal Cases*, *supra* note 108.

¹²⁶ *Id.*

¹²⁷ See *Doctors' protections under Massachusetts "apology" law are limited*, Adler, Cohen, Harvey, Wakeman, Guekguezian LLP, <http://www.adlercohen.com/?t=40&an=39782&format=xml&p=7637> (last visited March 18, 2016).

¹²⁸ *Id.*

contradictory or inconsistent statement.”¹²⁹ No clear precedent has been established to define this rule.¹³⁰

Despite these ambiguities, doctors have said they enjoy the program because it helps put a stop to the medical community’s culture of silence.¹³¹ Alan Woodward, chair of the Massachusetts Medical Society’s Committee on Professional Liability, summed up the benefits of the program by saying that “[i]t will encourage transparency and honesty, protect the rights of patients who have been harmed by avoidable events, improve patient safety, reduce litigation, and ultimately cut health care costs.”¹³² A study focused on Massachusetts’ DA&O model interviewed twenty-seven individuals in leadership positions and asked what they found to be most appealing about the model.¹³³ The number one answer related to the ethical and professional considerations.¹³⁴ Specifically, it was said that this model created

a huge win for patients, [who] suffer as much as anybody in the courts, maybe more. It’ll be a huge win for providers emotionally. It will be a huge win from a financial perspective because the right people will be getting compensated in a timelier manner and there will be far less waste in the process.¹³⁵

In 2005, the Veterans Health Administration (VHA) issued a directive that required all VHA facilities to disclose adverse events to patients and families when those events occurred within twenty-four hours.¹³⁶ This directive specified that adverse events must be probable or definite, and if they are close calls then disclosure is discretionary.¹³⁷ The directive was encouraged by and modeled after UMHS’s program.¹³⁸

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Mass. Embraces ‘Disclosure, Apology, Offer’ Approach for Med Mal Cases*, *supra* note 108.

¹³² *Id.*

¹³³ *See* Bell et al., *supra* note 8, at 688-89.

¹³⁴ *Id.* at 689.

¹³⁵ *Id.*

¹³⁶ Gibson & Del Vecchio, *supra* note 4, at 42.

¹³⁷ *Id.*

¹³⁸ *Id.*

In 2000, COPIC Insurance (COPIC) implemented a disclosure program, “Recognize, Respond, and Resolve,” in Colorado.¹³⁹ It requires participating providers to disclose unexpected outcomes to patients, and then supplies those providers with pre-litigation reimbursement up to \$25,000 of out-of-pocket medical expenses and up to \$5,000 for time lost based on extended recovery.¹⁴⁰ Cases involving a wrongful death or obvious errors are excluded from this program.¹⁴¹ As a whole, the program has had beneficial results – evidenced by the fact that COPIC ended up paying substantially less for claims that it closed and only fifty-two out of 2000 incidents became formal claims.¹⁴²

II. MANDATORY DISCLOSURE LAWS

Ten states currently have disclosure laws in place: Washington, Oregon, Nevada, Tennessee, Florida, South Carolina, Pennsylvania, Maryland, New Jersey, and Connecticut.¹⁴³ These states require healthcare facilities to notify patients or families of unanticipated outcomes of medical care.¹⁴⁴ Although this disclosure is useful, apologies are not required, as evidenced by each laws’ text.¹⁴⁵

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Summary of States’ Policy Toward Disclosure, QUALITY AND PATIENT SAFETY, http://www.qups.org/med_errors.php?c=state_comparison&t=10 (last visited Nov. 23, 2015).

¹⁴⁴ See WASH. REV. CODE § 70.41.380 (2005); OR. REV. STAT. § 677.082 (2003); NEV. REV. STAT. § 439.860 (2011); TENN. CODE ANN. § 68-11-211 (2009); FLA. STAT. § 381.028 (2013); S.C. CODE ANN. § 19-1-190 (2006); Patient Safety and Quality Assurance Act, S.B. 1263, Reg. Sess. (Pa. 2001); MD. CODE REGS. 10.07.06.12 (2016); N.J. STAT. ANN. § 26; CONN. GEN. STAT. ANN. § 52-184d (West 2006).

¹⁴⁵ See WASH. REV. CODE § 70.41.380 (2005); OR. REV. STAT. § 677.082 (2003); NEV. REV. STAT. § 439.860 (2011); TENN. CODE ANN. § 68-11-211 (2009); FLA. STAT. § 381.028 (2013); S.C. CODE ANN. § 19-1-190 (2006); Patient Safety and Quality Assurance Act, S.B. 1263, Reg. Sess. (Pa. 2001); MD. CODE REGS. 10.07.06.12 (2016); N.J. STAT. ANN. § 26; CONN. GEN. STAT. ANN. § 52-184d (West 2006).

The idea of supporting mandatory disclosure laws is also recognized by the medical community. The American College of Physicians' Ethics Manual provides that "physicians should disclose to patients information about procedural or judgment errors made in the course of care if such information is material to the patient's well-being."¹⁴⁶ The provision also states that "[e]rrors do not necessarily constitute improper, negligent, or unethical behavior, but failure to disclose them may."¹⁴⁷ Thus, it is vital to recognize that the medical community also supports mandatory disclosure on an ethical level.

III. FEDERAL DISCLOSURE LEGISLATION

The federal government has also attempted to encourage apologies from physicians to patients by trying to enact federal disclosure legislation. The main form of legislation that has successfully been enacted is the Patient Safety and Quality Improvement Act ("Act"), which was signed into law in 2005.¹⁴⁸ This Act "requires the Department of Health and Human Services ("HHS") to establish a process for voluntary and confidential reporting of medical errors to Patient Safety Organizations ("PSOs")."¹⁴⁹ Furthermore, it prevents a patient's safety work product from being subject to a subpoena or court order by classifying it as privileged.¹⁵⁰ By doing these things, the Act attempts to encourage participation in disclosure programs.

Unfortunately, other laws with the purpose of encouraging disclosure have not been enacted. The two most well-known acts that attempted to improve disclosure were The Fair and Reliable Medical Justice Act and the National Medical Error Disclosure Compensation Act (MEDiC).¹⁵¹ In 2005, The Fair and Reliable Medical Justice Act was introduced with the intent to provide grants to states that voluntarily implemented one of three pilot programs.¹⁵² In 2005, MEDiC was introduced to provide financial incentives and legal

¹⁴⁶ Gibson & Del Vecchio, *supra* note 4, at 42.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 45.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 8-10.

¹⁵² *Id.* at 8.

protection to institutions to encourage participation in disclosure programs.¹⁵³ MEDiC was inspired by the UMHS disclosure program and looked to the VA and COPIC programs for guidance.¹⁵⁴

IV. PROPOSAL

A. SHIFT FROM APOLOGY LAWS TO DISCLOSURE PROGRAMS

Apology laws have not lived up to the purpose that was originally intended by Senator Saltontall.¹⁵⁵ Instead of protecting effective apologies to both help the offender's conscience and aggrieved individual's emotions, these laws have become intertwined with so many limitations and copious amounts of legalese that the laws have encouraged mere sympathy – not apologies – or silence after an adverse medical event occurs. To shift from this fear of litigation and enter into a concern for patient safety, encouraging disclosure programs could alleviate the current problems found with the varying types of state apology laws. If future disclosure programs were modeled after The University of Michigan Health System's DA&O program, physicians would be a part of a program that expects apologies to be given and these apologies would be given, in such a way that would accomplish what apologies laws were intended to do. By ensuring that DA&O programs maintain the same four elements held by UMHS, these programs could reap similar benefits.¹⁵⁶ These benefits would, more likely than not, occur – as has already been evidenced by other programs that have modeled themselves after UMHS and reaped similar benefits.¹⁵⁷ With DA&O programs, we could expect significant improvements in claim frequency, transactional costs, litigation reductions, and reduced time to resolution.¹⁵⁸

Naturally, there are some potential barriers with DA&O programs; however, solutions are available. First, physicians may not

¹⁵³ *Id.* at 9.

¹⁵⁴ *Id.*

¹⁵⁵ See Zisk, *supra* note 2, at 376.

¹⁵⁶ See Boothman & Hoyler, *supra* note 8.

¹⁵⁷ See *id.*; Bell et al., *supra* note 8, at 688.

¹⁵⁸ See Bell et al., *supra* note 8 at 686.

be comfortable with disclosure because they remain fearful that what they say will remain unprotected.¹⁵⁹ To combat this concern, doctors should be educated and trained on the disclosure process, making them more comfortable with issuing apologies. Such education could occur during residency programs and job training, and through on-site legal coaching at the doctors' place of employment. Second, attorneys may fear decreasing clientele numbers and revenue.¹⁶⁰ However, attorneys could be better educated at CLE meetings about how DA&O programs actually endorse legal representation. Third, there could be concern as to whether DA&O programs would work where physicians are loosely affiliated with a facility rather than being directly employed.¹⁶¹ Unfortunately, little evidence has been gathered as to how this program would work outside of a facility that directly employs physicians as opposed to employing independent contractors. To better understand how to combat this obstacle, more research would need to be done on this issue. Finally, encouraging institutions to utilize a disclosure program could involve a greater up-front cost than the institution would be willing to pay. This could be solved by implementing a grant-based program. Unfortunately, the question remains as to where this grant money would come from.

Assuming that institutions could be persuaded to develop and actively utilize DA&O programs, these programs would be the ideal balance to reduce litigation, better facilitate doctor-patient communication, and most importantly, improve patient safety. Apology laws have had such a pin-pointed focus upon litigation costs and time that patient safety has fallen by the wayside. These programs would help refocus priorities. Still, a reduction in litigation would likely inevitably follow. Increased communication between doctors and their patients and/or their families would help ease tension and anger. It would also provide individuals with more understanding about the situation. Consequently, it has been proven that such programs would reduce litigation.¹⁶² Because anger and lack of understanding are reduced by physician communication, individuals are less likely to turn to litigation.¹⁶³ Additionally, the litigation reduction seen by UMHS and similar institutions with disclosure programs shows that those programs are able to facilitate

¹⁵⁹ *See id.*

¹⁶⁰ *Id.* at 693-94.

¹⁶¹ *Id.* at 697.

¹⁶² *See Phillips-Bute, supra* note 8, at 336.

¹⁶³ *See id.*

such an improvement.¹⁶⁴ Furthermore, it simply makes sense to disclose information to the patient and/or the family from the very moment an adverse medical event occurs because the information gathered during the disclosure will likely be revealed in court anyway.

B. PROTECT FULL APOLOGIES WITH THE FEDERAL RULES OF EVIDENCE

State apology laws have clearly proven insufficient to adequately protect physicians from their fears tied to apology and litigation, and disclosure programs modeled after UMHS have clearly proven to be beneficial. Still, there remains a dire need to have stronger state apology laws to ensure physicians are shielded from liability – whether they be part of a disclosure program that does not shield them from liability or whether they be outside a disclosure program. By encouraging a more uniform, less restrictive, and less legalese-encompassed state apology law from being enacted, the benefits for physicians and patients alike would be monumental. This goal could be accomplished by including a new rule in the Federal Rules of Evidence (“FRE”), would bar physicians’ apologies, in which statements of sympathy, fault, and liability are exposed, from being admitted as evidence of fault. The ideal rule would look similar to Colorado’s full apology law, which states:

[A]ll statements, affirmations, gestures, or conduct expressing apology, fault, sympathy, commiseration, condolence, compassion, or a general sense benevolence . . . shall be inadmissible as evidence of an admission of liability.¹⁶⁵

Naturally, states are not obligated to follow the FRE and they may deviate.¹⁶⁶ However, states normally closely follow the FRE or

¹⁶⁴ See Boothman & Hoyler, *supra* note 8.

¹⁶⁵ COLO. REV. STAT. ANN. § 13-25-135(1) (West 2014).

¹⁶⁶ Lauren Gailey, *I’m Sorry as Evidence? Why the Federal Rules of Evidence Should Include a New Specialized Relevance Rule to Protect Physicians*, 84 DEF. COUNS. J. 172, 174.

make their rules even stricter.¹⁶⁷ Therefore, it would be beneficial for such a provision to be included in the FRE so as to influence states to have more uniform types of state apology laws that would protect effective apologies.

The FRE contain five specialized relevance rules, Rules 407, 408, 409, 410, and 411 – all of which were designed to comport with the Rule 403 balancing test,¹⁶⁸ in which a statement of fault made by a physician to a patient through an apology would likely fail. These specialized relevance rules are founded upon rationales that are rooted deep within public policy.¹⁶⁹ Creating an additional specialized relevance rule to protect physicians' apologies would be supported by a public policy rationale to create more open doctor-patient communication and improve patient safety. "At their most general level, the specialized relevance rules thus discourage bad behavior, incentivize good behavior, and foster and protect the positive side of human nature" and this new rule would be doing the same.¹⁷⁰

V. CONCLUSION

Apology laws are not effectively fulfilling their intended purpose. Instead of promoting and protecting effective apologies from physicians to patients, the current state apology laws either protect ineffective apologies of sympathy or are filled with limitations and a large amount of legalese. Consequently, physicians may find it simpler to continue not apologizing in order to ensure that nothing they say relative to liability or fault may be used against them in a medical malpractice proceeding. To encourage effective apologies that consist of affirmative, affect, and action components, two particular proposals may prove useful: (1) a shift from apology laws to disclosure programs could help give more understanding to patients, allow physicians to learn from mistakes to improve patient safety, create better communication between physicians and patients, and reduce litigation; and (2) disclosure programs could be supplemented by better state apology laws, which could be modeled

¹⁶⁷ *Id.* at 175.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 176.

on a new apology law created within the FRE. Whether these proposals prove feasible or not, it is vital to understand the need to not settle for the current ways in which physicians are falling into the trap of the deny and defend mentality and remaining silent when they should be taking part in apologetic conversations with patients.