

You Had Me at “I’m Sorry”: The Impact of Physicians’ Apologies on Medical Malpractice Litigation

Article By:

Bonnie G. Ackerman

Physicians typically recall, with stunning clarity, the moment a patient’s treatment went wrong. Following an adverse event, physicians often are tormented by competing desires to apologize and instincts to forge ahead without acknowledgement. A patient’s decision to file a malpractice action may be triggered by the physician’s response to a problem ? or lack thereof.

[*The Washington Post*](#) highlighted contrasting tales of medical errors in which two patients suffered devastating consequences during surgery. Frustrated by a “white wall of silence” preventing her health care providers from articulating more than “things didn’t go well,” the first patient desperately committed to finding truth at all costs. In stark contrast, following his surgeon’s immediate explanation and apology for an error that rendered the second patient quadriplegic, the patient engaged in productive discussions with risk managers. The patient’s needs were met and his attorneys negotiated a confidential settlement without litigation.

Benefits of Apologies

Apologies [may decrease feelings of frustration](#) and anger that drive some plaintiffs to file lawsuits. A study published in the [*Journal of Patient Safety and Risk Management*](#) found that hospital staff and doctors willing to discuss, apologize for and resolve adverse medical events through a “collaborative communication resolution program” experienced a significant decrease in the filing of legal claims, defense costs, liability costs and time required to close cases. In 65% of the reported adverse events, no medical errors occurred. Events with medical errors were resolved by apology alone in 43% of the cases. Similar programs have cut the number of malpractice lawsuits and yielded dramatic litigation cost savings. In November 2017, consistent with studies demonstrating that resolution programs provide “an effective way to learn from medical errors and near misses, enhance patient safety, and improve the liability system,” the [American Medical Association](#) expressed support for this pre-litigation option.

The practice of defensive medicine may create a perception of indifference as patients grapple with the impact of adverse outcomes. The “deny and defend’ model” has raised concerns due to expense, lack of transparency and error perpetuation. Modern programs aim to avoid litigation through prompt error disclosure, apology and compensation. Benefits of disclosure may include increased transparency, medical cultures supportive of clinicians facing adverse events, and

enhanced patient safety due to discussions driven by acknowledgement and examination of errors.

“[Apology statutes](#),” enacted in the majority of states, evidence legislative efforts to reduce medical liability, malpractice actions and related litigation expenses. Many states have changed laws “to exclude expressions of sympathy, condolences or apologies from being used against medical professionals in court.” Courts have addressed the admissibility of physicians’ statements, pursuant to “I’m Sorry” statutes, through the interpretation of statutory language or a focus on distinctions between “apologies” and “admissions of fault or liability.” See *Stewart v. Vivian*, 151 Ohio St. 3d 574 (2017); *DeBussy v. Graybeal*, 2016 Del. Super. LEXIS 616; *Honey v. Bayhealth Med. Ctr., Inc.*, 2015 Del. Super. LEXIS 28; *Strout v. Cent. Me. Med. Ctr.*, 2014 ME 77; and *Lawrence v. Mountain Star Healthcare*, 2014 UT App. 40.

Advice of Counsel

While physicians may reduce malpractice litigation through [improved patient communication](#), health care providers should seek advice from counsel as to best practices regarding discussions of adverse outcomes before such situations arise. Alternatively, a physician may apologize for the patient’s disappointment with an outcome and commit to investigating in an effort to share and address the patient’s concerns. Of course, any such commitment must be fulfilled to avoid exacerbating the problem and creating further resentment and dissatisfaction.

Studies of communication and resolution programs suggest that the risk of malpractice litigation and related costs may be mitigated by a health care provider’s apology to the patient or the patient’s representative(s) following a medical error or an adverse outcome. Such communications, however, should take into account jurisdictional variations with respect to the existence, language and scope of apology laws.

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