

# Apologies - Avoiding Legal Pitfalls

## Who's Sorry Now?

*Who's sorry now? Who's sorry now?  
Who's heart is achin' for breakin' each vow?  
Who's sad and blue, who's cryin' too?  
Just like I cried over you?  
Right to the end, just like a friend  
I tried to warn you somehow.  
You had your way now you must pay.  
- As sung by Connie Francis, 1958*

Just as in Connie Francis' 1958 musical hit, chiropractic physicians who fall prey to the recent "political correctness" of apologizing for injuring a patient in hopes of avoiding a claim or lawsuit will most likely have to pay in the end.

Some current experts assert that the use of apologies reduce lawsuits and litigation costs; however, one must remain ever mindful of the legal pitfalls of saying "I'm sorry." Historically, apologies have been used as a means to address a wrong. The legal system, in turn, may interpret an apology as an admission against personal interest determining guilt or negligence. Defense attorneys, rightfully so, have serious concerns about their clients issuing any kind of mea culpa and/or any other communication that expresses sympathy or a general sense of benevolence to an alleged victim of the unanticipated outcome of medical care.

Given the opposing societal and legal interests with respect to apologies, several states have enacted legislation addressing the issue of the admissibility of apologies in court proceedings. For instance, Wyoming, Colorado, Oklahoma and Ohio have enacted legislation specifically applying to medical liability actions, noting that any and all statements, affirmations, gestures, or conduct expressing apology, fault, sympathy, commiseration, condolence, compassion, or a general sense of benevolence which are made by a healthcare provider to the alleged victim (or a relative or representative of the alleged victim) and which relate to the discomfort, pain, suffering, injury or death of the alleged victim as a result of an unanticipated outcome of medical care shall be inadmissible as evidence of an admission of liability or as evidence of an admission against interest.<sup>1</sup> Massachusetts and Texas, on the other hand, have enacted broader legislation applying beyond medical liability actions and prohibiting statements, writing 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 the family of such person.<sup>2</sup>

Not all legislation, however, offers absolute protection from admissibility. For example, legislation enacted in Washington, Florida and California only partially protects apologies. This legislation provides that statements, writings, or benevolent gestures expressing sympathy or a general sense of benevolence to the pain, suffering, or death of a person involved in an accident, and made to that person or to the family of that person, is inadmissible as evidence in a civil action, while a statement of fault is admissible.<sup>3</sup> Therefore, under this legislation, a partial apology such as "I am sorry this occurred" would be inadmissible, while a statement of fault such as "I am so sorry—this is all my fault" is admissible in a civil action as a statement against interest.

While the above-mentioned states have directly addressed this issue through legislation, most states have not. Given this divided landscape, pragmatic defense attorneys consequently have legitimate concerns about recommending any kind of apology by their clients except in scenarios in which liability is not an issue, which is rarely the case. Therefore, the modus operandi has been (and remains) to avoid any statement of contrition as it may equate to an admission of liability which, for all practical purposes, may be admissible, most likely as an admission against interest under evidence rule 801(d)(2).

As support for their assertion that apologies avoid claims and lawsuits, these so called "experts" cite research that says in 37% of medical malpractice cases, patients and families who filed the claims might not have done so if they have been given a complete explanation and apology. Uh, hello, in our world that still means that 63% of patients and families would file the claims even if a complete explanation and apology are given. We don't know about you, but we wouldn't take those odds in offering an apology, especially when (note, not if) it is used against us as a chiropractic physician defendant in our malpractice action. The overall win rate for plaintiffs in medical malpractice trials is 27%, ½ of the overall jury trial win rate for plaintiffs in all tort cases (52%). Even with a poor outcome, defendants in medical malpractice cases still win nearly 75% of trials. Why complicate matters with an apology that may be used against you as an admission of guilt or liability?

Moreover, let's face it, chiropractic physicians aren't the communicators they think they are. An attempt at an apology, however sincere, may be perceived by the aggrieved individual or party as nothing more than a self serving, gratuitous, hollow attempt to avoid blame and litigation, and may make matters even worse. This is especially true when the doctor is unaware of how what is being said may be legally detrimental to his/her case.

But, as Connie Francis croons, if the chiropractic physician has to have his/her way, an apology should never be a standard practice. If the healthcare provider nevertheless wishes to make an apology, it is essential that he/she knows how to insulate him or herself from legal exposure. First and foremost, under no circumstances should a healthcare provider ever admit to fault or liability; rather, apologies, while sincere, should remain generic. A healthcare provider issuing an apology should be empathic, but should not confess, grovel, or make gratuitous mea culpas.<sup>4</sup> Finally, the apology should not be lengthy because protracted apologies provide the healthcare provider with a greater opportunity to inadvertently impugn him or herself, thus fostering litigation.

While apologies have historically served to resolve interpersonal conflicts, in the legal world, they usually exacerbate the conflict by supporting a plaintiff's claim of medical negligence. In order to avoid this legal pitfall, apologies should be avoided, particularly any statement of fault or liability by the healthcare provider. If the circumstances dictate an apology being given, it must be carefully crafted as to not expose the healthcare provider to unnecessary claims of medical negligence. Be mindful though, just as in the song, in the end you may pay.

<sup>1</sup>Compare *Colo. Rev. Stat. § 13-25-135*; *Ohio Rev. Code Ann. § 2317.43*; *Okla. Stat. Ann. § 1-1708.1H*; *Wyo. Stat. Ann. § 1-1-130* (1977).

<sup>2</sup>Compare *Mass. Gen. Laws Ann. Ch. 233 § 23D*; *Tex. Code Ann. § 18.061*.

<sup>3</sup>Compare *Wash. Rev. Code Ann. § 5.66.010*; *Cal. Evid. Code § 1160*; *Fla. Stat. Ann. § 90.4026*.

<sup>4</sup>Kiger, Patrick J., *The Art of the Apology, Workforce Management*, October 2004, pp. 57-62