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"I'm Sorry." Mitigating Factor or Fodder for Suit?



By Mike Mongiello, Esq of Marshall, Dennehey, Warner, Coleman & Goggin

Key Points:

Pennsylvania may be enacting "apology" legislation that would allow medical professionals to apologize for, and explain the cause of unexpected medical outcomes, without fear that such statements could be used in a subsequent lawsuit.

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If enacted, apology legislation would reduce the number and severity of medical professional liability claims.

Enactment of apology legislation would be an important step toward lowering health care costs and attracting well-qualified specialist medical professionals to Pennsylvania.

Background

Should a medical professional's explanatory statements or benevolent sympathetic remarks regarding an unforeseen medical outcome be protected as confidential, or should attorneys for injured patients be allowed to interrogate the medical professional about such communications? This is currently a hotly contested tort reform issue in Pennsylvania, where lawmakers continue to debate whether to enact proposed "apology" legislation, which would allow medical professionals, including physicians, hospital employees and nursing home employees, to acknowledge, accept responsibility for and show compassion about an untoward medical event without effectively inviting a lawsuit. Pennsylvania's proposed apology legislation, as currently drafted, provides, in pertinent part, that: "[i]n any liability action, any benevolent gesture or admission of fault made prior to the commencement of a medical professional liability action by . . . a health care provider . . . to a patient . . . regarding the patient's . . . discomfort, pain, suffering, injury or death, regardless of the cause, including but not limited to, the unanticipated outcome of any treatment . . . shall be inadmissible as evidence of liability or as evidence of an admission against interest." *Regular Session 2011-2012, House Bill 495, Senate Bill 565*. The apology legislation would protect explanatory or apologetic communications by medical professionals only in liability actions – not in licensure actions brought by the State Board of Medicine or in criminal actions brought by the district attorney.

The Case for Enactment of Apology Legislation in Pennsylvania: Transparency Promotes Trust and Forgiveness

It is well known in the medical and legal communities that if a medical professional has a positive "bedside manner," it is less likely that a lawsuit will be filed and pursued against him or her in the event of a medical complication. It follows that the candor and empathy of a medical professional after an adverse medical event actually occurs should have a similar impact on whether an injured patient will pursue formal litigation, rather than some form of alternative dispute resolution. By way of substantiation, it has been found that "an apology gave the wronged party a sense of satisfaction and closure, resulting in faster settlements and lower demands for damages." *The Benefit of Saying You're Sorry, Curt Review*, Vol. 45, No. 3, Summer 2010.

Obviously, if an apology is admissible in a medical professional liability action, the defensibility of the case may be compromised and available insurance coverage may be jeopardized. *I'm Sorry: Why is that So Hard for Doctors to Say?*, *American Medical News*, amednews.com, Feb. 1, 2010. Not surprisingly, the defense bar almost always advises medical professionals against discussions about causes, opinions and expressions of regret to patients. Pennsylvania's proposed apology legislation, however, would allow medical professionals to openly communicate with patients about these matters without fearing that their communications will be retributively used against them in court. As a result, it is anticipated that if apology legislation becomes law, patient satisfaction would be fostered, critically important medical professional-patient relationships would be strengthened and, ultimately, the number and severity of medical professional liability claims would be reduced. In turn, enactment of apology legislation would be an important step toward lowering health care costs to the public at large, as well as attracting well-qualified specialist medical professionals to Pennsylvania, two recognized ongoing problems in this state. While

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providing these anticipated benefits, the apology legislation would not relieve medical professionals of liability, prevent the filing of medical professional liability actions or otherwise impair the legal rights of injured patients. Finally, enactment of apology legislation would be of no cost to taxpayers.

The Case Against Enactment of Apology Legislation in Pennsylvania: A Vehicle for Obstruction of Truth and Justice

Resistance to the enactment of apology legislation in Pennsylvania has been centered around the fact that, as written, it would make admissions of fault, in addition to apologies, inadmissible. *When Medical Apologies are Fodder for Suits, Philadelphia Inquirer*, November 6, 2011. The plaintiff's bar argues that evidence of responsibility is often not contained in medical records and that exclusion of such communications will result in an inability to meet the burden of proof in a medical professional liability action. Another obvious concern is that apologies "may become empty, utilitarian or self-serving rituals, leading doctors away from the higher moral purposes of apologies." *Doctors, Apologies, and the Law: An analysis and Critique of Apology Laws, Student Scholarship Papers*, Yale Law School/Yale School of Medicine, 2006.

Apology Laws in Other States

Currently, thirty-five states, including the surrounding states of Ohio, Delaware and Maryland, have enacted some type of apology legislation. *Is It Unrealistic to Expect a Doctor to Apologize for an Unforeseen Medical Complication?-A Primer on Apologies Laws, The Pennsylvania Bar Association Quarterly*, July 2010, Volume LXXXII, No. 3. Most such legislation shields "statements, gestures, or expressions of apology, benevolence, sympathy, or commiseration made by a health care provider to an alleged victim of an unanticipated outcome or the victim's relative or representative," and typically the "statement, gesture or expression must be related to the discomfort, pain, suffering, injury or death of the alleged victim." *I'm Sorry Laws: Summary of State Laws*, American Medical Association Advocacy Resource Center, July 2007. Some apology legislation imposes a timeframe in which an apology must be made in order to be held inadmissible. See e.g., *Washington RCWZ 5.64.010 and Vermont 12 V.S.A. § 1912, (thirty-day timeframe) and Illinois IL ST CH 735 §5/8-1901(seventy-two-hour timeframe)*. Other apology legislation excepts statements of fault from statutory protection, as distinguished from condolences. *Is It Unrealistic to Expect a Doctor to Apologize for an Unforeseen Medical Complication?-A Primer on Apologies Laws, supra*.

Status of Pennsylvania's Proposed Apology Legislation

Pennsylvania's proposed apology legislation, in the form of House Bill 495 and Senate Bill 565, is currently stalled in the Senate Judiciary Committee awaiting consideration. The battle for such legislation to become Pennsylvania law will certainly be uphill, even though a version of the legislation overwhelmingly passed the House of Representatives on March 2, 2011 (171-27). If apology legislation is to be enacted in Pennsylvania, there will likely need to be compromise as to the extent of the communications to be protected, with consideration given to what is being done in other jurisdictions. *When Medical Apologies are Fodder for Suits, supra*. Historically, Pennsylvania will often follow what other jurisdictions are doing on a given issue.

The current two-year legislative session continues through the close of 2012. Apology legislation is an issue of high priority for both the medical and business communities alike, and it is anticipated that if and when the legislation passes the Senate, it will be promptly signed into law. The outlook for eventual enactment of apology legislation is optimistic. If apology legislation is not signed into law by the end of the current legislative session, however, a new bill on this proposed tort reform measure will need to be introduced during the 2013-2014 session.

*Mike Mongiello, Esq. is an associate in the Harrisburg, Pennsylvania office of Marshall, Dennehey, Warner, Coleman & Goggin and can be reached at 717.651.3704 or mcmongiello@mdwgcg.com.

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