

'I'm sorry'

The legal community debates when clients should apologize

By [Reni Gertner](#)

"Say you're sorry."

It's something moms everywhere tell their children when they hurt someone at the playground.

Now, it appears, the art of apologizing is taking hold of the legal world, with risk managers, public relations specialists, doctors, lawyers and hospital administrators arguing that heartfelt apologies are reducing litigation — and minimizing recoveries even when lawsuits do arise.

"It's when physicians don't apologize that the patient or family gets angry, and sometimes they sue" as a result, Maureen Mondor, vice president of risk management for ProMutual Group, said at a recent panel discussion, "Good Business Sometimes Means Having to Say I'm Sorry."

Boston medical-malpractice attorney Robert M. Higgins agrees.

"One of the things we hear from clients a lot is, 'I might not have come here if they just accepted responsibility or acknowledged the mistake,'" says Higgins.

From a proliferation of state laws that make apologies for medical mistakes inadmissible in court to hospital disclosure programs set up to respond to errors, saying "sorry" — and the impact of failing to do so — is on the nation's radar screen.

While some apology proponents advocate complete disclosure, some lawyers suggest that health care professionals or others who want to apologize should be careful about how much they say.

Ralph C. Martin II, a former Suffolk County district attorney who practices in Boston, points out that there's "a distinction between admitting liability or that you've done something wrong and something short of that, which conveys empathy for someone else's human condition."

And it's not just whether someone says he is sorry; it's also how he says it and whether he means it that makes a difference.

How much to say

Risk managers generally advocate for open disclosure of errors. In the medical arena, this means admitting someone made a mistake, explaining why it happened and determining a reasonable amount of compensation.

If the physician or other health care professional made a mistake, "every patient is entitled to an open and honest disclosure of facts," stresses Rick Boothman, chief risk officer for the University of Michigan Health System, which has an apology and disclosure policy. "Some things are clear mistakes, while other things are just bad outcomes despite our best efforts. Either way, we get them the facts."

But lawyers argue that whether a doctor should apologize after a bad outcome — and how much they should say — should be determined on a case-by-case basis.

In general, "deciding what you want to demonstrate between empathy and responsibility depends on what your knowledge of the circumstances is, what your perceived liability is, and what message you want to send to a number of internal and external constituencies," says Martin.

If there has been an adverse result, but no negligence on the part of the physician, it is appropriate to offer an expression of sympathy, suggests Boston attorney David M. Gould, who represents physicians.

"What we're dealing with is an unfortunate medical result, such as if a gynecologist is doing a biopsy and there is an inadvertent cut, which is a possible risk of the procedure," explains Gould, who recently spoke at a Harvard Medical School conference on how physicians can avoid malpractice claims. "It's entirely appropriate to say to the patient, 'I am sorry you had a bad outcome.' I think it shows humanity and patients appreciate it."

However, in a case involving an unexpected outcome that likely involved negligence, Gould advises that a health care professional choose his words more carefully.

For example, it might be fine to say: "I'm sorry it didn't work out well and we'll do everything we can to make it better," he says. "But is it in the physician's interest to say, 'I made a terrible mistake?' Probably not."

He contends that such a statement "could make someone who may be on the fence run to a lawyer and file a malpractice case."

Gould says he represented a client who had told a patient that he "wished" something had been done sooner. In essence, "he apologized for something when he didn't do anything wrong, and several years later he was staring a malpractice claim squarely in the face," Gould says, noting that the client eventually won at trial.

Ashley McCown, executive vice president of the public relations firm Solomon McCown, notes that decisions about how much to say should be made with an eye toward the possibility of litigation several years down the road. "You have to make judgments now, while potential litigation may not materialize for three or four years," she says.

In addition to malpractice claims, attorneys advising doctors should remember that a poorly stated apology could lead to licensing complaints, says Boston attorney Paul Cirel, who represents health care providers.

One relative who is angry enough could lead to a complaint with the Board of Registration in Medicine, warns Cirel.

"The Board of Registration is a much more serious threat to an individual," says Gould. "Malpractice cases go away. But Board of Registration issues [may] never go away."

But Lancaster, Pa. attorney Jim Saxton, who represents medical professionals and hospitals, disagrees.

If the doctor doesn't apologize, "the patient can still go to the state board and ... maybe the doctor will be accused of concealing the mistake," says Saxton. "I'd be hard-pressed to conclude that the potential of a state board complaint should deter someone from good faith disclosure."

Anatomy of an apology

After deciding it is appropriate to say "sorry," there are guidelines to consider when offering apologies, according to lawyers, risk managers, public relations specialists and others.

From a business standpoint, McCown emphasizes the importance of developing a "communications strategy" with legal counsel that puts the business on the offensive instead of waiting and defending against accusations.

These rules would generally apply to any business that makes a mistake, from the police department to a hospital to a law firm.

*** Timing really matters.**

Experts agree that apologies should be made as soon as possible after the mistake occurs.

"The reality of the 24-hour news cycle is quick," says McCown. "The longer you wait to do or say something, the harder it gets."

However, that doesn't mean you should start saying too much before knowing what really happened. "You never want to say something when you're not absolutely sure about the facts," McCown advises.

In a medical setting, that might mean explaining to a patient or family the intention to look into the situation further, which should be stated sooner rather than later, says Saxton.

*** Actions speak louder than words.**

Non-verbal communication while making an apology can be just as important as the verbal. For example, people can often tell an apology isn't sincere if the person saying it is fidgeting or looking away.

Similarly, an apology without any follow-through will have no positive impact. "It should be genuine and supported by action," says McCown.

In the hospital setting, "you want to demonstrate to the patient and patient's family sincere elements of concern for them even if you don't know what happened, and convey that you are going to find out why things happened the way they happened," adds Martin. "It shouldn't be seen as any sort of posturing — defensive or otherwise."

*** Stay focused on the harmed party.**

In the medical context, Mondor says that an apology will be most successful when the physician focuses on the patient's needs and feelings.

A physician should say to the patient, "Can you tell me how you feel about this?" and then wait for the answer, suggests Mondor, who helped develop and serves as an advisor for the Communications and

Performance Improvement Program. Sponsored by Tufts University School of Medicine in collaboration with Tufts Health Care Institute and the University of Massachusetts Medical School, the program trains health care professionals in communication skills.

Often, if a patient explains for two minutes how the alleged mistake or lack of communication made him feel, that's enough, despite a human tendency to interrupt much more quickly, says Mondor, noting that the provider should "act like [he has] all the time in world, be at eye level and focus."

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Legislating and codifying the apology concept

In an attempt to encourage open apologies, more and more states are enacting laws that make a doctor apology — and sometimes full admission of fault — inadmissible at trial.

From 2003 through the end of October 2005, more than 20 states had enacted some form of law making apologies inadmissible, mostly in the medical context, according to the National Conference of State Legislatures. In 2005, at least 19 other states, including Massachusetts, have considered similar provisions.

In states where they exist, these laws are making some doctors more comfortable with saying sorry to patients.

These laws "make it easier for insurance carriers and defense lawyers to convince doctors to apologize," says Doug Wojcieszak, who founded SorryWorks!, an Illinois-based coalition to promote disclosure and apology policies at all hospitals.

Although Massachusetts hasn't enacted an apology measure protecting health care providers who admit mistakes, under a 1986 state law, statements or gestures "expressing sympathy" related to someone's pain or death after an "accident" are inadmissible as evidence of an admission of guilt. The statute applies to any accident, not just a medical mistake.

As a result, a physician admitting that he or she made a medical mistake would be admissible in a lawsuit, says Boston plaintiffs' attorney Robert M. Higgins.

A number of bills that would specifically bar apologies from being admissible in medical-malpractice actions are pending in the Legislature.

How hospital apology policies work

The apology trend is also spreading its way across the country in the form of hospital-based apology and disclosure policies.

The goal of such programs is for the medical profession to control its exposure to big verdicts by creating a policy of admitting medical errors up front, suggesting a reasonable settlement and offering a genuine apology for the error.

In Massachusetts, sources say that the Harvard network of hospitals is on the verge of issuing its own apology and medical error disclosure policy.

The hospital apology policy concept is also pending in Congress.

In September, Sens. Hillary Clinton and Barack Obama introduced a bill in the Senate that would require health care professionals to disclose medical errors as early as possible after they occur and create a process by which they would negotiate with injured patients for reasonable compensation. Hospitals would also be required to evaluate medical errors to prevent them from happening again.

Like most of the state "sorry" laws, the federal bill also states that apologies made during negotiations can't be used as evidence against a hospital or physician in a med-mal case.

One issue that concerns some health care defense lawyers about disclosure is that these policies often don't protect their clients from the possible ramifications of their apologies.

Boston attorney Paul Cirel, who represents health care professionals, says it would be helpful to "build some protection for the doctor" into the policy.

This might include releasing the provider from liability once the apology is made or requiring the apology to be privileged, says Cirel.

— Reni Gertner

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