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Narrative Review: Do State Laws Make It Easier to Say "I'm Sorry?"

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Initiatives intended to reduce the frequency and impact of medical errors generally rely on recognition and disclosure of medical errors. However, fear of malpractice liability is a barrier to physician disclosure. Some U.S. state legislatures have attempted to encourage physicians to disclose medical errors by enacting "apology laws." The authors reviewed the codified statutes of each of the 50 states and the District of Columbia to determine the prevalence and characteristics of such apology laws. They found that many states have recently adopted apology laws and that there is variability in these laws. The authors review some of the important differences in these laws and explore the potential impact of apology laws.

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The medical literature and lay press have increasingly reported on the incidence and impact of medical error. Among the most influential is the Institute of Medicine report "To Err Is Human: Building a Safer Health System" (1). The report estimated that more than one half of the adverse medical events occurring each year are due to preventable medical errors. These medical events cause 44 000 to 98 000 deaths annually in the United States (1). The annual costs associated with these errors in lost income, disability, and health care expenditures may be as much as $29 billion (1). The potential for severe consequences from medical error, including disability or death, underscores the need for aggressive action.

The Case for Disclosure and Apology

The errors in any system must be identified before they can be corrected. Therefore, initiatives intended to reduce the frequency and impact of medical error generally rely on recognition and disclosure of medical errors (1). Protected, voluntary incident-reporting systems have reduced errors in other industries (2). A similar approach to disclosure may be crucial in identifying and reducing systematic medical errors (1). Physician disclosure with apology is also a widely supported way to address the adverse effects of medical error, and ethicists and physicians concur that disclosure and apology are ethically indicated (3, 4). In addition, evidence suggests that affected patients and their families benefit substantially when physicians disclose medical errors, express sympathy, and apologize (3, 5). These communications enable patients to understand what has occurred and, in some cases, to obtain appropriate compensation (3). Moreover, full disclosure increases patient satisfaction, trust, and the likelihood of a positive emotional experience and reduces the likelihood of disrupting the physician–patient relationship (6). Improved physician communication may actually mitigate the harm from some errors, as well as reduce the incidence of future errors.

Despite the well-recognized benefits of disclosure and apology, however, most physicians simply do not communicate their errors to their patients (6, 7). Fear that such statements might result in malpractice liability is a substantial barrier to physician disclosure (8, 9). Physicians are often reluctant to express feelings of sympathy and condolence to patients who experience adverse outcomes and are even more reluctant to acknowledge medical errors.

These liability concerns on the part of physicians are historically well founded. The legal term *hearsay* relates to evidence based on past statements. The general hearsay rule usually precludes quoting previous statements to prove the truth of those statements at trial (10). However, a well-established exception to this general rule poses a clear risk to defendant physicians. The "admission by party opponent" exception to the hearsay rule specifically allows past statements made by a defendant physician to be used against him at trial (10). For example, in the Colorado malpractice case *Fognani v. Young*, in which a family member asserted that the defendant physician had stated that he was "sorry about your father's situation" and that "things might have turned out better had I been more up to date on current treatment options," the Colorado Supreme Court noted that these statements could be introduced at trial and that they "could subject [the physician] to liability" (11). Because of this "admission by party opponent" exception, physician disclosures and apologies pose a substantial risk in subsequent malpractice cases. As a result, lawyers routinely advise their physician clients to "keep quiet" about medical errors (12, 13).

Encouraging Disclosure and Apology

Some lawmakers have attempted to encourage physician disclosure and apology by legislatively overruling the "admission by party opponent" exception. In 2005, Senators Hillary Rodham Clinton (D, New York) and Barack Obama (D, Illinois) proposed the National Medical Error

See also:

Web-Only
CME quiz
Conversion of graphics into slides

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Table. **Types of Apology Laws**

Type of Law	Explanation
Sympathy only	Protects physician expressions of sympathy, regret, and condolence
Admission of fault	Protects physician admissions of fault and error, as well as expressions of sympathy, regret, and condolence

Disclosure and Compensation (MEDiC) Act (14). This bill emphasized open disclosure of medical errors to patients, apology and early compensation, and a comprehensive analysis of the events on a nationwide basis (14).

Although the U.S. Congress did not pass the MEDiC Act, some state legislatures have made similar attempts to encourage physician disclosure by enacting apology laws. Unfortunately, the medical literature lacks a complete and accurate resource to inform physicians of the current status of apology laws and to compare these laws among the states. As a result, physicians are unfamiliar with the apology laws in their respective states (Huffman-Dracht HB, McDonnell WM, Guenther E. Resident education in medical errors: a survey. In preparation.). Unless the scope, availability, and potential benefits of existing apology laws are presented to physicians in a clear, succinct manner, such laws are unlikely to affect physician disclosure and apology. Therefore, we sought to identify and analyze all apology laws in the United States and to describe the specific legal protections that they provide.

CURRENT STATE APOLOGY LAWS

On 20 November 2007, we used the electronic legal database Westlaw (Thomson Reuters/West, New York, New York) to conduct a comprehensive review of the codified statutes of each of the 50 U.S. states and the District of Columbia. We repeated the search and updated the database on 31 March 2008. We used the "50 State Surveys" resource of Westlaw to search state statutes under the headings "Tort Reform," "Medical Malpractice," and "Patient Safety and Medical Errors Reforms." In addition, we conducted Boolean searches of the Westlaw database of all state statutes by using various combinations of the following search terms: *physician*, *doctor*, *health care provider*, *apology*, *remorse*, *regret*, *sympathy*, *disclose*, *medical error*, and *outcome of medical care*. Furthermore, we reviewed the indices of all state statutes to locate any apology statutes not identified by the preceding searches.

Of the 50 states and the District of Columbia, 36 (71%) have enacted apology laws protecting voluntary disclosures (15–50) (**Table**). In 28 of these states, apology laws prevent the use of expressions of sympathy, regret, and condolence against the physician in subsequent litigation (16, 19–21, 23–40, 42–45, 47, 49) (**Figure**). For example, using the facts from *Fognani v. Young*, the physician's statement that he was "sorry about your father's situation" could not be used at trial (51). However, the statement "things might have turned out better had I been more up to date on current treatment options" is arguably an admission of fault and could be used against the physician. In the other 8 states, apology laws protect admissions of fault as well as expressions of sympathy (15, 17, 18, 22, 41, 46, 48, 50) (**Figure**). In these states, both of the statements in the *Fognani v. Young* case, and even one as explicit as "I made a mistake," would be excluded by the apology law.

The most important distinction among these apology laws is whether admissions of fault are protected. However, we noted many additional variations between states. For example, 1 state (Vermont) only protects oral, but not written, statements (46). Moreover, 4 states (Florida, New Jersey, Nevada, and Pennsylvania) have moved beyond the concept of voluntary disclosure and have enacted laws mandating that hospitals or their physicians notify patients of medical errors leading to adverse outcomes (52–55). Each mandatory notification law protects the required disclosure from being used as evidence of fault in any malpractice action.

THE EFFECTS OF APOLOGY LAWS

The impact of apology laws on physician disclosures and on quality of care remains unclear. Thirty-four apology laws (94%) became effective on or after 1 January 2000, and 24 of these only became effective on or after 1 January 2005. Because they are so recent, and because physicians remain unfamiliar with them, there is little evidence yet whether apology laws improve communication and whether they reduce medical error. As physician familiarity with these laws increases, studies addressing these questions will be important (5, 56).

Litigation activity related to medical errors might serve as one measure of the frequency and effectiveness of physician disclosure. Patients who feel that they have been deprived of full disclosure and appropriate apology may be more likely to pursue malpractice litigation (57). Conversely, some experiential evidence suggests that full disclosure, apology, and fair compensation may result in lower litigation costs arising from medical error. The University of Michigan reports that since it adopted a policy of full physician disclosure of medical error in 2001, a marked reduction in malpractice claims and decrease in legal expenses have occurred (58).

A similar experience has been reported by the Lexington Veterans Affairs (VA) Medical Center in Lexington, Kentucky. After the Lexington VA Medical Center adopted a full-disclosure and fair-settlement approach, the hospital had more settled claims, fewer plaintiffs' verdicts, and reduced payments per claim (59). The VA was so impressed with this experience that it adopted a full-disclosure policy across all hospitals in the VA system (60).

Disclosure as a way to reduce litigation costs, however, remains controversial (61, 62). Studdert and colleagues (63) argue that with physician disclosure of medical error, "an increase in litigation volume and costs is highly likely." They note that the vast majority of patients who suffer from medical errors are unaware of those errors and, consequently, never file malpractice claims (63). However, widespread disclosure and apology may "flag" such errors and prompt more claims than are dissuaded by the apologies (63).

Whether a reduction in litigation costs, absent a change in the underlying quality of care, is a useful outcome is also controversial. Some argue that any change to the medical malpractice system that reduces litigation costs leaves more health care system resources available for delivery of care (57, 64). In contrast, some patient advocates have suggested that these reduced litigation costs simply reflect injured patients being deprived of appropriate compensation for their injuries (65, 66).

Regardless of whether reduced litigation costs are a net value, the evidence that patients and their families receive tangible benefits from the act of disclosure and apology itself may be sufficient justification for apology laws. Even if increased disclosure and apology are unsuccessful in reducing systemic errors and improving quality of care, an increase in such physician communication might nonetheless be a beneficial product of apology laws.

Advice for State Legislatures

Many state legislatures have tried to increase apology and disclosure through apology laws. Such laws offer discrete legal protections. Nevertheless, physicians have generally declined to disclose errors due to liability concerns, and these concerns can only be eased if physicians are informed about their legal protections. We encourage states to explore ways to better inform physicians about existing apology laws.

For states still contemplating apology laws, evidence is currently insufficient to know what effect such laws will have on physicians' communications, on malpractice litigation activity, or on the incidence of medical error. Moreover, additional research is needed to assess the implications of "sympathy only" versus "admissions of fault" laws. At this time, we cannot make an evidence-based recommendation on whether to adopt an apology law and, if so, which type. Nonetheless, if further experience shows that disclosures and apologies can be fostered with apology laws, then improved physician–patient relationships, better patient understanding of their adverse outcomes, increased

Figure. **Types of apology laws, by state.**

patient satisfaction, and medical error reduction might all be realized.

IMPLICATIONS FOR PHYSICIANS

Issues regarding medical error and potential malpractice liability understandably make physicians uncomfortable. Nonetheless, apology laws may present new opportunities to discuss difficult topics with patients. Our article might be viewed as a first step in educating physicians about these new opportunities. In states in which no apology laws have yet been enacted, physicians have the opportunity to work with their state legislators in crafting apology laws that may best meet their needs. Physicians should now be equipped, and are strongly encouraged, to pose well-informed inquiries to their state medical associations and legal counsel about how best to comply with their own states' apology laws.

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