

**A Role for Apology in Medical Malpractice:
Apology, Forgiveness, and Reconciliation**

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Introduction

Beginning in childhood and continuing through adulthood, most people are taught that apologies are important. Whether it is apologizing to a sibling for taking their toy, apologizing to a parent for breaking curfew, or apologizing to a spouse for upsetting them, apologies are an important part of our lives. Why then, are apologies so often overlooked in modern legal proceedings, especially in the medical malpractice field?

Many people have suggested that an apology should not be given by a doctor because it is an admission of guilt, because an apology can and will be used against a doctor in subsequent litigation, or even because an apology may void an insurance policy. Although there has been a strong focus on the potential risks of an apology in the medical malpractice field, there has not been nearly as much attention paid to the potential benefits of an apology. However, there are benefits of an apology in a malpractice scenario. Recently, legal scholars have encouraged the use of apologies to promote settlement discussions and emotional well being. It appears that the benefits may even outweigh the risks of an apology for both the injured patient and the doctor. This paper will discuss the benefits of encouraging apologies in the medical malpractice field and how apologies of this nature can be implemented; focusing on the effects this would have on litigation. This paper will not focus on apologies in general relationships or in any context other than medical malpractice cases. Part I of this paper reviews the current

literature on apologies and their role in the medical malpractice industry, while Part II of this paper is an analysis of that literature.

Part I—Review of Current Apology Literature

As a starting point to a discussion on apology, it is important to develop a working definition of apology since there are so many varying definitions of apology.

One definition describes an apology as:

[A]n acknowledgement intended as an atonement for some improper or injurious remark or act: an admission to another of a wrong or discourtesy done him accompanied by an expression of regret or an explanation offered to a person affected by one's action that no offense was intended, coupled with the expression of regret for any that may have been given; or, a frank acknowledgment of the offense with expression of regret for it, by way of reparation.¹ Another definition of apology is that it “acknowledge[s] responsibility for the conduct that caused the harm.”² Similarly, it has been referred to as an “admission of regret, remorse, and responsibility.”³ Looking at these varying definitions, it appears as if this discussion is based upon the idea of an apology including an admission of responsibility, of regret, and of sympathy for the injured party.

The next step in this discussion is determining what the potential risks of an apology are. These risks often hinder apologies in the medical malpractice context. The first risk associated with apology is psychological.⁴ There is a psychological risk associated with apology because it forces the person apologizing to humble himself or

¹ Jonathan Cohen, *Advising Clients To Apologize* 72 S. Cal. L. Rev. 1009, 1014 (1999).

² Jennifer Robbennolt, *Attorneys, Apologies, and Settlement Negotiation*, 13 Harv. Negot. L. Rev. 349, 352 (2008).

³ Steven Raper, *No Role for Apology: Remedial Work and the Problem of Medical Injury*, 11 Yale J. Health Pol'y, L. & Ethics 267 (2011).

⁴ Cohen, *supra* note 1 at 1023.

herself and admit responsibility.⁵ More specifically, the psychological toll that an apology may take on a doctor is possibly more than on the layperson. This is because, “Doctors possess certain characteristics that aid in their medical pursuits . . . [S]ome of these traits include ‘confidence, competitiveness, and determination.’ These same qualities that are admired in physicians may also impede an apology, for pride, acknowledgement of failure, and fear of shame may restrain a sympathetic gesture.”⁶ Thus, for doctors apologies may carry more of a psychological risk and stigma than it does for others not involved in the medical profession. A second risk associated with apologies, is strategic.⁷ A strategic risk is that the victim may see an apology as a sign of weakness.⁸ Third, and perhaps the largest risk of an apology, is that it may void insurance coverage.⁹ Most doctors possess insurance coverage and many policies contain clauses specifically prohibiting the insured from volunteering any admission of liability.¹⁰ Since an apology tends to contain an admission of responsibility or guilt, most doctors err on the side of safety by not speaking with the patient at all, let alone apologizing, in an effort to maintain their insurance policy.¹¹ Finally, there is a risk that statements from an apology will be admissible at trial, likely resulting in a guilty verdict for the doctor.¹²

⁵ *Id.*

⁶ Nicole Marie Saitta & Samuel D. Hodge, Jr., *Is It Unrealistic To Expect A Doctor To Apologize For An Unforeseen Medical Complication? —A Primer on Apologies Laws*, 82 Pa. B.A. Q. 93, 97 (2011).

⁷ Cohen, *supra* note 1 at 1024.

⁸ *Id.*

⁹ *Id.* at 1025.

¹⁰ *Id.*

¹¹ Saitta, *supra* note 6.

¹² Jennfier Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 Mich. L. Rev. 460, 461 (2003).

This is especially true in California where statutes, allowing any admission of liability to be admitted into evidence, discourage apologies.¹³ Specifically, the California statute states:

The portion of statements, writings, 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 that person or to the family of that person shall be inadmissible as evidence of an admission of liability in a civil action. A statement of fault, however, which is part of, or in addition to, any of the above shall not be inadmissible pursuant to this section.¹⁴

Thus, as one author explains, California’s code of evidence “manifestly discourages the human tendency to apologize or express regret” because if a doctor does apologize, it can later be used against them in trial as evidence of guilt. The Federal Rules of Evidence discourage dialogue between a physician and patient even further. Rule 408 of the Federal Rules states that, “expressions of sympathy offered by the wrongdoer outside of settlement negotiations or mediation may not be protected and may be admissible evidence.”¹⁵ Therefore, the Federal Rules of evidence allow even a basic sympathetic statement to be admitted as evidence of guilt. Both of these statutes hint at why physicians are so fearful of speaking to, let alone apologizing to, patients after an injury—their careers depend on their silence.

Although there are many risks for a doctor when apologizing, there are also many potential benefits that cannot be overlooked. One of these benefits is a “decrease in the monetary losses that would result from litigating a malpractice claim.”¹⁶ One study

¹³ Cal. Evid. Code § 1160 (2007)

¹⁴ *Id.*

¹⁵ Robin E. Ebert, *Attorneys, Tell Your Clients To Say They’re Sorry: Apologies In The Health Care Industry*, 5 Ind. Health L. Rev. 337, 342 (2008) (quoting Federal Rules of Evidence Rule 408).

¹⁶ Saitta, *supra* note 6 at 94.

found that, “an apology gave the wronged party a sense of satisfaction and closure, resulting in faster settlements and lower demands for damages.”¹⁷ Another benefit of apologizing is that it helps meet the needs of the patient/victim, so that litigation is not necessary.¹⁸ After a negligently inflicted medical injury, a patient wants three things: “An apology . . . an acknowledgment of the patient’s situation . . . and an assurance that procedures or processes change so that the same thing does not happen to others.”¹⁹ Without an apology none of these needs are met, and thus a lawsuit is often the only way that a patient will receive these assurances.²⁰ Thus, if an apology is offered there is a chance that no lawsuit will be brought. This theory is further supported by research that indicates, “physician apologies reduce patient anger, increase communication, and reduce the patient’s motivation to litigate.”²¹ It appears then that patients are less likely to pursue litigation if they have been given the opportunity to speak with the doctor and hear an apology. However, there are always a few cases that make it to trial, even with an apology offered by the physician. In these instances, it has been suggested that a physician who has apologized looks better in front of a jury than one who has not.²² This can be extremely beneficial when a jury is determining punitive damages.²³

Now that it has been established that there are great benefits of apologizing, we must then turn our discussion to the next issue: when should an apology be given? It has

¹⁷ *Id.*

¹⁸ *See id.* at 98.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² Robbennolt, *supra* note 12 at 462.

²³ *See id.*

been suggested that, “an early apology may prevent an injury from turning into a dispute, nipping possible conflict in the bud.”²⁴ Therefore, an early apology can be a preventative means of avoiding litigation. Not only is an early apology helpful in smoothing over conflict, it is also in line with the American Medical Association’s Code of Ethics which states that, “concern regarding legal liability which might result following truthful disclosure should not affect the physician’s honesty with the patient.”²⁵ Thus, the code of ethics seems to indicate that when there is a medical error, the patient is entitled to know about the injury.²⁶

Part II—Analysis

Apologies are similar to snowflakes in the sense that no two are alike. With the wide variety of definitions of apology and the many associations made with the word, it is no wonder that physicians are fearful of apologies. I believe, as a future attorney, that it is important for those in the legal profession to encourage clients to apologize. As an agent of our clients we have a duty to encourage them to make the best decision for themselves not only legally, but emotionally as well. An apology is the tool by which both the patient and the physician will feel open and comfortable with one another, which will likely result in better communication, less anger, and overall satisfaction with the dispute resolution process.

As discussed earlier, there are many benefits of an apology made by a physician. Arguably the most significant benefit is a minimization of hurt so that settlement, not litigation, is more likely to occur. It is important for attorneys to explain to physicians,

²⁴ Ebert, *supra* note 15 at 362.

²⁵ *Id.* at 341.

²⁶ *See id.*

their clients, how this benefit is possible. Both research and our class discussions indicate that there are many psychological needs met by apologies. A few examples are: a restoration of self-respect and dignity, an assurance of shared values, an assurance that the offenses were not the patient's fault, an assurance that there is safety in the physician-client relationship, seeing the physician suffer from their remorse, a reparation for the harm caused by the offense, and a meaningful dialogue between the physician and the patient. If an attorney explains to their clients the psychological needs that are met through apology, then the physician will be able to make an educated decision as to whether they feel comfortable apologizing or not. Without informing them of these benefits, physicians will likely choose the "safe" choice of not apologizing because they do not see any other option.

If the psychological benefits are discussed with their clients, then attorneys can explain how the benefits of apology far outweigh the risks associated with apologies in medical malpractice cases. Although there is the psychological risk of losing confidence and humbling oneself in order to apologize, there is an even greater risk if the injury forces the doctor to be stripped of his right to practice medicine simply because there was no apology. Furthermore, although there is a strategic risk of being seen as weak if an apology is offered, this is not necessarily the case. As discussed earlier, often patients and jurors find physicians who apologize more likeable, as oppose to weak. Therefore, there may be a strategic benefit to apologizing when dealing with an impending medical malpractice claim. A physician who has apologized will likely be asked to pay less punitive damages and may even continue a relationship with the patient. Finally,

although there is a risk that an insurance policy may become void with an apology, attorneys can help their clients avoid this.

There is a way to apologize, without voiding an insurance policy. This is known as a “safe apology.” A safe apology is one that expresses sympathy for the patient’s injury and remorse for that injury, without containing any statements of personal liability.²⁷ It has been suggested that encouraging a safe apology is the best option for an attorney to discuss with their client: “[L]awyers protective of their clients’ interests might serve those interests by encouraging clients to apologize short of admitting liability.”²⁸ A safe apology offers the physician the opportunity to speak with the patient without voiding an insurance policy because there has been no admission of fault. In addition, the statement, at least under California law, cannot be admitted into evidence as an admission of guilt because there is only a statement of benevolence.

Although a “safe” apology does not include an admission of responsibility, which is typically associated with apologies, it is no less constructive to the process. Not only do safe apologies help the physician, but they also benefit the patient. Research has indicated that, “[w]hile a full apology will usually be most powerful, ‘merely’ expressing sympathy can often be a large step.”²⁹ In addition, it has been suggested that safe apologies can help avoid lawsuits and encourage settlement.³⁰ Therefore, it appears that apologies in the medical malpractice context not only meet psychological needs, but also economic needs. Apologies tend to discourage litigation and encourage settlement,

²⁷ Robbennolt, *supra* note 12 at 468.

²⁸ *Id.* at 469.

²⁹ *Id.*

³⁰ *Id.*

which is economically beneficial to both the patient and the physician. I believe that it is important for attorneys, who often work on a contingent-fee basis, to remember that they have a fiduciary duty to their client. In the medical malpractice world, which is highly uncertain, an attorney should encourage his client to maintain a relationship with the patient, which is often only accomplished through settlement and apologies.

As seen, the risks of an apology are far outweighed by its benefits. An attorney dealing with a medical malpractice claim would serve his client's best interests by encouraging the physician to apologize without psychological, strategic, or insurance-related risk in an effort to pursue both emotional and financial health.

Another reason that it is important for attorneys to encourage apologies in the medical malpractice environment is that it will foster an environment of openness and communication. A cornerstone of the physician-patient relationship is an open dialogue between the two, without open communication there is a failure in the relationship.³¹ As indicated earlier, patients want answers after an injury has occurred. They want to know why it happened, who did it, and they want to be assured that it will not happen again. When an apology is offered, whether it is a safe apology or "full" apology, it fosters open communication between the patient and physician. Not only is this beneficial to the physician because the patient will be less likely to pursue litigation, but this communication encourages doctors and patients to be honest with one another, it encourages the relationship that should exist, guided by morals, not fear.

Now that the benefits of apologizing have been established, the next question must be asked: what if it is the attorney that does not want the physician to apologize?

³¹ Ebert, *supra* note 15 at 340.

Although there are evidentiary rules that may lead a lawyer to discourage apologies, are there other factors at play? It is very likely that the “litigation culture creates additional pressure antithetical to apology.”³² Lawyers tend to impose “rational calculations” on their clients every move, which often hinders apology.³³ Apologies stem from an emotional place, something moral in nature. An apology is something that we are taught at a young age, to smooth over a situation when we have done wrong. As children we have no qualms with apologizing, but as adults we seem to forget the therapeutic effect it has not only on the offended, but also on the offender. Attorneys must understand the power of apologies not only economically, but also psychologically. Apologies allow for an increase in client satisfaction with the dispute resolution process, and allow clients to settle differences.³⁴ This satisfaction should be a goal of all attorneys, and one that I hope to remember as I enter the legal profession.

Conclusion

Apologies are not something that should be forgotten in childhood; rather, they are valuable tools that can bring people together. Although physicians and attorneys are often fearful of apologizing in the wake of a medical malpractice claim, it should not be forgotten. An apology can lead to an expedited settlement, a renewed relationship between the physician and the patient, and an overall satisfaction with the dispute resolution system. Although attorneys are taught to be rational and calculated, so as to minimize risks to their clients, it is important that attorneys recognize the ways that an apology can benefit their clients and the litigation system as a whole. An attorney who

³² Deborah L. Levi, *The Role of Apology in Mediation*, 72 N.Y.U. L. Rev. 1165, 1187 (1997).

³³ *See id.*

³⁴ *Id.* at 1189.

focuses on these benefits will be able to foster an environment of open communication and fulfillment. In addition, if attorneys begin to support apologies then legislation will likely follow course. Thus, statutes which discourage apologies may be changed to protect physicians who have a moral desire to apologize, but cannot out of fear of incrimination. All in all, it is important that physicians apologize to their patients in the medical malpractice context. Physicians will feel a sense of relief and patients will have their questions answered. Such changes can only occur if attorneys encourage apologies and create an environment that focuses on emotions and people, not monetary outcomes.