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FEATURED ARTICLE
New law means never having to [not] say you're sorry
By Paul Giancola and Sarah Perry

In a recent installment of the Chicago Tribune advice column "Ask Amy," a devastated advice-seeker wrote to complain that, following the deaths of two ill relatives, neither of their respective primary care physicians called the family to offer condolences about the deaths-"I can't understand why some sort of acknowledgement from the [doctor] is too much to expect...I think it is the responsibility of the [doctor] to offer some sort of condolence to the family when it is in the midst of the shock of the loss of a loved one."

Unfortunately for the distressed inquirer, the situation she described is often standard protocol for many physicians. As distasteful as it may seem to the surviving family, physicians are generally well advised to keep quiet after death or injury of a patient. This is because under the Rules of Evidence, a physician's statements and conduct reflecting responsibility, apology or even sympathy may later be introduced in a malpractice lawsuit as evidence of an admission of liability.

All of this may be changing, however, due to legislative changes to the evidence that may be heard in medical malpractice cases. Many states have adopted so-called "I'm Sorry" laws that allow physicians to apologize to patients or offer sympathy without later subjecting themselves to claims by plaintiffs that they admitted fault for the poor patient outcome. At least seven states, including Arizona in this legislative session, have passed "I'm Sorry" laws, and at least seven others, have similar laws under consideration.

Arizona's new "I'm Sorry" law applies to any: "Statement, affirmation, gesture or conduct expressing apology, responsibility, liability, sympathy, commiseration, condolence, compassion or a general sense of benevolence." Made by: "A health care provider or an employee of a health care provider." Made to: "The patient, a relative of the patient, the patient's survivors or a health care decision maker of the patient." Relating to: "The discomfort, pain, suffering, injury or death of the patient as the result of the unanticipated outcome of medical care." Result: The physician's statement or conduct "is inadmissible as evidence of an admission of liability or as evidence of an admission against interest."

For some patients, hearing a doctor say "I'm sorry for what happened" is part of the healing process. Similarly, many physicians want to apologize or express sympathy for an unanticipated outcome, but they remain silent. Supporters of "I'm Sorry" laws say an apology alone may sometimes be enough to satisfy a patient's need for justice, and that, even if a lawsuit cannot be prevented, an apology may be an important first step toward a less adversarial process and possibly a reduced settlement.

Proponents of "I'm Sorry" laws also claim that many plaintiffs say they chose to sue their health care provider because of a breakdown in communication and a lack of information following an
unexpected outcome. Proponents claim that when physicians do not communicate about such events, the patient may feel betrayed by the physician's unexplained silence. This uncomfortable silence between the physician and the patient results in the patient becoming angry, and the seeds of a lawsuit are sown.

There is currently no evidenced-based data to support the belief that an apology reduces malpractice claims. However, anecdotal evidence suggests that an apology may reduce claims by as much as ten to 30 percent. An anecdotal example is that, in 2002, the University of Michigan Health System hospitals began advising physicians to apologize for their mistakes. Over the next two years, the hospital's attorneys' fees to defend malpractice cases declined from $3 million to $1 million, and the number of malpractice suits declined from 262 in 2001 to about 130 in 2004.

The Arizona "I'm Sorry" law is designed to primarily provide protection for expressions of apology and condolence. Although the law includes the words "responsibility" and "liability" it is unclear how these words will ultimately be interpreted by a court when the statute is challenged by plaintiffs. There may also be efforts at finding alternative reasons for getting the apology admitted into evidence. For instance, it may be argued that it is a prior inconsistent statement that contradicts the doctor's denial of liability or responsibility at trial for the adverse outcome. A jury, of course, may not perceive the legal distinction for the admission of the evidence, and likely will believe it is an admission of fault. Until such laws have been judicially tested, a physician should carefully consider the words to be used before an apology is provided.

It should also be anticipated that a patient or family may request, or the physician may wish to provide, an explanation for the adverse outcome. Any explanation, whether as part of an apology or a disclosure of a misadventure, may not be protected by the new law. Accordingly, when including substantive information while saying "I'm Sorry," a physician should provide only known facts without blaming, guessing, speculating as to what happened or why it happened; consider having a witness to the discussion; document who was present and the conversation in the medical record.

"I'm Sorry" laws provide an excellent opportunity for physicians to sympathize with patients and to participate in changing the culture of silence about discussing medical errors and adverse outcomes with patients and their families. Time will tell whether such efforts will stem the tide of malpractice suits and decrease malpractice premiums. Regardless, encouragement of open communication and empathy between patients and physicians is a goal that is likely to be beneficial to both patients and physicians.

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