

## **Apology Law**

### **A Federal Standard for the Protection of Apologies Following Medical Harm**

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The essence of the findings and conclusions in this paper is that the federal government should enact an apology law protecting full apologies in civil “medical harm” cases, meaning a law that protects statements, affirmations, gestures or conduct expressing apology, fault, sympathy, commiseration, condolence, compassion, or a general sense of benevolence in writing or verbally given by the provider or an employee of the provider, the organization, or a representative of the organization. Once such a law has been enacted, education and training for existing and new providers should occur to prepare them for the difficult apologetic conversations with the patient, the patient’s family and the provider’s organization in the event of medical harm. The federal support of full apologies will encourage their use following harm, allowing the benefits to be realized throughout our judicial and healthcare systems.

With a federal law protecting full apologies, providers will no longer feel that following a patient’s medical harm “sorry seems to be the hardest word.” Protecting full apologies by federal law will provide many benefits that include: avoiding lawsuits; increasing settlement rates for compensable cases by working in conjunction with alternative dispute resolution (“ADR”); decreasing overall administrative costs as compared to litigating cases, thereby decreasing the costs of malpractice insurance and healthcare overall; and encouraging natural-healing communication between the parties involved following a harm event.

*Sorry seems to be the hardest word.*

*-Elton John*

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## I. Introduction

Eighteen-month old Josie King arrived in the Intensive Care Unit of Johns Hopkins Hospital after sustaining scalding burns from a bathtub accident.<sup>1</sup> On February 22, 2001, two days before Josie's planned discharge home with her loving family, she died after being administered a dose of methadone in error and severe dehydration.<sup>2</sup> Josie's care team didn't see the danger she was in until the time was too late and the hospital, which had done so well to heal her injuries, had in fact mistakenly caused her death.<sup>3</sup> Josie's mother recalls her conversation with Dr. George Dover, the director of Johns Hopkins Children's Center:

"We wanted someone to tell us why - why didn't they listen to us when we said something was wrong with Josie, why didn't they give her something to drink? We were involved with our lawyers then. We were going for it. If George had said, 'we're not sure what happened,' we would have thrown him out. But he totally did the right thing, at least from our perspective. He said, 'I am sorry. This happened on my watch, at my hospital. I will help you get to the bottom of it.'"<sup>4</sup>

The King family is not alone in the fact their daughter experienced a medical error that gravely impacted their family. A recent study completed by Johns Hopkins projected more than 250,000 medical errors cause patient deaths annually in American hospitals and estimated medical errors to be the third leading cause of death in the United States.<sup>5</sup> Whereas studies confirm the unfortunate fact that medical errors occur all too often in healthcare, the apology and open communication from Johns Hopkins to the King family following Josie's death is a much rarer occurrence.<sup>6</sup>

Patients who are harmed, as well as their support system, view apologizing as the appropriate ethical response to a medical error.<sup>7</sup> In recent years, there has been encouragement to include apologies following harm in clinical settings as a response to the collective call from

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<sup>1</sup> Mary Ann Ayd, *A Remedy of Errors* (Spring/Summer, 2004) <http://esgweb1.nts.jhu.edu/hmn/S04/feature1.cfm>.

<sup>2</sup> Id.

<sup>3</sup> Id.

<sup>4</sup> Id.

<sup>5</sup> Jen Christensen and Elizabeth Cohen, *Medical Errors May Be The Third Leading Cause of Death in the U.S.* (3 May 2016) <http://www.cnn.com/2016/05/03/health/medical-error-a-leading-cause-of-death/index.html>.

<sup>6</sup> Mary Ann Ayd, *A Remedy of Errors* (Spring/Summer, 2004) <http://esgweb1.nts.jhu.edu/hmn/S04/feature1.cfm>.

<sup>7</sup> ARTICLE: Transparency and Disclosure of Medical Errors: It's the Right Thing to Do, So Why the Reluctance?, 35 Campbell L. Rev. 333 (2013) (p. 333).

patients and providers who claim to want these types of honest interactions.<sup>8,9</sup> A sincere “I’m sorry” is what people want to hear most from those they view as responsible following a poor healthcare outcome; but sadly, those responsible parties are very reluctant to utter those words due to concerns about liability exposure.<sup>10,11</sup>

As of September 2014, 36 states have enacted apology laws which vary in construction and protection of apologies.<sup>12,13</sup> In the event of litigation, apology laws prevent the provider’s apology from being used as evidence against them to prove liability for the patient’s harm.<sup>14</sup> The statutes in place have recognized structural weaknesses and minor differences in wording that may actually prevent the use of apologies and decrease the impact of the law on medical malpractice lawsuits.<sup>15,16</sup> The majority of apology laws, like those in New Hampshire and Massachusetts, protect partial apologies allowing providers to voluntarily express feelings of sympathy and apologize for an act or omission in the event of medical harm.<sup>17,18</sup> This approach to apology laws tracks most closely to the dictionary definition which states an apology to be an admission of error along with an expression of regret.<sup>19</sup> These laws do not protect full apologies that include an additional expression of remorse or self-criticism.<sup>20</sup>

Apology laws are essential to the continued development of alternative dispute resolution (ADR) and medical malpractice reform in this country necessitating a standardized approach to apology laws. A federal apology law developed to protect full apologies from being admissible as evidence of negligence in a medical malpractice lawsuit will advance ADR by encouraging and allowing open communication between the parties involved in a medical malpractice claim and increase the likelihood of settlement. A federal apology law will provide a consistent approach for apology protection throughout the United States that will empower all providers to apologize in the event of harm or death to a patient during medical care.

This paper starts by presenting an argument for the development of a federal apology law. In part two, the paper will explore why the healthcare industry needs apologies. A brief

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<sup>8</sup> Id. at 151.

<sup>9</sup> Article: APOLOGIES IN THE HEALTHCARE SYSTEM: FROM CLINICAL MEDICINE TO PUBLIC HEALTH, 74 Law & Contemp. Prob. 151 (2011) (p. 151).

<sup>10</sup> ARTICLE: Forgive and Forget: Recognition of Error and Use of Apology as Preemptive Steps to ADR or Litigation in Medical Malpractice Cases, 6 Pepp. Disp. Resol. L.J. 81 (2006) (p. 92).

<sup>11</sup> ARTICLE: Apologize First; Mediate Second; Litigate ... Never?, 34 Rev. Litig. 493 (2015) (p. 493).

<sup>12</sup> Id. at 499.

<sup>13</sup> McMichael, Benjamin J. and Van Horn, R. Lawrence and Viscusi, W. Kip, *Sorry is Never Enough: The Effect of State Apology Laws on Medical Malpractice Liability Risk* (10 December 2016). Available at SSRN: <https://ssrn.com/abstract=2883693> or <http://dx.doi.org/10.2139/ssrn.2883693>

<sup>14</sup> ARTICLE: DOES 'SORRY' INCRIMINATE? EVIDENCE, HARM AND THE PROTECTION OF APOLOGY, 21 Cornell J. L. & Pub. Pol'y 567 (2012) (p. 571-572).

<sup>15</sup> Anna C. Mastroianni et al., *The Flaws in State “Apology” and “Disclosure” Laws Dilute Their Intended Impact on Malpractice Suits*, 29 Health Affairs 1611, 1616 (2010) (p. 1614).

<sup>16</sup> ATTORNEYS, TELL YOUR CLIENTS TO SAY THEY’RE SORRY: APOLOGIES IN THE HEALTH CARE INDUSTRY, 5 Ind. Health L. Rev. 337 (2008) (p. 348).

<sup>17</sup> N.H. Rev. Stat. Ann. § 507-E:4

<sup>18</sup> Mass. Ann. Laws ch. 233, § 23D

<sup>19</sup> Apology (n.d.). Retrieved on May 25, 2017 from <https://www.merriam-webster.com/dictionary/apology>.

<sup>20</sup> ARTICLE: DOES 'SORRY' INCRIMINATE? EVIDENCE, HARM AND THE PROTECTION OF APOLOGY, 21 Cornell J. L. & Pub. Pol'y 567

history will outline the medical malpractice insurance crises as they relate to apology laws. Then an explanation will show how ADR and apologies can work in tandem to change the medical liability system in the United States. Part three will then explore the differences between partial and full apologies as well as two studies which outline the impact of each type of apology following a medical harm event. Section three will also present why the protection of full apologies is the most advantageous and recommended in the development of a federal apology law. In parts four and five, the paper will outline some of the benefits of apology from the perspectives of patients, families, and providers involved in medical harm events. Part five will also outline historical barriers to provider apologies such as the fears of legal, professional, emotional and financial consequences. Current state apology laws, the Federal Rules of Evidence, and case law from a variety of states will be reviewed in parts six and seven highlighting the differences in protections and how these variations can lead to reluctance of open apologetic communication from providers to patients and families. Lastly, part eight will present arguments against apology laws in general and the flaws identified in those arguments.

## **II. Background: Why healthcare needs apologies, the medical malpractice insurance crisis, and Alternative Dispute Resolution**

The simple answer to the question why the healthcare field needs apologies is because “modern medicine is dangerous.”<sup>21</sup> In 1999, the Institute of Medicine (IOM) published a now famous study titled *To Err is Human: Building a Safer Health System*, which at that time estimated between 44,000 and 98,000 deaths per year were attributed to medical errors.<sup>22, 23</sup> As more and more care is provided to patients outside the hospital setting in places like outpatient surgery centers, physician offices and nursing homes, previous data projections from the IOM report have been considered a significant underestimation of patient death because the study only took into account in-hospital events.<sup>24, 25, 26</sup> More recent studies have concluded medical errors are the third leading cause of death in the United States.<sup>27</sup> The number of harm events increases dramatically again when analyzing nonfatal patient injuries estimating 130,000 Medicare beneficiaries sustained severe harm during hospitalization and nearly half of those harm events may have been preventable.<sup>28</sup> Harm related to medical error committed in hospitals is estimated to cost approximately \$1,246 extra per patient admission.<sup>29</sup> The IOM report estimates the total

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<sup>21</sup> ARTICLE: THE PATIENT INJURY EPIDEMIC: MEDICAL MALPRACTICE LITIGATION AS A CURATIVE TOOL, 4 Drexel L. Rev. 41 (2011) (p.45).

<sup>22</sup> ARTICLE: Apology and Medical Mistake: Opportunity or Foil?, 14 Ann. Health L. 55 (2005) (p.55-56).

<sup>23</sup> ARTICLE: A DOSE OF REALITY FOR MEDICAL MALPRACTICE REFORM, 88 N.Y.U.L. Rev. 1224 (2013) (p. 1233).

<sup>24</sup> SYMPOSIUM: THE TWENTY-FIFTH ANNIVERSARY OF THE MINNESOTA COURT OF APPEALS: EVIDENCE LAW: MY LAWYER TOLD ME TO SAY I'M SORRY: LAWYERS, DOCTORS, AND MEDICAL APOLOGIES, 35 Wm. Mitchell L. Rev. 1410 (2009) (p.1416-1417).

<sup>25</sup> ARTICLE: Apology and Medical Mistake: Opportunity or Foil?, 14 Ann. Health L. 55 (2005) (p.56).

<sup>26</sup> ARTICLE: THE PATIENT INJURY EPIDEMIC: MEDICAL MALPRACTICE LITIGATION AS A CURATIVE TOOL, 4 Drexel L. Rev. 41 (2011) (p.46).

<sup>27</sup> Jen Christensen and Elizabeth Cohen, *Medical Errors May Be The Third Leading Cause of Death in the U.S.* (3 May 2016) <http://www.cnn.com/2016/05/03/health/medical-error-a-leading-cause-of-death/index.html>.

<sup>28</sup> Article: TRIAL AND ERROR: LEGISLATING ADR FOR MEDICAL MALPRACTICE REFORM, 76 Md. L. Rev. 247 (2017) (p.249).

<sup>29</sup> FEATURE: The Cure for What Ails: A Realistic Remedy for the Medical Malpractice "Crisis", 23 Stan. L. & Pol'y Rev 477 (2012) (p.484).

economic cost connected to medical error annually floats between \$17 and \$29 billion.<sup>30</sup> With all these errors, providers are still reluctant to discuss the mistake and apologize for fear of blame and that their words will lead to legal action; and, with no protection of a provider's apologetic expression, they fear their apology will be used against them to prove liability.<sup>31, 32</sup>

The publishing of the IOM report "broke the silence that [had] surrounded medical errors and their consequences by recognizing that 'to err is human' and [the report refused] to blame well-intentioned healthcare professionals for making honest mistakes."<sup>33</sup> The IOM report presented evidence the majority of hospital errors responsible for patient deaths were causally linked to systems issues and not physician negligence.<sup>34</sup> This conclusion about systems issues sparked a movement to begin having more frank discussions about medical errors in healthcare organizations across the country focusing on continuous quality improvement and reliable reproducible system design to improve patient safety.<sup>35</sup> The IOM report also stated victims of medical mistakes were not being adequately informed of the error.<sup>36</sup> In 2001, The Joint Commission (TJC) instituted a requirement to inform patients about all outcomes of care, including "unanticipated outcomes."<sup>37</sup> This requirement was designed to provide the patient with the information needed to fully understand how a medical error has impacted their health and what to expect for their future.<sup>38</sup>

The data presented in the IOM report identified the extent to which medical errors plague the healthcare industry and also exposed a communication gap and lack of acknowledgment of medical errors by the healthcare system.<sup>39</sup> When an error occurs, research shows patients and families want an apology; and, in order to reduce errors and improve patient safety, clinicians need to feel comfortable reporting and discussing errors with their patients as well as within their organizations.<sup>40</sup> In order to encourage apologies and open communication by providers following harm, safe harbors need to be created in the legislative area to neutralize the legal consequences of honest apologetic correspondence.<sup>41</sup>

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<sup>30</sup> ARTICLE: Apology and Medical Mistake: Opportunity or Foil?, 14 Ann. Health L. 55 (2005) (p.56).

<sup>31</sup> ARTICLE: Forgive and Forget: Recognition of Error and Use of Apology as Preemptive Steps to ADR or Litigation in Medical Malpractice Cases, 6 Pepp. Disp. Resol. L.J. 81 (2006) (p. 92).

<sup>32</sup> Darra James Coleman, *The Power of the Apology: Resolving Medical Malpractice Claims in South Carolina*, 2 Resolved: J. Alternative Disp. Resol. 1, 13 (2012) (p.7).

<sup>33</sup> Article: APOLOGIES IN THE HEALTHCARE SYSTEM: FROM CLINICAL MEDICINE TO PUBLIC HEALTH, 74 Law & Contemp. Prob. 151 (2011) (p. 155).

<sup>34</sup> ARTICLE: The Clinton-Obama Approach to Medical Malpractice Reform: Reviving the Most Meaningful Features of Alternative Dispute Resolution, 8 Pepp. Disp. Resol. L.J. 171 (2007) (p.175).

<sup>35</sup> SYMPOSIUM ARTICLE: Paths to Reducing Medical Injury: Professional Liability and Discipline vs. Patient Safety--and the Need for a Third Way, 29 J.L. Med. & Ethics 369 (2001) (p. 370).

<sup>36</sup> ARTICLE: Transparency and Disclosure of Medical Errors: It's the Right Thing to Do, So Why the Reluctance?, 35 Campbell L. Rev. 333 (2013) (p. 335).

<sup>37</sup> Id. at 334.

<sup>38</sup> COMMENT: FULL DISCLOSURE: AN ALTERNATIVE TO LITIGATION, 48 Santa Clara L. Rev. 473 (2008) (p.500).

<sup>39</sup> ARTICLE: Transparency and Disclosure of Medical Errors: It's the Right Thing to Do, So Why the Reluctance?, 35 Campbell L. Rev. 333 (2013) (p. 334).

<sup>40</sup> ARTICLE: Transparency and Disclosure of Medical Errors: It's the Right Thing to Do, So Why the Reluctance?, 35 Campbell L. Rev. 333 (2013) (p. 334).

<sup>41</sup> Article: APOLOGIES IN THE HEALTHCARE SYSTEM: FROM CLINICAL MEDICINE TO PUBLIC HEALTH, 74 Law & Contemp. Prob. 151 (2011) (p. 155).

Medical errors explain why apologies are needed; but, the full picture of the necessity for statutory protection of full apologies cannot be gleaned from discussing errors alone. When providers are unwilling to communicate based on concerns about liability, litigation is commonly the only path available to patients seeking information and apology after a harm event.<sup>42, 43</sup> Increased litigation has led to negative impacts on providers and patients including: a rise in the cost of medical malpractice insurance; a decrease in service availability especially in high risk specialties due to providers leaving practice; and, an increase in healthcare costs and health insurance premiums related to the practice of defensive medicine.<sup>44</sup> Medical malpractice reform is a large concern for physicians, lawyers, legislators, and patients because in addition to increased litigation, medical malpractice tort awards have increased at a quicker rate than any other tort area swelling the financial burden of medical legal cases for all parties.<sup>45</sup> Historically, medical malpractice insurance companies have not been prepared for the accelerated claim rates and increased tort awards.<sup>46</sup> Thus, in order to cover losses the company incurred, premiums were sharply increased causing instability in the healthcare malpractice insurance marketplace.<sup>47, 48, 49</sup> Enacting a federal apology law would provide more stability and benefit patients, providers, and insurers by helping to limit or avoid lawsuits altogether and increase the probability of reaching a more reasonable settlement utilizing non-confrontational communication.<sup>50, 51</sup>

Since the 1970's, three noted crises in the medical malpractice insurance market have occurred characterized by unavailability and unaffordability of malpractice insurance.<sup>52, 53</sup> The crisis in the 1970's was marked by scarcity of insurance in some parts of the country with physicians unable to obtain a policy at any dollar value.<sup>54, 55</sup> In the mid-1980's and again in the early 2000's insurance rates jumped quickly leaving providers in fear of being able to afford to

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<sup>42</sup> ARTICLE: Transparency and Disclosure of Medical Errors: It's the Right Thing to Do, So Why the Reluctance?, 35 Campbell L. Rev. 333 (2013) (p. 335-336).

<sup>43</sup>NOTE: Tired of Tribunals: A Proposal To Combine Section 60L's "Notice of Claim" Requirement with Certificates of Merit in Massachusetts Medical Malpractice Litigation, 48 Suffolk U. L. Rev. 867 (2015) (p. 883).

<sup>44</sup> NOTE: Physician Apologies and General Admissions of Fault: Amending the Federal Rules of Evidence, 72 Ohio St. L.J. 687 (2011) (p. 688).

<sup>45</sup> Id.

<sup>46</sup> MCDONALD-MERRILL-KETCHAM MEMORIAL AWARD FOR EXCELLENCE IN LAW AND MEDICINE: Beyond Tort Reform: Fixing Real Problems, 3 Ind. Health L. Rev. 1 (2006) (p.7).

<sup>47</sup> ARTICLE: Forgive and Forget: Recognition of Error and Use of Apology as Preemptive Steps to ADR or Litigation in Medical Malpractice Cases, 6 Pepp. Disp. Resol. L.J. 81 (2006) (p. 82).

<sup>48</sup> MCDONALD-MERRILL-KETCHAM MEMORIAL AWARD FOR EXCELLENCE IN LAW AND MEDICINE: Beyond Tort Reform: Fixing Real Problems, 3 Ind. Health L. Rev. 1 (2006) (p. 7).

<sup>49</sup> SYMPOSIUM: MEDICAL MALPRACTICE: EMERGING ISSUES & THE EFFECT OF TORT REFORM: ARTICLE: Things To Do (or Not) To Address The Medical Malpractice Insurance Problem, 26 N. Ill. U. L. Rev. 469 (2006) (p. 471).

<sup>50</sup> ARTICLE: APOLOGIES AND LEGAL SETTLEMENT: AN EMPIRICAL EXAMINATION, 102 Mich. L. Rev. 460 (2003) (p. 463).

<sup>51</sup> NOTE: Physician Apologies and General Admissions of Fault: Amending the Federal Rules of Evidence, 72 Ohio St. L.J. 687 (2011) (p. 697-698).

<sup>52</sup> ARTICLE: MEDICAL LIABILITY AND HEALTH CARE REFORM, 21 Health Matrix 443 (2011) (p. 453-454).

<sup>53</sup> Article: TRIAL AND ERROR: LEGISLATING ADR FOR MEDICAL MALPRACTICE REFORM, 76 Md. L. Rev. 247 (2017) (p.263).

<sup>54</sup> Id.

<sup>55</sup> Kathleen M. O'Neill, et al., *Surgeons and Medical Liability: A guide to Understanding Medical Liability Reform*, American College of Surgeons (December, 2014) (p.4).

continue practicing medicine.<sup>56, 57</sup> Already high medical malpractice insurance premiums rose 15 percent between 2000 and 2002 causing some providers to leave their practices.<sup>58, 59</sup> These medical malpractice insurance crises are a symptom of the broken medical-liability system in the United States.<sup>60, 61</sup> The liability system is ineffective at promoting patient safety, takes an exorbitant amount of time to get a patient compensated and encourages defensive medicine.<sup>62</sup> People typically speak of winners and losers in litigation; but, the way our system functions there really aren't any winners.<sup>63</sup> "The current medical-liability system is estimated to cost \$55.6 billion annually, or 2.4 percent of total healthcare spending."<sup>64</sup> The American Medical Association (AMA) stated the litigation system has contributed to raising the cost of healthcare for all Americans.<sup>65</sup> Tort reform has been the focus of legislative change in the medical liability system following each insurance crisis; but, studies have shown these reforms have had minimal impact on cutting costs or improving patient safety.<sup>66, 67</sup> With a skeptical eye toward tort reform, the medical and legislative communities are giving more focus to the application of ADR principles to decrease the incidence of medical malpractice lawsuits, decrease the cost of litigation by promoting earlier settlement, improve patient safety, and prevent future medical malpractice insurance crises while benefitting providers and harmed patients alike.<sup>68, 69</sup>

ADR programs reduce litigation costs because they use less time and less expensive resources by resolving conflicts before they enter into the lengthy arduous process of litigation.<sup>70</sup> In addition to the financial benefit, two other valuable benefits of ADR are the positive communication between harmed patients and providers and ADR offers a better way for all

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<sup>56</sup> Article: TRIAL AND ERROR: LEGISLATING ADR FOR MEDICAL MALPRACTICE REFORM, 76 Md. L. Rev. 247 (2017) (p. 263).

<sup>57</sup> MCDONALD-MERRILL-KETCHAM MEMORIAL AWARD FOR EXCELLENCE IN LAW AND MEDICINE: Beyond Tort Reform: Fixing Real Problems, 3 Ind. Health L. Rev. 1 (2006) (p. 6).

<sup>58</sup> Article: Toward Healing and Restoration for All: Reframing Medical Malpractice Reform, 39 Conn. L. Rev. 667 (2006) (p.689).

<sup>59</sup> Article: TRIAL AND ERROR: LEGISLATING ADR FOR MEDICAL MALPRACTICE REFORM, 76 Md. L. Rev. 247 (2017) (p. 263).

<sup>60</sup> COMMENT: Medical Liability and the Disclosure-Offer Approach: Transforming How Arkansans Should Think About Medical Malpractice Reform, 64 Ark. L. Rev. 1057 (2011) (p. 1057).

<sup>61</sup> Kathleen M. O'Neill, et al., *Surgeons and Medical Liability: A guide to Understanding Medical Liability Reform*, American College of Surgeons (December, 2014) (p.5).

<sup>62</sup> Id.

<sup>63</sup> Norman G. Jr. Tabler, *Sixteen Myths of Medicine and Medical Malpractice*, 13 Ind. Health L. Rev. 363, 383 (2016) (p. 371).

<sup>64</sup> COMMENT: Medical Liability and the Disclosure-Offer Approach: Transforming How Arkansans Should Think About Medical Malpractice Reform, 64 Ark. L. Rev. 1057 (2011) (p. 1073-1074).

<sup>65</sup> ARTICLE: The Clinton-Obama Approach to Medical Malpractice Reform: Reviving the Most Meaningful Features of Alternative Dispute Resolution, 8 Pepp. Disp. Resol. L.J. 171 (2007) (p. 173).

<sup>66</sup> ARTICLE: MEDICAL LIABILITY AND HEALTH CARE REFORM, 21 Health Matrix 443 (2011) (p.453).

<sup>67</sup> Kathleen M. O'Neill, et al., *Surgeons and Medical Liability: A guide to Understanding Medical Liability Reform*, American College of Surgeons (December, 2014) (p.5).

<sup>68</sup> ARTICLE: The Clinton-Obama Approach to Medical Malpractice Reform: Reviving the Most Meaningful Features of Alternative Dispute Resolution, 8 Pepp. Disp. Resol. L.J. 171 (2007) (p. 172).

<sup>69</sup> ARTICLE: FOREWORD TO THE SYMPOSIUM: THERAPEUTIC APPROACHES TO CONFLICT RESOLUTION IN HEALTH CARE SETTINGS, 21 Ga. St. U.L. Rev. 797 (2005) (p. 806).

<sup>70</sup> Keeva, Steven. "Does Law Mean Never Having to Say You're Sorry." 85.12 A.B.A. J. 64, 69 (1999) (p. 65).

parties to manage the emotional aspects of conflict.<sup>71, 72</sup> Mediation, in particular, recognizes financial recompense is often not the primary objective for claimants so instead mediation focuses on breaking down communication barriers as a crucial step to hasten settlement thus reducing litigation costs.<sup>73, 74, 75</sup> Goals of mediation include: improvement of patient safety moving forward; teamwork between the parties; repair of the broken relationship and reconciliation between the parties; financial savings; and, reduction of the burden of medical malpractice litigation on the court system.<sup>76, 77</sup> Mediation is conducted by a neutral third party who has no decision-making authority in the resolution of the claim.<sup>78</sup> Either party can walk away from mediation rejecting the proposals set forth, or a binding settlement contract is signed by the parties if an agreement is reached.<sup>79</sup>

Apologies are crucial in mediation to overcome the emotional barriers of anger and mistrust some plaintiffs feel toward their providers or the healthcare institution where they were harmed.<sup>80</sup> ADR professors have noted that “many mediators have had one or more experiences in which an apology was the key to a settlement that might otherwise not have been attainable.”<sup>81</sup> Mediation does offer confidentiality protections, but the scope of those protections can be somewhat fuzzy.<sup>82</sup> Enacting a federal apology law as a legislative tool would encourage providers to apologize before and during mediation by adding supplementary protections for apologies to ensure if no agreement is reached, the apology would not give rise to legal liability because the apology would be inadmissible in an ongoing lawsuit.<sup>83</sup>

An apology plays a very important role in the ADR process to increase the success of settlement as an alternative to litigation and help to prevent future insurance crises.<sup>84, 85</sup> The

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<sup>71</sup> Susan J. Szmania, et al., *Alternative Dispute Resolution in Medical Malpractice: A Survey of Emerging Trends and Practices*, 26(1) Conflict Resolution Quarterly (2008) (p.74).

<sup>72</sup> Carol B. Liebman, *Medical Malpractice Mediation: Benefits Gained, Opportunities Lost*, 74 Law & Contemp. Probs. 135, 150 (2011) (p. 135).

<sup>73</sup> Article: TRIAL AND ERROR: LEGISLATING ADR FOR MEDICAL MALPRACTICE REFORM, 76 Md. L. Rev. 247 (2017) (p. 277-278).

<sup>74</sup> ARTICLE: Malpractice, Mediation, and Moral Hazard: The Virtues of Dodging the Data Bank, 27 Ohio St. J. on Disp. Resol. 109 (2012) (p. 121).

<sup>75</sup> ARTICLE: Medical Liability Insurance and Damage Caps: Getting Beyond Band Aids to Substantive Systems Treatment to Improve Quality and Safety in Healthcare, 30 Am. J. L. and Med. 501 (2004) (p. 539).

<sup>76</sup> Carol B. Liebman, *Medical Malpractice Mediation: Benefits Gained, Opportunities Lost*, 74 Law & Contemp. Probs. 135, 150 (2011) (p. 136).

<sup>77</sup> SYMPOSIUM: THE FIFTH REMEDIES DISCUSSION FORUM: DAMAGES AS RECONCILIATION, 42 Loy. L.A. L. Rev. 5 (2008) (p. 16-17).

<sup>78</sup> NOTE: THE ROLE OF APOLOGY IN MEDIATION, 72 N.Y.U.L. Rev. 1165 (1997) (p.1169).

<sup>79</sup> Article: Toward Healing and Restoration for All: Reframing Medical Malpractice Reform, 39 Conn. L. Rev. 667 (2006) (p. 697).

<sup>80</sup> NOTE: APOLOGETIC JUSTICE: EVALUATING APOLOGIES TAILORED TOWARD LEGAL SOLUTIONS, 81 B.U.L. Rev. 289 (2001) (p. 299-300).

<sup>81</sup> NOTE: APOLOGETIC JUSTICE: EVALUATING APOLOGIES TAILORED TOWARD LEGAL SOLUTIONS, 81 B.U.L. Rev. 289 (2001) (p. 295).

<sup>82</sup> ARTICLE: HEALTHCARE MEDIATION AND THE NEED FOR APOLOGIES, 18 Health L.J. 31 (2010) (p. 42).

<sup>83</sup> Id. at 40.

<sup>84</sup> Article: Apologies All Around: Advocating Federal Protection for the Full Apology in Civil Cases, 46 San Diego L. Rev. 137 (2009) (p. 158-159).

<sup>85</sup> COMMENT: FULL DISCLOSURE: AN ALTERNATIVE TO LITIGATION, 48 Santa Clara L. Rev. 473 (2008) (p. 476).



ultimate outcome of apologies is to prevent litigation, thereby reducing insurance premiums and the cost of healthcare while also improving communication between patients, families, and care teams resulting in increased patient safety and satisfaction.<sup>86</sup> Both sides benefit from open communication during ADR especially if the original communication with the patient and family was poor.<sup>87</sup> Having a federal apology law protecting full apologies would carve out a place for apology in civil cases in a justice system that is moving towards decreasing litigation in favor of settlement, mediation and other ADR methods.<sup>88</sup> The healthcare industry should support a federal apology law and help Congress to see the value of enacting the law to protect full apologies allowing providers to say “I’m sorry” before patients say “I’ll see you in court.”<sup>89</sup>

### III. What is an Apology?

“I’m sorry” is one of few phrases with the power to turn an uncomfortable or explosive situation into one in which all parties are ready for resolution making apology an effective tool for conflict de-escalation.<sup>90, 91, 92</sup> In literature, apology is broadly defined as an admission of blameworthiness accompanied by regret, remorse and sympathy for the harm experienced by the victim.<sup>93, 94, 95</sup> There can be variations in the structure of an apology, but essentially there are four identified parts: (1) acknowledgement of the event precipitating the apology; (2) an expression of remorse; (3) explanation of the situation; and (4) an offer of reparation.<sup>96, 97, 98</sup> There is a difference between apologies offering only sympathy and ones that assume responsibility for harm.<sup>99</sup> A partial apology only expresses sympathy to the patient and perhaps a hope for a rapid recovery.<sup>100</sup> A full apology contains the expression of sympathy given during a partial apology

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<sup>86</sup> Id. at 477.

<sup>87</sup> Carol B. Liebman, *Medical Malpractice Mediation: Benefits Gained, Opportunities Lost*, 74 Law & Contemp. Probs. 135, 150 (2011) (p. 140).

<sup>88</sup> Article: Apologies All Around: Advocating Federal Protection for the Full Apology in Civil Cases, 46 San Diego L. Rev. 137 (2009) (p. 145-146).

<sup>89</sup> Article: Apologies All Around: Advocating Federal Protection for the Full Apology in Civil Cases, 46 San Diego L. Rev. 137 (2009) (p. 154).

<sup>90</sup> Sullivan, Brian. "The Last Word: When the Last Thing you Want to Do is the First Thing you Ought to Do." 98.1 A.B.A. J. 51, 57 (2012) (p. 51).

<sup>91</sup> NOTE & COMMENT: ON APOLOGY AND CONSILIENCE, 77 Wash. L. Rev. 1121 (2002) (p. 1132).

<sup>92</sup> ARTICLE: IS IT UNREALISTIC TO EXPECT A DOCTOR TO APOLOGIZE FOR AN UNFORESEEN MEDICAL COMPLICATION?--A PRIMER ON APOLOGIES LAWS, 82 PA Bar Assn. Quarterly 93 (2011) (p. 94-95).

<sup>93</sup> NOTE & COMMENT: ON APOLOGY AND CONSILIENCE, 77 Wash. L. Rev. 1121 (2002) (p. 1131- 1132).

<sup>94</sup> ATTORNEYS, TELL YOUR CLIENTS TO SAY THEY'RE SORRY: APOLOGIES IN THE HEALTH CARE INDUSTRY, 5 Ind. Health L. Rev. 337 (2008) (p. 360).

<sup>95</sup> FEATURE: YOU DON'T HAVE TO SAY YOU'RE SORRY: BUT YOUR CASE MIGHT BENEFIT IF SOMEBODY DOES, 73 Or. St. B. Bull. 24 (2012) (p. 25).

<sup>96</sup> SPECIAL ISSUE: ALTERNATIVE DISPUTE RESOLUTION: THE POWER OF APOLOGY AND FORGIVENESS, 36 Ver. B. J. & L. Dig. 55 (2010) (p. 55).

<sup>97</sup> Darra James Coleman, *The Power of the Apology: Resolving Medical Malpractice Claims in South Carolina*, 2 Resolved: J. Alternative Disp. Resol. 1, 13 (2012) (p. 2).

<sup>98</sup> SYMPOSIUM: CHALLENGES TO THE ATTORNEY-CLIENT RELATIONSHIP: THREATS TO SOUND ADVICE?: TEENTH ANNUAL CLIFFORD SYMPOSIUM ON TORT LAW AND SOCIAL POLICY: ARTICLE: THE HEALING FORCES OF APOLOGY IN MEDICAL PRACTICE AND BEYOND, 57 DePaul L. Rev. 251 (2008) (p. 256).

<sup>99</sup> REGULATING FOR PATIENT SAFETY: THE LAW'S RESPONSE TO MEDICAL ERRORS: ARTICLE: MALPRACTICE REFORM AS A HEALTH POLICY PROBLEM, 12 Widener L. Rev. 107 (2005) (p. 117).

<sup>100</sup> Darra James Coleman, *The Power of the Apology: Resolving Medical Malpractice Claims in South Carolina*, 2 Resolved: J. Alternative Disp. Resol. 1, 13 (2012) (p. 2).

but goes further to accept fault, responsibility, and provide an explanation.<sup>101, 102, 103</sup> The right type of apology is crucial to make the most positive impact toward open communication, where the wrong type will often anger or offend the harmed preventing patients and families from beginning the healing process and being open to settlement discussion following a medical error.<sup>104, 105, 106</sup> A partial apology can seem very hollow especially when fault for the error is clear and the person who erred fails to acknowledge their wrongdoing.<sup>107, 108</sup> Full apologies are more impactful in the litigation process and are more influential on successful settlement than partial apologies.<sup>109</sup> Full apologies contribute to positive communication between the parties leading to a better experience and lower demands for compensation.<sup>110</sup> A federal apology law written broadly to protect full apologies will be most beneficial for open communication and to meet financial goals.<sup>111, 112</sup>

Studies have been conducted which prove full apologies are more influential on settlement decision-making and open communication.<sup>113, 114</sup> In 1992, Charles Vincent conducted a study which surveyed 227 patients and family members taking legal action following a medical harm event.<sup>115</sup> Vincent's study concluded about 40 percent of patients and families would not have filed a lawsuit if the provider had offered an apology and a full explanation of the event.<sup>116</sup> In 2003, Jennifer Robbennolt led a study in which participants read harm scenarios and were given settlements to evaluate along with no apology, partial apologies, and full apologies.<sup>117</sup> The

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<sup>101</sup> ARTICLE: APOLOGIES AND LEGAL SETTLEMENT: AN EMPIRICAL EXAMINATION, 102 Mich. L. Rev. 460 (2003) (p. 475).

<sup>102</sup> COLLOQUY ESSAY: THE SYNERGY OF EARLY OFFERS AND MEDICAL EXPLANATIONS/APOLOGIES+, 103 Nw. U.L. Rev. 2007 (2009) (p. 2011- 2012)

<sup>103</sup> Anna C. Mastroianni et al., *The Flaws in State "Apology" and "Disclosure" Laws Dilute Their Intended Impact on Malpractice Suits*, 29 Health Affairs 1611, 1616 (2010) (p 1612).

<sup>104</sup> REGULATING FOR PATIENT SAFETY: THE LAW'S RESPONSE TO MEDICAL ERRORS: ARTICLE: MALPRACTICE REFORM AS A HEALTH POLICY PROBLEM, 12 Widener L. Rev. 107 (2005) (p. 116).

<sup>105</sup> NOTE: Enough with the White Lie-ability: Decreasing Frivolous Health Care Liability Actions in Tennessee with Time and Transparency, 46 U. Mem. L. Rev. 503 (2015) (p. 529-530).

<sup>106</sup> NOTE: Innovative Cost Control: An Analysis of Medical Malpractice Reform in Massachusetts, 9 J. Health & Biomed. L. 87 (2013) (p. 99).

<sup>107</sup> REGULATING FOR PATIENT SAFETY: THE LAW'S RESPONSE TO MEDICAL ERRORS: ARTICLE: MALPRACTICE REFORM AS A HEALTH POLICY PROBLEM, 12 Widener L. Rev. 107 (2005) (p. 116).

<sup>108</sup> ARTICLE:APOLOGIES AND LEGAL SETTLEMENT: AN EMPIRICAL EXAMINATION, 102 Mich. L. Rev. 460 (2003) (473).

<sup>109</sup> SPECIAL ISSUE: ALTERNATIVE DISPUTE RESOLUTION: THE POWER OF APOLOGY AND FORGIVENESS, 36 Ver. B. J. & L. Dig. 55 (2010) (p. 55- 56).

<sup>110</sup> Id.

<sup>111</sup> TORTS SPECIAL ISSUE: ARTICLE: Apologizing to Avoid Liability: Cynical Civility or Practical Morality?, 27 Sydney L. Rev. 483 (2005) (p. 504).

<sup>112</sup> Anna C. Mastroianni et al., *The Flaws in State "Apology" and "Disclosure" Laws Dilute Their Intended Impact on Malpractice Suits*, 29 Health Affairs 1611, 1616 (2010) (p. 1616).

<sup>113</sup> TORTS SPECIAL ISSUE: ARTICLE: Apologizing to Avoid Liability: Cynical Civility or Practical Morality?, 27 Sydney L. Rev. 483 (2005) (p. 504).

<sup>114</sup> ARTICLE:APOLOGIES AND LEGAL SETTLEMENT: AN EMPIRICAL EXAMINATION, 102 Mich. L. Rev. 460 (2003) (p. 505).

<sup>115</sup> Charles Vincent, Magi Young & Angela Philips, *Why do people sue doctors? A study of patients and relatives taking legal action*, 343 The Lancet 1609-1613 (25 June 1994) (p. 1609).

<sup>116</sup> Id. at 1611-1612.

<sup>117</sup> ARTICLE:APOLOGIES AND LEGAL SETTLEMENT: AN EMPIRICAL EXAMINATION, 102 Mich. L. Rev. 460 (2003) (p. 491).

results of the study showed full apologies positively impacted settlement 73 percent of the time.<sup>118</sup> Quite interestingly, the results showed partial apologies were often interpreted as if no apology was delivered; no apology and partial apology did not increase the likelihood of settlement like full apologies did.<sup>119, 120</sup> The study participants saw offenders who offered full apologies as remorseful; thus, participants felt those offenders would be more careful in the future and gave them more sympathy than no or partial apologizers.<sup>121</sup> Both these studies offered concrete evidence that full apology will reduce the odds of ending up in a courtroom, enhance the provider and patient relationship, and help to revive the patient's and family's confidence in the entire healthcare system.<sup>122, 123</sup>

The majority of apology laws currently in place only protect partial apologies leaving those who make full apologies open to having those statements admissible in legal actions against them.<sup>124, 125</sup> Physicians may be unaware of the protections their state's apology law gives them and minor differences in the statutory language can have a dramatic effect on what the court deems admissible.<sup>126, 127</sup> Some states leave the word apology out of their statute in an attempt to decrease confusion about the protection of apologies admitting fault; however, other states craft their laws outright denying the protection of admissions of fault.<sup>128, 129, 130</sup> These examples demonstrate that varying interpretations of the definition of the word apology, lack of specificity in the law, and lack of knowledge about the law could leave providers' well-meaning statements discoverable and admissible in legal proceedings.<sup>131, 132, 133</sup>

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<sup>118</sup> Id. at 484- 486.

<sup>119</sup> Id. at 495.

<sup>120</sup> TORTS SPECIAL ISSUE: ARTICLE: Apologizing to Avoid Liability: Cynical Civility or Practical Morality?, 27 Sydney L. Rev. 483 (2005) (p. 498).

<sup>121</sup> ARTICLE:APOLOGIES AND LEGAL SETTLEMENT: AN EMPIRICAL EXAMINATION, 102 Mich. L. Rev. 460 (2003) (p. 495-496).

<sup>122</sup> ATTORNEYS, TELL YOUR CLIENTS TO SAY THEY'RE SORRY: APOLOGIES IN THE HEALTH CARE INDUSTRY, 5 Ind. Health L. Rev. 337 (2008) (p. 352).

<sup>123</sup> Darra James Coleman, *The Power of the Apology: Resolving Medical Malpractice Claims in South Carolina*, 2 Resolved: J. Alternative Disp. Resol. 1, 13 (2012) (p. 5).

<sup>124</sup> COLLOQUY ESSAY: THE SYNERGY OF EARLY OFFERS AND MEDICAL EXPLANATIONS/APOLOGIES+, 103 Nw. U.L. Rev. 2007 (2009) (p. 2012).

<sup>125</sup> Kevin Klauer, DO, EJD, *Apology Laws: Better Read the Fine Print* (25 September 2015)

<https://www.ahcmedia.com/articles/136295-apology-laws-the-complexities-of-apologies-and-error-disclosure>.

<sup>126</sup> Anna C. Mastroianni et al., *The Flaws in State "Apology" and "Disclosure" Laws Dilute Their Intended Impact on Malpractice Suits*, 29 Health Affairs 1611, 1616 (2010) (p. 1616).

<sup>127</sup> ATTORNEYS, TELL YOUR CLIENTS TO SAY THEY'RE SORRY: APOLOGIES IN THE HEALTH CARE INDUSTRY, 5 Ind. Health L. Rev. 337 (2008) (p.348).

<sup>128</sup> Id. at 361.

<sup>129</sup> ARTICLE: DOES 'SORRY' INCRIMINATE? EVIDENCE, HARM AND THE PROTECTION OF APOLOGY, 21 Cornell J. L. & Pub. Pol'y 567 (2012) (p. 576).

<sup>130</sup> RECENT LEGISLATION COMMENT: THINKING LIKE A: BRITISH COLUMBIA'S APOLOGY ACT, 40 U.B.C. L. Rev. 769 (2007) (p. 778).

<sup>131</sup> ARTICLE: Transparency and Disclosure of Medical Errors: It's the Right Thing to Do, So Why the Reluctance?, 35 Campbell L. Rev. 333 (2013) (p. 345).

<sup>132</sup> ATTORNEYS, TELL YOUR CLIENTS TO SAY THEY'RE SORRY: APOLOGIES IN THE HEALTH CARE INDUSTRY, 5 Ind. Health L. Rev. 337 (2008) (p. 360).

<sup>133</sup> NOTE: Enough with the White Lie-ability: Decreasing Frivolous Health Care Liability Actions in Tennessee with Time and Transparency, 46 U. Mem. L. Rev. 503 (2015) (p. 534).

Another problem with the laws protecting partial apologies is the precise word choice required for the apology sends mixed messages to the provider about the legal protections and leaves the provider feeling unsafe to engage in open conversations with the patient and family.<sup>134, 135, 136, 137</sup> At times, the uncertainty of legal protection brings providers and their legal counsel together shortly after a harm event to craft what they consider a safe apology in hopes of mitigating the risk of the statement becoming evidence of liability later in litigation.<sup>138, 139</sup> Physicians desire to have open conversations with patients and families following harm events without the immediate involvement of legal counsel; but, healthcare providers generally engage in vague conversations when legal protections are unclear, which may anger patients and encourage rather than discourage litigation.<sup>140, 141</sup> The fear and confusion felt by providers can be resolved and the risk to the provider and organization can be mitigated by creating a federal apology law that protects written and oral statements of full apology made by the provider or the organization.<sup>142</sup> With enhanced statutory design and education to providers about federal apology law protections, open communication and an increased chance of success with settlement can change the landscape of the medical malpractice system.<sup>143</sup>

#### IV. Apologies and Patients

Harm through medical error is different than other types of harm because the injury occurs in an environment in which the injuring party is attempting to care for the victim.<sup>144</sup> Cases of medical harm have a large range of damages including: patient death; severe harm in which the patient will need assistance with activities of daily living for the rest of their lives; and, minor cases of harm that lead to discomfort and inconvenience.<sup>145</sup> Victims are harmed physically, financially, and socially and may experience a complex array of emotions such as loss in trust in caregivers, confusion, fear, and anxiety about their future.<sup>146, 147</sup> The emotional trauma

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<sup>134</sup> TORTS SPECIAL ISSUE: ARTICLE: Apologizing to Avoid Liability: Cynical Civility or Practical Morality?, 27 Sydney L. Rev. 483 (2005) (p. 504).

<sup>135</sup> ARTICLE: Just Apologies: An Overview of the Philosophical Issues, 13 Pepp. Disp. Resol. L.J. 35 (2013) (p.49).

<sup>136</sup> ARTICLE: Transparency and Disclosure of Medical Errors: It's the Right Thing to Do, So Why the Reluctance?, 35 Campbell L. Rev. 333 (2013) (p. 347).

<sup>137</sup> Charles A. Egner, et al., *I'm Sorry Laws: A Multistate Analysis* (23 August 2013)

[http://www.martindale.com/medical-malpractice-law/article\\_Hinshaw-Culbertson-LLP\\_1936940.htm](http://www.martindale.com/medical-malpractice-law/article_Hinshaw-Culbertson-LLP_1936940.htm)

<sup>138</sup> ARTICLE:APOLOGIES AND LEGAL SETTLEMENT: AN EMPIRICAL EXAMINATION, 102 Mich. L. Rev. 460 (2003) (p. 468).

<sup>139</sup> ARTICLE: Legal Consequences of Apologizing, 1996 J. Disp. Resol. 115 (1996) (p. 122).

<sup>140</sup> COLLOQUY ESSAY: THE SYNERGY OF EARLY OFFERS AND MEDICAL EXPLANATIONS/APOLOGIES+, 103 Nw. U.L. Rev. 2007 (2009) (p. 2010).

<sup>141</sup> ARTICLE: Transparency and Disclosure of Medical Errors: It's the Right Thing to Do, So Why the Reluctance?, 35 Campbell L. Rev. 333 (2013) (p. 348).

<sup>142</sup> Anna C. Mastroianni et al., *The Flaws in State "Apology" and "Disclosure" Laws Dilute Their Intended Impact on Malpractice Suits*, 29 Health Affairs 1611, 1616 (2010) (p. 1616).

<sup>143</sup> Anna C. Mastroianni et al., *The Flaws in State "Apology" and "Disclosure" Laws Dilute Their Intended Impact on Malpractice Suits*, 29 Health Affairs 1611, 1616 (2010) (p. 1616).

<sup>144</sup> SHOULD PHYSICIANS APOLOGIZE FOR MEDICAL ERRORS?, 19 Health Lawyer 23 (2007) (p. 25).

<sup>145</sup> Student Comment: The Medical Malpractice Liability Insurance Crisis: Critiquing the Effectiveness of the 2002 MCARE Legislation in Pennsylvania, 35 Ohio N.U.L. Rev. 351 (2009) (p. 392).

<sup>146</sup> SYMPOSIUM: THE FIFTH REMEDIES DISCUSSION FORUM: DAMAGES AS RECONCILIATION, 42 Loy. L.A. L. Rev. 5 (2008) (p. 9).

<sup>147</sup> SHOULD PHYSICIANS APOLOGIZE FOR MEDICAL ERRORS?, 19 Health Lawyer 23 (2007) (p. 25).

experienced by the patient and family members can increase when they perceive providers aren't being forthcoming with them, ignoring the error that occurred, and failing to provide them with a sincere apology for what they're experiencing.<sup>148, 149</sup> The protection of full apologies by federal law would encourage providers to offer apologies to harmed individuals leading to legal and non-legal benefits.<sup>150</sup>

There is a common fallacy among the medical community that a plaintiff who utilizes the legal system to sue is opportunistic and their primary goal is to squeeze out every last dime they can from the litigation process.<sup>151</sup> Conversely, studies have shown patients don't want large amounts of monetary compensation following harm, they want the following: an apology for what they are going through; an explanation of how the harm event occurred in a way they can understand; an assurance a process has been put into place to prevent the event from happening again; and, fair compensation for their damages.<sup>152, 153, 154</sup> When patients and families experience inadequate communication from providers and organizations, they feel their needs aren't being met and may hire an advocate to seek recourse through the adversarial, expensive, and time consuming legal system to obtain an apology and answers.<sup>155, 156, 157, 158</sup> The fact that research shows some people's motivation to take legal action is to obtain an apology attests to the importance of the apology to them, and the provider's reluctance to proffer an apology can inadvertently promote litigation.<sup>159, 160</sup> By removing the fear of liability and therefore the

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<sup>148</sup> ARTICLE: The Clinton-Obama Approach to Medical Malpractice Reform: Reviving the Most Meaningful Features of Alternative Dispute Resolution, 8 Pepp. Disp. Resol. L.J. 171 (2007) (p. 192).

<sup>149</sup> SPECIAL FEATURE: FALL 2007 SYMPOSIUM ON ADVANCED ISSUES IN DISPUTE RESOLUTION: INNOVATIVE APPROACHES TO MANAGING HEALTH CARE CONFLICT: Healthcare Conflict Management: An Obligation of the Board, 29 Hamline J. Pub. L. & Pol'y 401 (2008) (p. 405).

<sup>150</sup> ARTICLE: WHAT WE KNOW AND DON'T KNOW ABOUT THE ROLE OF APOLOGIES IN RESOLVING HEALTH CARE DISPUTES, 21 Ga. St. U.L. Rev. 1009 (2005) (p. 1015).

<sup>151</sup> NOTES & COMMENTS: A Better Approach to Medical Malpractice Claims? The University of Michigan Experience, Vol. 2, No. 1, J. Health & Life Sci. L. Pg. 125 (2009) (p. 130).

<sup>152</sup> ARTICLE: IS IT UNREALISTIC TO EXPECT A DOCTOR TO APOLOGIZE FOR AN UNFORESEEN MEDICAL COMPLICATION?--A PRIMER ON APOLOGIES LAWS, 82 PA Bar Assn. Quarterly 93 (2011) (p. 98).

<sup>153</sup> Norman G. Jr. Tabler, *Sixteen Myths of Medicine and Medical Malpractice*, 13 Ind. Health L. Rev. 363, 383 (2016) (p. 382).

<sup>154</sup> Charles Vincent, Magi Young & Angela Philips, *Why do people sue doctors? A study of patients and relatives taking legal action*, 343 The Lancet 1609-1613 (25 June 1994) (p. 1612).

<sup>155</sup> NOTE: Enough with the White Lie-ability: Decreasing Frivolous Health Care Liability Actions in Tennessee with Time and Transparency, 46 U. Mem. L. Rev. 503 (2015) (p. 514).

<sup>156</sup> COMMENT: THE MEDICAL MALPRACTICE CRISIS: BANDAGING OREGON'S WOUNDED SYSTEM AND PROTECTING PHYSICIANS, 43 Willamette L. Rev. 363 (2007) (p. 393).

<sup>157</sup> ARTICLE: FOREWORD TO THE SYMPOSIUM: THERAPEUTIC APPROACHES TO CONFLICT RESOLUTION IN HEALTH CARE SETTINGS, 21 Ga. St. U.L. Rev. 797 (2005) (p. 805).

<sup>158</sup> ARTICLE: Transparency and Disclosure of Medical Errors: It's the Right Thing to Do, So Why the Reluctance?, 35 Campbell L. Rev. 333 (2013) (p. 343-344).

<sup>159</sup> ARTICLE: APOLOGIES AND LEGAL SETTLEMENT: AN EMPIRICAL EXAMINATION, 102 Mich. L. Rev. 460 (2003) (p. 465-466).

<sup>160</sup> ARTICLE: HEALTHCARE MEDIATION AND THE NEED FOR APOLOGIES, 18 Health L.J. 31 (2010) (p. 35).

communication barrier by federally protecting full apologies, the patient's needs can be met which will result in the legal benefit of settlement without utilizing litigation.<sup>161</sup>

There are a number of non-legal benefits the patient and family experience following an apology that should promote the protection of full apology by legislators and the use of apology by providers who strive to positively impact their patients.<sup>162</sup> An apology may cause a number of psychological healing effects for the patient including reduced anger to consider forgiveness, encouragement of open dialogue with the injurer, and feeling comfort, respect and empowered.<sup>163, 164, 165</sup> Absent an apology, patients and families may feel disrespected and their anger can work as a barrier to repairing the damaged relationship between the parties moving forward.<sup>166, 167</sup> Forgiveness has a healing effect for the patient and the provider and will lessen the likelihood the harmed party seeks justice through litigation.<sup>168, 169, 170</sup> An apology also helps restore equity in the patient-provider relationship validating the injurer has also suffered from the harm and signals the commitment made toward reconciliation.<sup>171, 172</sup> Since a provider aims to heal patients, the ability to assist in the emotional healing following a harm event has value for both parties and will help to restore the confidence the patient once had in healthcare providers.<sup>173, 174</sup> By passing legislation to protect full apologies, the adverse parties would engage in the conversations needed to prevent litigation, encourage emotional healing, and inspire forgiveness without the imminent concern for liability.<sup>175</sup>

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<sup>161</sup> SYMPOSIUM: MEDICAL MALPRACTICE: EMERGING ISSUES & THE EFFECT OF TORT REFORM: ARTICLE: Things To Do (or Not) To Address The Medical Malpractice Insurance Problem, 26 N. Ill. U. L. Rev. 469 (2006) (p. 519).

<sup>162</sup> ARTICLE: WHAT WE KNOW AND DON'T KNOW ABOUT THE ROLE OF APOLOGIES IN RESOLVING HEALTH CARE DISPUTES, 21 Ga. St. U.L. Rev. 1009 (2005) (p. 1015).

<sup>163</sup> NOTE: Innovative Cost Control: An Analysis of Medical Malpractice Reform in Massachusetts, 9 J. Health & Biomed. L. 87 (2013) (p 99).

<sup>164</sup> ARTICLE: Apology, Forgiveness, Reconciliation & Therapeutic Jurisprudence, 13 Pepp. Disp. Resol. L.J. 131 (2013) (p. 138).

<sup>165</sup> SYMPOSIUM: CHALLENGES TO THE ATTORNEY-CLIENT RELATIONSHIP: THREATS TO SOUND ADVICE?: TEENTH ANNUAL CLIFFORD SYMPOSIUM ON TORT LAW AND SOCIAL POLICY: ARTICLE: THE HEALING FORCES OF APOLOGY IN MEDICAL PRACTICE AND BEYOND, 57 DePaul L. Rev. 251 (2008) (p. 263).

<sup>166</sup>NOTE: Enough with the White Lie-ability: Decreasing Frivolous Health Care Liability Actions in Tennessee with Time and Transparency, 46 U. Mem. L. Rev. 503 (2015) (p. 529-530).

<sup>167</sup> ARTICLE: ADVISING CLIENTS TO APOLOGIZE, 72 S. Cal. L. Rev. 1009 (1999) (p. 1019).

<sup>168</sup> Id. at 1020-1021.

<sup>169</sup> Youngberg, Barbara J., *Principles of Risk Management and Patient Safety*, 239 (2011).

<sup>170</sup> ARTICLE: PSYCHOLOGICAL BARRIERS TO LITIGATION SETTLEMENT: AN EXPERIMENTAL APPROACH, 93 Mich. L. Rev. 107 (1994) (p. 150).

<sup>171</sup> ARTICLE: APOLOGIES AND LEGAL SETTLEMENT: AN EMPIRICAL EXAMINATION, 102 Mich. L. Rev. 460 (2003) (p.477).

<sup>172</sup> SYMPOSIUM: THE FIFTH REMEDIES DISCUSSION FORUM: DAMAGES AS RECONCILIATION, 42 Loy. L.A. L. Rev. 5 (2008) (p. 13).

<sup>173</sup> ARTICLE: Just Apologies: An Overview of the Philosophical Issues, 13 Pepp. Disp. Resol. L.J. 35 (2013) (p. 90-91).

<sup>174</sup> Richard W. Bourne, *Medical Malpractice: Should Courts Force Doctors to Confess Their Own Negligence to Their Patients*, 61 Ark. L. Rev. 621, 672 (2009) (p. 623).

<sup>175</sup> ATTORNEYS, TELL YOUR CLIENTS TO SAY THEY'RE SORRY: APOLOGIES IN THE HEALTH CARE INDUSTRY, 5 Ind. Health L. Rev. 337 (2008) (p. 347).

## V. Apologies and Providers

Unfortunate medical professionals involved in a patient harm event face an intense internal conflict about what to say following an incident.<sup>176</sup> A vicious cycle initiates in which the provider wants to apologize to meet the patient's psychological need for healing and to clear their conscience, but they fear their apology will trigger a lawsuit and be used against them to prove liability so the provider chooses to stay silent.<sup>177, 178, 179</sup> Through word of mouth from colleagues, providers are conditioned to think anything they say following an error will be used against them so providers drive a wedge between them and the patient and family, withdrawing in a time when those harmed need emotional support the most.<sup>180, 181</sup> Providers think silence is the best way to protect themselves, but the lack of communication may prompt a patient to sue.<sup>182</sup> A myriad of fears plague providers that prevent them from apologizing for medical mistakes and even non-negligent complications of care.<sup>183</sup> Providers fear liability and legal discoverability, punishment by their organization or the medical board, humiliation and judgment by colleagues, and difficulty obtaining insurance or an increase in insurance premiums.<sup>184, 185</sup> Having a federal apology law would create a safe harbor for the provider's apology preventing the provider from having to balance all those fears and the risks of communication during a time of extreme stress.<sup>186</sup>

Providers experience emotional distress unrelated to the threat of pending litigation as well.<sup>187</sup> Watching their patient worsen due to a medical error can be extremely difficult for the provider and create a large amount of guilt.<sup>188</sup> Medical training tends to place a strong emphasis on infallibility focusing on proper training to be error free so a mistake is seen as a moral failing.<sup>189, 190</sup> The provider feels apologizing is contrary to the values of success and perfection

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<sup>176</sup> SYMPOSIUM: CHALLENGES TO THE ATTORNEY-CLIENT RELATIONSHIP: THREATS TO SOUND ADVICE?: TEENTH ANNUAL CLIFFORD SYMPOSIUM ON TORT LAW AND SOCIAL POLICY: ARTICLE: THE HEALING FORCES OF APOLOGY IN MEDICAL PRACTICE AND BEYOND, 57 DePaul L. Rev. 251 (2008) (p. 265).

<sup>177</sup> Id.

<sup>178</sup> ARTICLE: ADVISING CLIENTS TO APOLOGIZE, 72 S. Cal. L. Rev. 1009 (1999) (p. 1011).

<sup>179</sup> Jim Patterson, *Apology Laws Don't Help Doctors Avoid Malpractice Payouts* (1 Feb 2017)

<https://news.vanderbilt.edu/2017/02/01/apology-laws-malpractice-payouts/>.

<sup>180</sup> ARTICLE: ADVISING CLIENTS TO APOLOGIZE, 72 S. Cal. L. Rev. 1009 (1999) (p. 1011).

<sup>181</sup> ARTICLE: Legal Consequences of Apologizing, 1996 J. Disp. Resol. 115 (1996) (p.129).

<sup>182</sup> ARTICLE: APOLOGIES AND LEGAL SETTLEMENT: AN EMPIRICAL EXAMINATION, 102 Mich. L. Rev. 460 (2003) (p. 464).

<sup>183</sup> NOTE: Enough with the White Lie-ability: Decreasing Frivolous Health Care Liability Actions in Tennessee with Time and Transparency, 46 U. Mem. L. Rev. 503 (2015) (p. 512).

<sup>184</sup> Id.

<sup>185</sup> SYMPOSIUM: CHALLENGES TO THE ATTORNEY-CLIENT RELATIONSHIP: THREATS TO SOUND ADVICE?: TEENTH ANNUAL CLIFFORD SYMPOSIUM ON TORT LAW AND SOCIAL POLICY: ARTICLE: THE HEALING FORCES OF APOLOGY IN MEDICAL PRACTICE AND BEYOND, 57 DePaul L. Rev. 251 (2008) (p. 265).

<sup>186</sup> ARTICLE: WHAT WE KNOW AND DON'T KNOW ABOUT THE ROLE OF APOLOGIES IN RESOLVING HEALTH CARE DISPUTES, 21 Ga. St. U.L. Rev. 1009 (2005) (p. 1024).

<sup>187</sup> ARTICLE: HEALTHCARE MEDIATION AND THE NEED FOR APOLOGIES, 18 Health L.J. 31 (2010) (p. 36).

<sup>188</sup> Id.

<sup>189</sup> ARTICLE: MEDICAL ERROR REDUCTION AND TORT REFORM THROUGH PRIVATE, CONTRACTUALLY-BASED QUALITY MEDICINE SOCIETIES, 35 Am. J. L. and Med. 505 (2009) (p. 552).

<sup>190</sup> ARTICLE: A DOSE OF REALITY FOR MEDICAL MALPRACTICE REFORM, 88 N.Y.U.L. Rev. 1224 (2013) (p. 1232).

on which they were trained.<sup>191</sup> Full apology protection by federal law would illustrate that the medical and legal community understand errors happen because providers are human and when errors occur the provider should apologize to their patient to begin the healing process for themselves as well as to better care for all their patients.<sup>192, 193, 194</sup>

The AMA has long prescribed providers have an ethical duty to disclose medical harm to the patient and family following a harm event; but, conveying disclosure without an apology may leave the patient angered and distressed.<sup>195, 196</sup> The AMA writes “concern regarding the legal liability that might result following truthful disclosure should not affect the physician’s honesty with a patient.”<sup>197</sup> The Joint Commission and the National Patient Safety Foundation also support prompt communication with patients following a harm event; however, none of these ethical or regulatory guidelines equip providers to perform apology and disclosure or how to balance their fears during the process.<sup>198, 199, 200</sup> The complicated skill of expressing empathy without expressing fault while delivering bad news as required by partial apology laws is not commonly included in the curriculum for medical school and can be confusing and distressing for providers.<sup>201, 202</sup> The need for provider training in order to move to open communication is another argument for a federal apology law as one consistent approach to providing full apology can be taught to new and old providers alike.<sup>203, 204</sup>

Most providers will be sued at least once during their medical careers.<sup>205</sup> This fear pushes them to insulate themselves from medical malpractice lawsuits at any cost.<sup>206</sup> In an effort to

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<sup>191</sup> ARTICLE: Legal Consequences of Apologizing, 1996 J. Disp. Resol. 115 (1996) (p. 115).

<sup>192</sup> ARTICLE: ADVISING CLIENTS TO APOLOGIZE, 72 S. Cal. L. Rev. 1009 (1999) (p. 1015-1016; 1021-1022).

<sup>193</sup> ARTICLE: Apology, Forgiveness, Reconciliation & Therapeutic Jurisprudence, 13 Pepp. Disp. Resol. L.J. 131 (2013) (p. 150-151).

<sup>194</sup> SYMPOSIUM ARTICLE: Paths to Reducing Medical Injury: Professional Liability and Discipline vs. Patient Safety--and the Need for a Third Way, 29 J.L. Med. & Ethics 369 (2001) (p. 370).

<sup>195</sup> Norman G. Jr. Tabler, *Sixteen Myths of Medicine and Medical Malpractice*, 13 Ind. Health L. Rev. 363, 383 (2016) (p. 382).

<sup>196</sup> SHOULD PHYSICIANS APOLOGIZE FOR MEDICAL ERRORS?, 19 Health Lawyer 23 (2007) (p. 23).

<sup>197</sup> American Medical Association, *AMA Code of Medical Ethics*, 8.6 Promoting Patient Safety, Chapter 8, p. 5-6 (2016).

<sup>198</sup> SHOULD PHYSICIANS APOLOGIZE FOR MEDICAL ERRORS?, 19 Health Lawyer 23 (2007) (p. 23).

<sup>199</sup> ARTICLE: WHAT WE KNOW AND DON'T KNOW ABOUT THE ROLE OF APOLOGIES IN RESOLVING HEALTH CARE DISPUTES, 21 Ga. St. U.L. Rev. 1009 (2005) (p. 1012).

<sup>200</sup> The National Patient Safety Foundation Lucian Leape Institute, *Shining a Light; Safer Health Care Through Transparency* (2015) (p. 9).

<sup>201</sup> Debra Beaulieu-Volk, *Apology Laws: Talking to Patients about Adverse Events; The right and wrong way to talk to patients with sympathy* (10 June 2014) <http://medicaleconomics.modernmedicine.com/medical-economics/content/tags/apology-laws/apology-laws-talking-patients-about-adverse-events?page=full>.

<sup>202</sup> ARTICLE: IS IT UNREALISTIC TO EXPECT A DOCTOR TO APOLOGIZE FOR AN UNFORESEEN MEDICAL COMPLICATION?--A PRIMER ON APOLOGIES LAWS, 82 PA Bar Assn. Quarterly 93 (2011) (p. 96).

<sup>203</sup> Doug Wojcieszak, et al., *The Sorry Works! Coalition: Making the Case For Full Disclosure*, 32(6) The Journal on Quality and Patient Safety, 344, 350 (2006) (p. 344-345).

<sup>204</sup> ARTICLE: Apologize First; Mediate Second; Litigate ... Never?, 34 Rev. Litig. 493 (2015) (p. 521).

<sup>205</sup> ARTICLE: A DOSE OF REALITY FOR MEDICAL MALPRACTICE REFORM, 88 N.Y.U.L. Rev. 1224 (2013) (p. 1238).

<sup>206</sup> ARTICLE: ANNOUNCING REMEDIES FOR MEDICAL INJURY: A PROPOSAL FOR MEDICAL LIABILITY REFORM BASED ON THE PATIENT PROTECTION AND AFFORDABLE CARE ACT, 16 J. Health Care L. & Pol'y 309 (2013) (p. 314-317).



protect themselves, some providers choose to practice defensive medicine that includes practicing with extreme caution and ordering diagnostic testing the patient may not need.<sup>207</sup> Defensive medicine causes providers to make medical judgments centered on perceived legal benefit and not clinical benefit to the patient.<sup>208, 209</sup> Protecting full apologies will decrease the number of lawsuits so providers won't feel inclined to practice defensively saving the provider time and stress and saving the healthcare system and patients' money.<sup>210</sup> Fear leads to defensive practice and fear that committing and admitting medical errors will lead to legal, professional, emotional and financial consequences also fuels the code-of-silence and the culture of deny and defend in healthcare.<sup>211, 212</sup> These cultures directly clash with the value patients place on open communication.<sup>213</sup> Denying error and defending practice have been the traditional response following an error, but this approach may not be in the providers' best interest since lack of communication has been proven to increase the chance of a lawsuit.<sup>214</sup> The code-of-silence and deny and defend attitude is also a direct hindrance to patient safety advancement because providers and organizations are not able to learn from mistakes and correct problems for future patients without provider transparency about errors.<sup>215, 216</sup> By protecting full apologies through federal law, providers and organizations will favor open communication with patients and increased transparency that will strengthen patient safety by assuring mitigation strategies will be utilized to prevent future errors.<sup>217</sup>

## **VI. Legislation Protecting Apologies**

States have enacted apology laws in a response to many factors including meeting the needs of the patient and family for an apology and open communication; mitigating the fears providers have about liability exposure; increasing the chance of settlement; and, decreasing the burden of medical malpractice litigation on the state court system by lessening the likelihood of

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<sup>207</sup> NOTE: Enough with the White Lie-ability: Decreasing Frivolous Health Care Liability Actions in Tennessee with Time and Transparency, 46 U. Mem. L. Rev. 503 (2015) (p. 515-516).

<sup>208</sup> Id.

<sup>209</sup> ARTICLE: Malpractice, Mediation, and Moral Hazard: The Virtues of Dodging the Data Bank, 27 Ohio St. J. on Disp. Resol. 109 (2012) (p. 115).

<sup>210</sup> NOTE: Innovative Cost Control: An Analysis of Medical Malpractice Reform in Massachusetts, 9 J. Health & Biomed. L. 87 (2013) (p. 113-114).

<sup>211</sup> ARTICLE: RETHINKING THE TORT LIABILITY SYSTEM AND PATIENT SAFETY: FROM THE CONVENTIONAL WISDOM TO LEARNING FROM LITIGATION, 12 Ind. Health L. Rev. 327 (2015) (p. 348-349).

<sup>212</sup> SPECIAL FEATURE: FALL 2007 SYMPOSIUM ON ADVANCED ISSUES IN DISPUTE RESOLUTION: DOCTORS AND LAWYERS: PATHWAYS TO COLLABORATION: Doctors as Advocates, Lawyers as Healers, 29 Hamline J. Pub. L. & Pol'y 331 (2008) (p. 385).

<sup>213</sup> ATTORNEYS, TELL YOUR CLIENTS TO SAY THEY'RE SORRY: APOLOGIES IN THE HEALTH CARE INDUSTRY, 5 Ind. Health L. Rev. 337 (2008) (p. 340-342).

<sup>214</sup> SPECIAL FEATURE: FALL 2007 SYMPOSIUM ON ADVANCED ISSUES IN DISPUTE RESOLUTION: DOCTORS AND LAWYERS: PATHWAYS TO COLLABORATION: Doctors as Advocates, Lawyers as Healers, 29 Hamline J. Pub. L. & Pol'y 331 (2008) (p. 384-385).

<sup>215</sup> ARTICLE: RETHINKING THE TORT LIABILITY SYSTEM AND PATIENT SAFETY: FROM THE CONVENTIONAL WISDOM TO LEARNING FROM LITIGATION, 12 Ind. Health L. Rev. 327 (2015) (p. 328).

<sup>216</sup> SPECIAL FEATURE: FALL 2007 SYMPOSIUM ON ADVANCED ISSUES IN DISPUTE RESOLUTION: INNOVATIVE APPROACHES TO MANAGING HEALTH CARE CONFLICT: Healthcare Conflict Management: An Obligation of the Board, 29 Hamline J. Pub. L. & Pol'y 401 (2008) (p. 404-405).

<sup>217</sup> ATTORNEYS, TELL YOUR CLIENTS TO SAY THEY'RE SORRY: APOLOGIES IN THE HEALTH CARE INDUSTRY, 5 Ind. Health L. Rev. 337 (2008) (p. 365).

litigation.<sup>218, 219, 220</sup> The laws have been created on the basic premise that providers should not be punished for expressing their apologies to the person they have harmed.<sup>221</sup> The majority of apology laws in place protect partial apologies leaving statements of fault admissible in legal proceedings (please see Appendix A for a map of states with apology laws).<sup>222</sup> The partial protection of these apology laws encourage fearful providers to stay silent, are counterproductive for patient healing, and are less impactful on decreasing litigation.<sup>223, 224, 225</sup> Besides the protection of partial or full apologies, the state statutes tend to vary in others ways including 25 of the 34 statutes in the country explicitly mention apology; eight of the statutes do not mention patients or providers; some statutes outline who can offer apology to the patient; some statutes dictate when the apology has to be made to the patient in order for it to be protected; and, some statutes define whether the apology can be written, spoken or both.<sup>226</sup> Differences in apology laws create conflict and confusion for providers that discourage the use of apology.<sup>227</sup>

In 1986, Massachusetts became the first state in the country to enact an apology law.<sup>228</sup> The statute was created in response to a state legislator's daughter being struck and killed by a car while riding her bicycle.<sup>229</sup> The driver never apologized for causing the girl's death, and he stated later he was concerned his apology would be considered an admission of fault during litigation.<sup>230</sup> The senator decided to create a safe harbor for apologies so other families wouldn't have the same experience his did in the future.<sup>231, 232</sup> The Massachusetts law protects partial apologies and states:

“Statements, writings or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering or death of a person involved

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<sup>218</sup> SPECIAL FEATURE: FALL 2007 SYMPOSIUM ON ADVANCED ISSUES IN DISPUTE RESOLUTION: INNOVATIVE APPROACHES TO MANAGING HEALTH CARE CONFLICT: Healthcare Conflict Management: An Obligation of the Board, 29 Hamline J. Pub. L. & Pol'y 401 (2008) (p. 404-405).

<sup>219</sup> Admissibility of Evidence of Medical Defendant's Apologetic Statements or the Like as Evidence of Negligence, 97 A.L.R.6th 519 (2013) (p. 2).

<sup>220</sup> Article: No Role for Apology: Remedial Work and the Problem of Medical Injury, 11 Yale J. Health Pol'y L. & Ethics 267 (2011) (p. 291).

<sup>221</sup> ATTORNEYS, TELL YOUR CLIENTS TO SAY THEY'RE SORRY: APOLOGIES IN THE HEALTH CARE INDUSTRY, 5 Ind. Health L. Rev. 337 (2008) (p. 346).

<sup>222</sup> COLLOQUY ESSAY: THE SYNERGY OF EARLY OFFERS AND MEDICAL EXPLANATIONS/APOLOGIES+, 103 Nw. U.L. Rev. 2007 (2009) (p. 2012).

<sup>223</sup> NOTE: Physician Apologies and General Admissions of Fault: Amending the Federal Rules of Evidence, 72 Ohio St. L.J. 687 (2011) (p. 700-701, 703-704).

<sup>224</sup> ARTICLE: Transparency and Disclosure of Medical Errors: It's the Right Thing to Do, So Why the Reluctance?, 35 Campbell L. Rev. 333 (2013) (p. 345).

<sup>225</sup> ARTICLE: DOES 'SORRY' INCRIMINATE? EVIDENCE, HARM AND THE PROTECTION OF APOLOGY, 21 Cornell J. L. & Pub. Pol'y 567 (2012) (p. 576).

<sup>226</sup> Article: No Role for Apology: Remedial Work and the Problem of Medical Injury, 11 Yale J. Health Pol'y L. & Ethics 267 (2011) (p. 305-307).

<sup>227</sup> Student Comment: The Medical Malpractice Liability Insurance Crisis: Critiquing the Effectiveness of the 2002 MCARE Legislation in Pennsylvania, 35 Ohio N.U.L. Rev. 351 (2009) (p. 393).

<sup>228</sup> ARTICLE: Forgive and Forget: Recognition of Error and Use of Apology as Preemptive Steps to ADR or Litigation in Medical Malpractice Cases, 6 Pepp. Disp. Resol. L.J. 81 (2006) (p. 98).

<sup>229</sup> ARTICLE: When More Than Sorry Matters, 13 Pepp. Disp. Resol. L.J. 181 (2013) (p. 192).

<sup>230</sup> Id.

<sup>231</sup> Id.

<sup>232</sup> ARTICLE: LEGISLATING APOLOGY: THE PROS AND CONS, 70 U. Cin. L. Rev. 819 (2002) (p. 827).

in an accident and made to such person or to the family of such person shall be inadmissible as evidence of an admission of liability in a civil action.”<sup>233</sup>

The Massachusetts law does not define “statements, writings or benevolent gestures expressing sympathy or a general sense of benevolence,” and the statute is also silent on whether statements of fault would be admissible or not.<sup>234, 235</sup>

In contrast to the Massachusetts statute, the apology laws in New Hampshire and California specifically exclude admissions of fault giving the provider some additional direction about the language that can be used during their partial apology to the patient.<sup>236</sup> New Hampshire law holds “this section does not apply to a statement of fault, negligence, or culpable conduct that is part of or made in addition to a statement, writing, or action described in paragraph II.”<sup>237</sup> California law outlines “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.”<sup>238</sup> Providers must take care to understand these laws since slight linguistic changes could have significant legal ramifications during litigation making part or their entire apology admissible.<sup>239</sup>

Colorado was the first state to pass an apology law protecting full apologies.<sup>240</sup> The statute offers in relevant part:

“Any and all statements, affirmations, gestures or conduct expressing apology, fault, sympathy, commiseration, condolence, compassion, or a general sense of benevolence which are made by a healthcare provider or an employee of a healthcare provider to the alleged victim, a relative of the alleged victim, or a representative of the alleged victim and which related to the discomfort, pain, suffering, injury, or death of the alleged victim as the result of the unanticipated outcome of medical care shall be inadmissible as evidence of an admission of liability or as evidence of an admission against interest.”<sup>241</sup>

Colorado’s law protecting full apologies should be used as the example when crafting the federal law as the statute provides the most thorough protection for providers. Full protection will decrease providers’ fear to allow open communication with patients and families creating a decrease in medical malpractice lawsuits.<sup>242</sup> However, despite how comprehensive the protection of Colorado’s state apology statute, there’s not a guarantee in the federal jurisdiction.<sup>243</sup> In 2004, in *Atteberry v. Longmont United Hospital*, the Supreme Court held Colorado’s apology law did

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<sup>233</sup> Mass. Ann. Laws ch. 233, § 23D

<sup>234</sup> ARTICLE: LEGISLATING APOLOGY: THE PROS AND CONS, 70 U. Cin. L. Rev. 819 (2002) (p. 827-828).

<sup>235</sup> Article: Apologies All Around: Advocating Federal Protection for the Full Apology in Civil Cases, 46 San Diego L. Rev. 137 (2009) (p. 152).

<sup>236</sup> ARTICLE: LEGISLATING APOLOGY: THE PROS AND CONS, 70 U. Cin. L. Rev. 819 (p. 829).

<sup>237</sup> N.H. Rev. Stat. Ann. § 507-E:4

<sup>238</sup> Cal. Evid. Code § 1160

<sup>239</sup> ARTICLE: LEGISLATING APOLOGY: THE PROS AND CONS, 70 U. Cin. L. Rev. 819 (2002) (p. 829-830).

<sup>240</sup> Article: Apologies All Around: Advocating Federal Protection for the Full Apology in Civil Cases, 46 San Diego L. Rev. 137 (2009) (p. 156).

<sup>241</sup> Colo. Rev. Stat. 13-25-135

<sup>242</sup> Article: Apologies All Around: Advocating Federal Protection for the Full Apology in Civil Cases, 46 San Diego L. Rev. 137 (2009) (p. 157).

<sup>243</sup> Id.

not privilege discovery requests for apologies in a federal case.<sup>244</sup> Even though Colorado's law provides the most protection for apologies, the law does not provide protection in the event of a federal case creating further doubt in a provider's mind and limiting their use of apology following harm events.<sup>245</sup>

While the state statutes are designed to encourage apologies by providing protection, the Federal Rules of Evidence have had a chilling effect on apologies because the laws specifically allow apologies into evidence in a number of circumstances.<sup>246, 247</sup> Federal Rule of Evidence 801(d)(2) offers that an admission of fault by an opposing party should not be considered hearsay, which removes hearsay protections, therefore making the fault statement admissible.<sup>248</sup> The rule means that even though the classic definition of hearsay would normally apply to apologies, the Federal Rules of Evidence see apologies as admissions of fault that are not considered hearsay, making the apology admissible.<sup>249, 250</sup> The Federal Rule of Evidence 408 generally protects offers for settlement from being admitted into evidence, but apologies are not specifically included in the protection and could still be admitted as evidence if settlement fails.<sup>251</sup> Unless another evidentiary protection is in place, a provider could hear their apology used against them in a federal trial as the plaintiff's attorney will claim the provider's apology is an admission of liability.<sup>252</sup> A federal law protecting full apologies, structured much like Colorado's apology law, would provide clear guidance for providers to follow and protect apologies from being admissible in the event of a lawsuit in any jurisdiction allowing the benefits of apologies to be fully realized.<sup>253</sup>

Understanding the need for a national-level apology law, Hillary Rodham Clinton and Barack Obama co-sponsored the National Medical Error Disclosure and Compensation Act (MEDiC Act) in 2005.<sup>254</sup> The goals of the MEDiC Act were to foster a non-litigious approach to medical malpractice by creating an environment for safe and prompt disclosure and apology to patients; encourage parties to enter into negotiations for fair compensation without litigation

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<sup>244</sup> *Atteberry v. Longmont United Hosp.*, 221 F.R.D. 644 (D. Colo. 2004) (at 646-647).

<sup>245</sup> Article: Apologies All Around: Advocating Federal Protection for the Full Apology in Civil Cases, 46 San Diego L. Rev. 137 (2009) (p. 157).

<sup>246</sup> ARTICLE: IS IT UNREALISTIC TO EXPECT A DOCTOR TO APOLOGIZE FOR AN UNFORESEEN MEDICAL COMPLICATION?--A PRIMER ON APOLOGIES LAWS, 82 PA Bar Assn. Quarterly 93 (2011) (p. 101).

<sup>247</sup> ARTICLE: Dispute Resolution & New Governance: Role of the Corporate Apology, 34 Seattle U. L. Rev. 481 (2011) (p. 496-497).

<sup>248</sup> FED. R. EVID. 801(d)

<sup>249</sup> ARTICLE: Dispute Resolution & New Governance: Role of the Corporate Apology, 34 Seattle U. L. Rev. 481 (2011) (p. 497-498).

<sup>250</sup> NOTE & COMMENT: ON APOLOGY AND CONSILIENCE, 77 Wash. L. Rev. 1121 (2002) (p. 1170).

<sup>251</sup> Article: No Role for Apology: Remedial Work and the Problem of Medical Injury, 11 Yale J. Health Pol'y L. & Ethics 267 (2011) (p. 305).

<sup>252</sup> FEATURE: The Cure for What Ails: A Realistic Remedy for the Medical Malpractice "Crisis", 23 Stan. L. & Pol'y Rev 477 (2012) (p. 510-511).

<sup>253</sup> NOTE: Physician Apologies and General Admissions of Fault: Amending the Federal Rules of Evidence, 72 Ohio St. L.J. 687 (2011) (p. 704).

<sup>254</sup> ARTICLE: IS IT UNREALISTIC TO EXPECT A DOCTOR TO APOLOGIZE FOR AN UNFORESEEN MEDICAL COMPLICATION?--A PRIMER ON APOLOGIES LAWS, 82 PA Bar Assn. Quarterly 93 (2011)(p. 101).

following harm; and, highlight and support important patient safety initiatives.<sup>255, 256, 257</sup> The bill was originally intended to protect full apologies and was being debated and revised in committee where unfortunately the MEDiC Act died.<sup>258</sup> Although the bill did not pass, the attempt indicates the potential for federal legislation in the future as lawmakers are educated to the benefits of apology and how apologies should not be admissible as evidence to prove liability even when the apology is the most self-critical.<sup>259, 260</sup>

## VII. Case Law

Just as state apology laws vary in their construction and protection of apologies, case law on whether apologies are admitted to prove provider liability have also varied.<sup>261</sup> A number of cases have been decided in states with apology laws in which the statute successfully barred the use of a provider apology as an admission of liability, although there is case law to the contrary as well.<sup>262</sup> Providers want to apologize following harm events, and society and patients view this as the appropriate human response; but, the reality a provider's apology can be used against them in court will continue to be a deterrent.<sup>263</sup> The following cases will give some examples of the real life implications of apologies in healthcare without having a federal apology law protecting full apologies in place.<sup>264</sup>

In the case of *Lawrence v. Mountain Star Healthcare* from Utah, Shannon Lawrence who was experiencing an allergic reaction was administered three doses of epinephrine intravenously mistakenly instead of two doses intravenously and one dose under the skin.<sup>265</sup> Following the medication error, Ms. Lawrence experienced palpitations, nausea, vomiting and rapid heart rate and was admitted to the intensive care unit for monitoring for one week.<sup>266</sup> While the patient was hospitalized, the provider and the risk manager from Mountain Star Healthcare came to speak with her acknowledging the medication error, providing disclosure, and apologizing for her experience.<sup>267</sup> Once improved, Ms. Lawrence was discharged home, but she reported she

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<sup>255</sup> NOTES & COMMENTS: A Better Approach to Medical Malpractice Claims? The University of Michigan Experience, Vol. 2, No. 1, J. Health & Life Sci. L. Pg. 125 (2009) (p. 130).

<sup>256</sup> SHOULD PHYSICIANS APOLOGIZE FOR MEDICAL ERRORS?, 19 Health Lawyer 23 (2007) (p. 24).

<sup>257</sup> ARTICLE: The Clinton-Obama Approach to Medical Malpractice Reform: Reviving the Most Meaningful Features of Alternative Dispute Resolution, 8 Pepp. Disp. Resol. L.J. 171 (2007) (p. 187).

<sup>258</sup> Article: Apologies All Around: Advocating Federal Protection for the Full Apology in Civil Cases, 46 San Diego L. Rev. 137 (2009) (p. 155-156).

<sup>259</sup> Youngberg, Barbara J., *Principles of Risk Management and Patient Safety* (2011) (p. 220).

<sup>260</sup> ARTICLE: DOES 'SORRY' INCRIMINATE? EVIDENCE, HARM AND THE PROTECTION OF APOLOGY, 21 Cornell J. L. & Pub. Pol'y 567 (2012) (p. 596).

<sup>261</sup> Article: No Role for Apology: Remedial Work and the Problem of Medical Injury, 11 Yale J. Health Pol'y L. & Ethics 267 (2011) (p. 297).

<sup>262</sup> Admissibility of Evidence of Medical Defendant's Apologetic Statements or the Like as Evidence of Negligence, 97 A.L.R.6th 519 (2013) (p. 2).

<sup>263</sup> Id.

<sup>264</sup> ARTICLE: IS IT UNREALISTIC TO EXPECT A DOCTOR TO APOLOGIZE FOR AN UNFORESEEN MEDICAL COMPLICATION?--A PRIMER ON APOLOGIES LAWS, 82 PA Bar Assn. Quarterly 93 (2011) (p. 94-95).

<sup>265</sup> *Lawrence v. MountainStar Healthcare*, 2014 UT App 40, 320 P.3d 1037 (p. 1042).

<sup>266</sup> Id. at 1042- 1043.

<sup>267</sup> Id. at 1042- 1044.

continued to experience ongoing health issues related to the medication error.<sup>268</sup> A little over a year after the event, she filed a claim against the hospital seeking damages for negligence.<sup>269</sup> Utah has an apology law in place to protect partial apologies as well as a description of the sequence and significance of the event.<sup>270, 271</sup> The trial court deemed all statements made to the patient in the hospital were inadmissible at trial because they fell directly within the protected statements per Utah's apology law.<sup>272</sup> The jury ultimately decided the hospital was not in breach of the standard of care causing the patient's injuries and did not award damages to the plaintiff.<sup>273</sup> Ms. Lawrence appealed the decision and the case moved to the appellate court.<sup>274</sup>

The appellate court reviewed the statements excluded from evidence and held the trial court was correct in excluding statements made by the physician to the patient as they met the letter of the law being an apology only containing sympathy.<sup>275</sup> However, the appellate court needed more review prior to determining if the trial court was correct in excluding all statements made by the risk manager on behalf of the hospital.<sup>276</sup> Statements made by the risk manager such as "we messed up" did not fit directly in the description offered by the law and the plaintiff claimed that statement amounted to an admission of fault.<sup>277</sup> Utah's apology statute does not directly address whether statements of fault are inadmissible, so this forced the appellate court to research the historical construction of the bill to determine what legislators intended when they passed the law.<sup>278</sup> The appellate court ultimately determined the trial court had erred in excluding the statements made by the risk manager finding Utah's legislature did not intend to make statements of fault inadmissible in court proceedings because the word fault had been removed from the bill prior to it being passed.<sup>279</sup> Although the ruling did not ultimately change the outcome of the case, the case law illustrates how ambiguity in the statute can cause confusion in court as well as for well-meaning providers and risk managers.<sup>280</sup> Having a federal apology law in place to protect full apologies would provide clarity for the court and providers about the protection the law affords for full apologies, which include statements of fault.<sup>281</sup>

Like the first case we have examined from Utah, *Strout v. Central Maine Medical Center (CMMC)* also contemplates whether statements written to a patient fall within the scope of the apology statute in Maine.<sup>282</sup> Similar to Utah, Maine has a partial apology law in place, but legislators included additional language to the statute to clarify "nothing in this section prohibits

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<sup>268</sup> *Lawrence v. MountainStar Healthcare*, 2014 UT App 40, 320 P.3d 1037 (p. 1042- 1044).

<sup>269</sup> *Id.* at 1042- 1044.

<sup>270</sup> Utah R. Evid. 409

<sup>271</sup> Utah Code Ann. Sec. 78B-3-422

<sup>272</sup> *Lawrence v. MountainStar Healthcare*, 2014 UT App 40, 320 P.3d 1037 (p. 1043).

<sup>273</sup> *Id.* at 1045.

<sup>274</sup> *Id.* at 1045.

<sup>275</sup> *Id.* at 1047-1048.

<sup>276</sup> *Id.* at 1049.

<sup>277</sup> *Id.* at 1048-1049.

<sup>278</sup> *Id.* at 1049-1051.

<sup>279</sup> *Lawrence v. MountainStar Healthcare*, 2014 UT App 40, 320 P.3d 1037 (p. 1050-1051).

<sup>280</sup> *Id.* at 1049-1051.

<sup>281</sup> Anna C. Mastroianni et al., *The Flaws in State "Apology" and "Disclosure" Laws Dilute Their Intended Impact on Malpractice Suits*, 29 *Health Affairs* 1611, 1616 (2010) (p 1616 and 1618).

<sup>282</sup> *Admissibility of Evidence of Medical Defendant's Apologetic Statements or the Like as Evidence of Negligence*, 97 *A.L.R.6th* 519 (2013) (p. 7).

the admissibility of a statement of fault.”<sup>283</sup> Wendell Strout Jr. presented to the emergency department at CMMC with abdominal pain where a CAT scan revealed he had a liver lesion the clinician suspected was cancer of hepatic or pancreatic origin.<sup>284</sup> At a follow-up visit with the provider, Strout was told the results of the lesion biopsy were still pending, but the provider believed the cancer he was suffering from gave him only months to live.<sup>285</sup> Several weeks later the biopsy results revealed Strout had B-cell non-Hodgkin lymphoma, which has a much greater survival rate of about five years.<sup>286</sup> Strout filed a complaint about the provider; and, after CMMC’s internal investigation the patient received a letter from the president of Central Maine Medical Group apologizing for the patient’s experience.<sup>287</sup>

During the trial that followed, the trial court admitted a redacted version of the letter from CMMC into evidence that included only one sentence the court deemed to be an admission of fault as it stated the provider realized he needed to wait for the results of the biopsy prior to sharing his clinical impression.<sup>288</sup> Strout prevailed in court and was awarded \$200,000 in damages and CMMC promptly filed an appeal arguing the letter should have been inadmissible entirely because the letter was a statement of sympathy and not an admission of fault.<sup>289</sup> The appellate court affirmed the verdict holding the trial court did not err in admitting the sentence from the letter because the statement was an admission of fault and nothing in the statute gives protection to statements of fault accompanying statements of sympathetic apology.<sup>290</sup> This case illustrates that without a federal apology law protecting full apologies slight wording changes may cause professional and legal ramifications when open and honest conversations with a patient are admitted to prove liability.<sup>291</sup> Based on the unpredictability of the protections of the law, providers and organizations are fearful and choose to forgo apologies altogether.<sup>292</sup>

An Ohio case, *Davis v. Wooster Orthopaedics & Sportsmedicine*, concerns statements made to the husband and daughter of a 49 year-old women, Barbara Davis, who died from a lacerated vein and a completely severed artery following back surgery.<sup>293</sup> The trial court allowed testimony from Mrs. Davis’ family, which included the provider telling them he took full responsibility for the patient’s death and in his five years of practice he had never had anything like this case happen.<sup>294</sup> The Davis family was awarded \$3 million in their wrongful death action, which was appealed.<sup>295</sup> The appellate court held the trial court did not err in admitting the testimony because the provider’s statements did not include an expression of sympathy or

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<sup>283</sup> 24 M.R.S. § 2907(2)

<sup>284</sup> *Strout v. Cent. Me. Med. Ctr.*, 2014 ME 77, 94 A.3d 786 (2014) (p. 787).

<sup>285</sup> *Id.* at 787-788.

<sup>286</sup> *Strout v. Cent. Me. Med. Ctr.*, 2014 ME 77, 94 A.3d 786 (2014) (p. 788).

<sup>287</sup> *Id.* at 788.

<sup>288</sup> *Id.* at 788-789.

<sup>289</sup> *Id.* at 789.

<sup>290</sup> *Id.* at 789-790.

<sup>291</sup> ARTICLE: IS IT UNREALISTIC TO EXPECT A DOCTOR TO APOLOGIZE FOR AN UNFORESEEN MEDICAL COMPLICATION?--A PRIMER ON APOLOGIES LAWS, 82 PA Bar Assn. Quarterly 93 (2011) (p. 96).

<sup>292</sup> *Id.* at 97.

<sup>293</sup> *Davis v. Wooster Orthopaedics & Sportsmedicine*, 2011-Ohio-3199, 193 Ohio App. 3d 581, 952 N.E.2d 1216 (2011) (p. 1217-1218).

<sup>294</sup> *Davis v. Wooster Orthopaedics & Sportsmedicine*, 2011-Ohio-3199, 193 Ohio App. 3d 581, 952 N.E.2d 1216 (2011) (p. 1217-1218).

<sup>295</sup> *Id.* at 1216.

apology and therefore not were protected under the Ohio statute protecting partial apologies.<sup>296</sup> Like the case from Utah, the parties disagreed on whether the word apology was intended to include fault admitting statements, but the court held the word apology was meant to include only sympathetic statements and not an expression of fault.<sup>297</sup> With a clearly defined federal apology law protecting full apologies this provider could have had his open honest statement protected as he attempted to repair the relationship broken by the devastating loss of a family member following this surgical harm event.<sup>298</sup> Also, having a federal apology law would allow for provider training in medical school and throughout their careers on the art of apology and how to inform patients and families of poor outcomes.<sup>299</sup> With training, providers would feel better equipped to have a therapeutic conversation in the event of medical harm to the benefit of all parties involved allowing movement toward emotional and legal closure without taxing the court system with medical malpractice cases.<sup>300, 301</sup>

### **VIII. Arguments Against Apology Laws**

The idea of an apology law protecting full apologies has been met with some opposition.<sup>302</sup> One concern critics cite is that protecting full apologies from being admissible in court proceedings will make the apology seem insincere and inauthentic to receiver because the provider would be willing to admit fault privately, but not openly in court.<sup>303, 304</sup> Critics worry that instead of the patient feeling the emotional benefits of healing, an insincere apology could cause the patient to become angered and take a more aggressive approach toward the provider and the organization.<sup>305</sup> With this concern heard, there is evidence that plaintiffs will value protected apologies as an important part of the settlement process even if they have a suspicion the apology may be insincere because apology is part of a ritual to encourage the harmed to forgive, create equity, and normalize a terrible situation.<sup>306, 307</sup> Furthermore, protecting apologies

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<sup>296</sup> Id. at 1216.

<sup>297</sup> Admissibility of Evidence of Medical Defendant's Apologetic Statements or the Like as Evidence of Negligence, 97 A.L.R.6th 519 (2013) (p. 7).

<sup>298</sup> ARTICLE: ADVISING CLIENTS TO APOLOGIZE, 72 S. Cal. L. Rev. 1009 (1999) (p. 1020).

<sup>299</sup> ARTICLE: IS IT UNREALISTIC TO EXPECT A DOCTOR TO APOLOGIZE FOR AN UNFORESEEN MEDICAL COMPLICATION?--A PRIMER ON APOLOGIES LAWS, 82 PA Bar Assn. Quarterly 93 (2011) (p. 96).

<sup>300</sup> ARTICLE: Apologize First; Mediate Second; Litigate ... Never?, 34 Rev. Litig. 493 (2015) (p. 521).

<sup>301</sup> ARTICLE: IS IT UNREALISTIC TO EXPECT A DOCTOR TO APOLOGIZE FOR AN UNFORESEEN MEDICAL COMPLICATION?--A PRIMER ON APOLOGIES LAWS, 82 PA Bar Assn. Quarterly 93 (2011) (p. 94-95)

<sup>302</sup> NOTE:APOLOGETIC JUSTICE: EVALUATING APOLOGIES TAILORED TOWARD LEGAL SOLUTIONS, 81 B.U.L. Rev. 289 (2001) (p. 291).

<sup>303</sup> SYMPOSIUM: THE TWENTY-FIFTH ANNIVERSARY OF THE MINNESOTA COURT OF APPEALS: EVIDENCE LAW: MY LAWYER TOLD ME TO SAY I'M SORRY: LAWYERS, DOCTORS, AND MEDICAL APOLOGIES, 35 Wm. Mitchell L. Rev. 1410 (2009) (p. 1441-1442).

<sup>304</sup> ARTICLE: DOES 'SORRY' INCRIMINATE? EVIDENCE, HARM AND THE PROTECTION OF APOLOGY, 21 Cornell J. L. & Pub. Pol'y 567 (2012) (p. 580).

<sup>305</sup> SYMPOSIUM: CHALLENGES TO THE ATTORNEY-CLIENT RELATIONSHIP: THREATS TO SOUND ADVICE?: TEENTH ANNUAL CLIFFORD SYMPOSIUM ON TORT LAW AND SOCIAL POLICY: ARTICLE: THE HEALING FORCES OF APOLOGY IN MEDICAL PRACTICE AND BEYOND, 57 DePaul L. Rev. 251 (2008) (p. 253).

<sup>306</sup> SYMPOSIUM: THE FIFTH REMEDIES DISCUSSION FORUM: DAMAGES AS RECONCILIATION, 42 Loy. L.A. L. Rev. 5 (2008) (p. 23).

<sup>307</sup> Article: Apologies All Around: Advocating Federal Protection for the Full Apology in Civil Cases, 46 San Diego L. Rev. 137 (2009) (p. 150).



does not mean the apology would be cost-free to the provider.<sup>308</sup> Even in a protected setting, apologies take a certain amount of moral courage because apologizing can still expose the provider to shame, damage to their professional reputation, damage to their self-esteem, and worry about exposing others involved in the medical harm event.<sup>309</sup> Providers may desire to satisfy their moral duty of apology to the patient they harmed, and federal protection of full apologies will facilitate them in exercising moral courage without the immediate threat of legal liability.<sup>310</sup>

Another concern critics have is that providers and organizations will abuse full apology law protection for strategic legal benefit persuading the patient to settle for lower monetary damages than they are entitled to or not pursue monetary damages at all.<sup>311, 312, 313</sup> Critics tout apology as a commodity in the legal setting made solely to minimize damages manipulating the patient with the trust they have in the provider-patient relationship.<sup>314, 315, 316</sup> Having a federal apology law in place protecting full apologies would in no way eliminate the need for compensating a patient and family who were the victims of a medical harm event involving negligence.<sup>317</sup> An apology does have value emotionally and financially because the communication gives the patient and family the apology and explanation they desire and will make determining appropriate compensation far less adversarial in nature decreasing the legal and administrative costs to reach settlement.<sup>318, 319</sup> While some claimants might prefer an apology in conjunction with large financial exposure to the provider and organization, most people would rather receive an apology than not hear one at all.<sup>320</sup> The basic premise in civil cases is that the victim is compensated to right the wrong committed; and if this is the desired result then reaching a settlement faster and in a more therapeutic fashion using apology is indeed meeting the goal in tort utilizing more positive methods.<sup>321</sup> Facilitating the federal protection of

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<sup>308</sup> SYMPOSIUM: THE TWENTY-FIFTH ANNIVERSARY OF THE MINNESOTA COURT OF APPEALS: EVIDENCE LAW: MY LAWYER TOLD ME TO SAY I'M SORRY: LAWYERS, DOCTORS, AND MEDICAL APOLOGIES, 35 Wm. Mitchell L. Rev. 1410 (2009) (p. 1443).

<sup>309</sup> *Id.* at 1443-1444.

<sup>310</sup> ARTICLE: DOES 'SORRY' INCRIMINATE? EVIDENCE, HARM AND THE PROTECTION OF APOLOGY, 21 Cornell J. L. & Pub. Pol'y 567 (2012) (p. 580).

<sup>311</sup> ARTICLE: How Medical Apology Programs Harm Patients, 15 Chap. L. Rev. 307 (2011) (p. 308).

<sup>312</sup> ARTICLE: Liability and the Health Care Bill: An "Alternative" Perspective, 1 Calif. L. Rev. Circuit 57 (2010) (p. 64).

<sup>313</sup> Symposium: On the Table: An Examination of Medical Malpractice, Litigation, and Methods of Reform: Medical Apology Programs and the Unauthorized Practice of Law, 46 New Eng. L. Rev. 505 (2012) (p. 506).

<sup>314</sup> SYMPOSIUM: INJURIES WITHOUT REMEDIES: WHAT IS CIVIL JUSTICE?, 44 Loy. L.A. L. Rev. 317 (2010) (p. 334).

<sup>315</sup> COMMENT: FULL DISCLOSURE: AN ALTERNATIVE TO LITIGATION, 48 Santa Clara L. Rev. 473 (2008) (p. 498).

<sup>316</sup> Sullivan, Brian. "The Last Word: When the Last Thing you want to do is the First Thing you ought to do." 98.1 A.B.A. J. 51, 57 (2012) (p. 53).

<sup>317</sup> Keeva, Steven. "Law and Sympathy." 90.8 A.B.A. J. 74, 75 (2004) (p. 74).

<sup>318</sup> Keeva, Steven. "Law and Sympathy." 90.8 A.B.A. J. 74, 75 (2004) (p. 74).

<sup>319</sup> SYMPOSIUM: INJURIES WITHOUT REMEDIES: WHAT IS CIVIL JUSTICE?, 44 Loy. L.A. L. Rev. 317 (2010) (p. 334).

<sup>320</sup> ARTICLE: APOLOGIES AND LEGAL SETTLEMENT: AN EMPIRICAL EXAMINATION, 102 Mich. L. Rev. 460 (2003) (p. 474).

<sup>321</sup> ARTICLE: DOES 'SORRY' INCRIMINATE? EVIDENCE, HARM AND THE PROTECTION OF APOLOGY, 21 Cornell J. L. & Pub. Pol'y 567 (2012) (p. 606).

apology is crucial to make settlement discussions less adversarial and decrease the time to patient compensation using the ADR process.<sup>322</sup>

There is also concern that protecting apologies could increase the amount of lawsuits against providers and hospitals because an apology law would increase the patient's awareness of mistakes made in the healthcare setting.<sup>323, 324</sup> Without the transparency of apologies, the current culture of silence and deny and defend remains which are proven to increase the chance of lawsuits because patients and families are forced to use litigation to get answers.<sup>325</sup> Hospitals that have launched programs supporting disclosure and apology have reported a decline in the incidence and cost of lawsuits, while also decreasing the amount of meritless claims settled with monetary compensation.<sup>326</sup> When the University of Michigan began a proactive disclosure and apology program the organization saw pending lawsuits drop by 50 percent.<sup>327</sup> Similarly when COPIC, a Colorado insurance company, supported providers in apology and encouraged them to recognize adverse events, respond quickly and resolve any issues they saw, malpractice claims against their providers also dropped by 50 percent.<sup>328</sup> Supporting providers to openly discuss medical harm events and apologize has been shown to decrease medical malpractice lawsuits making this argument against apology laws unfounded.<sup>329, 330</sup>

Finally, critics of apology laws argue the protection of apologies will decrease patient safety because providers will take fewer precautions to protect patients because they feel secure they will be able to apologize without consequence if there is an error.<sup>331</sup> Additionally, apology law critics worry overly forgiving patients would be less likely to sue, and critics believe fear of the consequences of the tort system increase patient safety.<sup>332</sup> Opponents contend that without the pressure of liability providers would be less likely to engage in patient safety activities.<sup>333, 334</sup>

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<sup>322</sup> ARTICLE:APOLOGIES AND LEGAL SETTLEMENT: AN EMPIRICAL EXAMINATION, 102 Mich. L. Rev. 460 (2003) (p. 474).

<sup>323</sup> ARTICLE: What's an Apology Worth? Decomposing the Effect of Apologies on Medical Malpractice Payments Using State Apology Laws, 8 J. Empirical Legal Stud. 179S (2011) (p. 184s).

<sup>324</sup> Doug Wojcieszak, et al., *The Sorry Works! Coalition: Making the Case For Full Disclosure*, 32(6) The Journal on Quality and Patient Safety, 344, 350 (2006) (p.347).

<sup>325</sup> SPECIAL FEATURE: FALL 2007 SYMPOSIUM ON ADVANCED ISSUES IN DISPUTE RESOLUTION: DOCTORS AND LAWYERS: PATHWAYS TO COLLABORATION: Doctors as Advocates, Lawyers as Healers, 29 Hamline J. Pub. L. & Pol'y 331 (2008) (p. 384-385).

<sup>326</sup> ARTICLE: A DOSE OF REALITY FOR MEDICAL MALPRACTICE REFORM, 88 N.Y.U.L. Rev. 1224 (2013) (p. 1256-1258).

<sup>327</sup> ARTICLE: When More Than Sorry Matters, 13 Pepp. Disp. Resol. L.J. 181 (2013) (p 196).

<sup>328</sup> ARTICLE: Transparency and Disclosure of Medical Errors: It's the Right Thing to Do, So Why the Reluctance?, 35 Campbell L. Rev. 333 (2013) (p. 340).

<sup>329</sup> ARTICLE: What's an Apology Worth? Decomposing the Effect of Apologies on Medical Malpractice Payments Using State Apology Laws, 8 J. Empirical Legal Stud. 179S (2011) (p. 181s-182s).

<sup>330</sup> SYMPOSIUM: THE TWENTY-FIFTH ANNIVERSARY OF THE MINNESOTA COURT OF APPEALS: EVIDENCE LAW: MY LAWYER TOLD ME TO SAY I'M SORRY: LAWYERS, DOCTORS, AND MEDICAL APOLOGIES, 35 Wm. Mitchell L. Rev. 1410 (2009) (p. 1411).

<sup>331</sup> Article: No Role for Apology: Remedial Work and the Problem of Medical Injury, 11 Yale J. Health Pol'y L. & Ethics 267 (2011) (p. 296).

<sup>332</sup> NOTE: Physician Apologies and General Admissions of Fault: Amending the Federal Rules of Evidence, 72 Ohio St. L.J. 687 (2011) (p. 718).

<sup>333</sup> Id.

<sup>334</sup> ARTICLE: RETHINKING THE TORT LIABILITY SYSTEM AND PATIENT SAFETY: FROM THE CONVENTIONAL WISDOM TO LEARNING FROM LITIGATION, 12 Ind. Health L. Rev. 327 (2015) (p. 328).

Contrary to this argument, safety analysts assert that fear of liability hinders information sharing and performance improvement; however, openness and transparency cultivate a culture of patient safety and quality improvement.<sup>335, 336</sup> Establishing a federal apology law protecting fault-admitting apologies would prevent future mistakes because providers would feel empowered to admit error allowing hospitals to utilize the information to improve systems and processes to prevent the occurrence of future events.<sup>337</sup>

## **IX. Conclusion**

Protecting full apologies by federal law will provide many benefits that include avoid lawsuits; increase settlement rates for compensable cases by working in conjunction with ADR; decrease overall administrative costs as compared to litigating cases thereby decreasing the cost of malpractice insurance and healthcare overall; and encourage natural-healing communication between the parties involved following a harm event. Johnathan Cohen notes:

“We don’t live in a world of pristine morality where everyone rushes to take full responsibility for the harms they have committed but in a second-best world where many people don’t. Within this second-best context, exempting apologies from admissibility to encourage more apologies is a step in the right direction.”<sup>338</sup>

Without creating a federal apology law protecting full apologies as a legislative option, apologies will still be seen as admissions of liability.<sup>339</sup> Absent protections, apologies will scarcely be used to resolve legal disputes and emotionally heal those involved in a medical harm event.<sup>340, 341</sup> The federal protection of full apologies is the first step to increase transparency with patients and families following a harm event and engage them in productive conversations about compensation if warranted. Having the protection in place will allow providers to feel more comfortable engaging in apologetic, fault admitting communication and make the patient more likely to entertain settlement through ADR methods instead of through litigation.

The federal government should enact an apology law protecting full apologies in civil cases, which protects statements, affirmations, gestures or conduct expressing apology, fault, sympathy, commiseration, condolence, compassion, or a general sense of benevolence in writing or verbally given by the provider or an employee of the provider, the organization, or a representative of the organization.<sup>342</sup> Once the law has been enacted, education and training for existing and new providers should occur to prepare

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<sup>335</sup> MCDONALD-MERRILL-KETCHAM MEMORIAL AWARD FOR EXCELLENCE IN LAW AND MEDICINE: Beyond Tort Reform: Fixing Real Problems, 3 Ind. Health L. Rev. 1 (2006) (p. 17).

<sup>336</sup> ARTICLE: RETHINKING THE TORT LIABILITY SYSTEM AND PATIENT SAFETY: FROM THE CONVENTIONAL WISDOM TO LEARNING FROM LITIGATION, 12 Ind. Health L. Rev. 327 (2015) (p. 328).

<sup>337</sup> ATTORNEYS, TELL YOUR CLIENTS TO SAY THEY’RE SORRY: APOLOGIES IN THE HEALTH CARE INDUSTRY, 5 Ind. Health L. Rev. 337 (2008) (p. 358).

<sup>338</sup> ARTICLE: LEGISLATING APOLOGY: THE PROS AND CONS, 70 U. Cin. L. Rev. 819 (2002) (p. 856).

<sup>339</sup> NOTE: APOLOGETIC JUSTICE: EVALUATING APOLOGIES TAILORED TOWARD LEGAL SOLUTIONS, 81 B.U.L. Rev. 289 (2001) (p. 316).

<sup>340</sup> NOTE: APOLOGETIC JUSTICE: EVALUATING APOLOGIES TAILORED TOWARD LEGAL SOLUTIONS, 81 B.U.L. Rev. 289 (2001) (p. 316).

<sup>341</sup> ARTICLE: HEALTHCARE MEDIATION AND THE NEED FOR APOLOGIES, 18 Health L.J. 31 (2010) (p. 47).

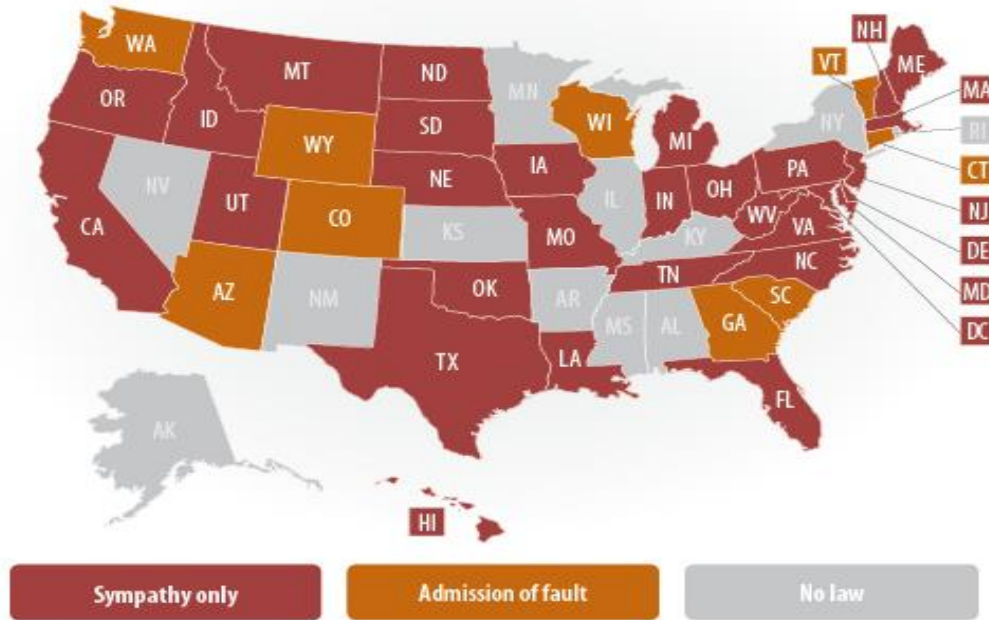
<sup>342</sup> Colo. Rev. Stat. 13-25-135

them for the difficult apologetic conversations with the patient, the patient's family and the provider's organization in the event of medical harm. The federal support of full apologies will encourage their use following harm allowing the benefits to be seen in our judicial and healthcare systems. With a federal apology law protecting full apologies, providers will no longer feel that following a patient's medical harm "sorry seems to be the hardest word."<sup>343</sup>

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<sup>343</sup> Elton John, *Sorry seems to be the Hardest Word* (1976).

## States with apology laws



Source: *Annals of Internal Medicine*; various news reports

<sup>344</sup> Debra Beaulieu-Volk, *Apology Laws: Talking to Patients about Adverse Events; The right and wrong way to talk to patients with sympathy* (10 June 2014) <http://medicaleconomics.modernmedicine.com/medical-economics/content/tags/apology-laws/apology-laws-talking-patients-about-adverse-events?page=full>.