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# DOCTORS Rx

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## A Letter from the Chair of the Board

*Dear Colleague:*

*In 2005, the Maryland Legislature enacted into law the "I'm Sorry" statute. The impact of this legislation on the Physicians of Maryland is the focus of this edition of the Doctors RX newsletter. Understanding what this statute is all about is important to Physicians as they continue to address communication issues in the Patient-Physician relationship.*

*Sincerely,*

*D. Ted Lewers, M.D.*
*Chair of the Board*
*Medical Mutual Liability Insurance Society of Maryland*

## Maryland's New 'I'm Sorry' Legislation

***If properly implemented by Physicians, Maryland's new "I'm Sorry" statute creates the opportunity for openness and increased patient satisfaction. In the face of an unexpected outcome or adverse event, we suggest the following steps be taken:***

### RECOMMENDED ACTIONS

Physicians should be aware that this new statute has serious limitations and its interpretation by the courts is, as yet, unknown and could be further limiting. In that regard, caution is paramount. However, having said that, physicians cannot ignore the opportunity for openness and increased patient satisfaction that this statute provides.

In the face of an unexpected outcome or adverse event, we suggest the following steps be taken:

1. **First and foremost, attend to the patient's clinical situation.**

2. **Gain an understanding of the clinical course.** Discuss the patient's condition with other health care providers to the extent that such discussions are germane and helpful to the patient's clinical condition and the patient's treatment. Avoid discussions that do not have a clinical purpose or are not part of formal peer review.

3. **Meet with the patient and/or designated family members. Provide the patient with a medical explanation of what occurred. Explain that the outcome was not preferred and be prepared to offer an apology in general terms.** For instance, consider the simple statement, "I'm very sorry", or "I'm very sorry this has happened."

   Do not feel the need to make your apology any more elaborate than the suggestions above.

*Continued on next page*

Separate the apology from the explanation or discussion of options: "I'm very sorry this has happened. Now, let's talk about your options for future treatment."

Do not respond to accusations by the patient or the patient's family

1 Avoid admitting fault or liability. Any apology which either (1) calls into question your clinical course or clinical judgment or (2) suggests that your treatment or your judgment was the cause of the patient's unfavorable result would be considered an admission of fault and should be avoided. For instance, "I'm sorry; this was my fault", or "I'm sorry; I should never have tried this procedure" or "I'm sorry; I should have tried a different approach" or "I'm sorry; it was clearly my method of treatment which caused this problem" or "I'm sorry; it was just a mistake" or "I'm sorry; I guess I was wrong, after all" are all forms of apologies accompanied by admissions. These will be considered admissible evidence, and will be used against you in the event of a lawsuit.

4. **Advise the patient of the need for future treatment.**

5. **Provide additional information to the patient/family as it becomes available.**

6. **BE ACCESSIBLE**

This conversation, while sympathetic, should be medically factual and not based on conjecture. Do not speculate. Remember that your demeanor will communicate as strong a message to your patient as your words. To the extent your words have limited protection under the new statute, your demeanor can only help you so long as your expression of sympathy is sincere and is delivered to your patient in a manner that lets your patient know that you are sincere.

If you experience an untoward event that you are unsure as to how to handle, or feel you need further guidance before proceeding, please contact the Risk Management Services Department for assistance. We strongly recommend that physicians continue to hone their communication skills – it can only inure to your benefit.

## *Understanding and Implementing Maryland's 'I'm Sorry' Legislation*

*Benjamin S. Vaughan, Esq.*
*Armstrong, Donohue, Ceppos & Vaughan*

As of January 11, 2005, Maryland has joined a growing list of states that have addressed the issue of apology and enacted "I'm Sorry" statutes. The upshot of these statutes is to render inadmissible, to varying degrees, a health care provider's "apology" to a patient who has suffered an unexpected, and unwanted, outcome.

Several states (Massachusetts and Colorado, for example) have established new evidentiary rules or statutes that render any expressions of sympathy inadmissible, even those containing explicit admissions of fault or wrongdoing. Others, such as Texas and California, have drawn a distinction between simple apologies containing no admission of fault or liability (which are inadmissible) and apologies containing such admissions (which remain admissible.) Maryland has followed the **latter** model.

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**Doctors RX**

Elizabeth A. Svoysky, J.D., *Editor*
Director of Risk Management Services

D. Ted Lewers, M.D., *Chair of the Board*
MEDICAL MUTUAL Liability Insurance Society of Maryland



**Numbers you should know!**

| | |
|---|---|
| Home Office Switchboard | 410-785-0050 |
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# CME Evaluation Form

## Statement of Educational Purpose

"Doctors RX" is a newsletter sent twice each year to the insured physicians of MEDICAL MUTUAL/Professionals Advocate. Its mission and educational purpose is to identify current health care related risk management issues and provide physicians with educational information that will enable them to reduce their malpractice liability risk.

Readers of the newsletter should be able to obtain the following educational objectives:
1) gain information on topics of particular importance to them as physicians,
2) assess the newsletter's value to them as practicing physicians, and
3) assess how this information may influence their own practices.

## CME Objectives for Maryland's New "I'm Sorry" Legislation

Educational Objectives: Participants should be able to:
1. Describe the basic concepts of Maryland's "I'm Sorry" legislation.
2. Understand potential implementation issues of the statute.
3. Describe the differences between a partial apology and a full apology.

| | Strongly Agree | | | | Strongly Disagree |
|---|---|---|---|---|---|
| ***Part I. Educational Value:*** | 5 | 4 | 3 | 2 | 1 |
| I learned something new that was important. | ❑ | ❑ | ❑ | ❑ | ❑ |
| I verified some important information. | ❑ | ❑ | ❑ | ❑ | ❑ |
| I plan to seek more information on this topic. | ❑ | ❑ | ❑ | ❑ | ❑ |
| This information is likely to have an impact on my practice. | ❑ | ❑ | ❑ | ❑ | ❑ |

***Part 2. Commitment to Change:*** What change(s) (if any) do you plan to make in your practice as a result of reading this newsletter?

_____

_____

_____

***Part 3. Statement of Completion:*** I attest to having completed the CME activity.

Signature: _____ Date: _____

***Part 4. Identifying Information:*** Please PRINT legibly or type the following:

Name: _____ Telephone Number: _____

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# CME Test Questions

## Instructions for CME Participation

*CME Accreditation Statement* — MEDICAL MUTUAL Liability Insurance Society, which is affiliated with Professionals Advocate, is accredited by the Accreditation Council for Continuing Medical Education to sponsor continuing medical education for physicians. MEDICAL MUTUAL designates this educational activity for a maximum of one hour in category 1 credit towards the AMA Physician's Recognition Award. Each physician should claim only those hours of credit that he/she actually spent in the educational activity.

Instructions—to receive credit, please follow these instructions:

1. Read the articles contained in the newsletter and then answer the test questions.
2. Mail or fax your completed answers for grading:

   Med•Lantic Management Services, Inc.
   225 International Circle
   P.O. Box 8016
   Hunt Valley, Maryland 21030
   Attention: Risk Management Services Dept.

   Fax: 410-785-2631
3. One of our goals is to assess the continuing educational needs of our readers so we may enhance the educational effectiveness of the Doctors RX. To achieve this goal, we need your help. You must complete the CME evaluation form to receive credit.
4. Completion Deadline: March 31, 2006
5. Upon completion of the test and evaluation form, a certificate of credit will be mailed to you. Please allow three weeks to receive your certificate.

1. Maryland joins Massachusetts and Colorado in affording Physicians the ability to admit liability to a patient without fear that the admission will be used against them in a medical malpractice action.

   A. True B. False

2. Maryland's new statute provides protection only with regard to a "partial apology."

   A. True B. False

3. The Maryland statute provides guidance for Physicians as to what distinguishes an apology without an admission of fault from an apology containing an admission of fault.

   A. True B. False

4. There is currently no appellate case law in Maryland interpreting the statute.

   A. True B. False

5. The intent of the new statute is to foster an atmosphere of openness between Physician and patient in the face of an untoward outcome.

   A. True B. False

6. There is no need to meet with the patient/family once the patient has been stabilized.

   A. True B. False

7. There is some evidence that a partial apology can be beneficial when the resulting injury is severe or when there is strong evidence of the offender's responsibility.

   A. True B. False

8. The impact of this statute won't be known for many years.

   A. True B. False

9. When speaking to a patient/family about an untoward outcome, it is a good idea to place blame immediately.

   A. True B. False

10. It is important to be accessible to the patient/family for any additional questions/concerns they might have about an untoward outcome.

    A. True B. False

Thus, our new statute reads as follows:

(1) **Except as provided in paragraph (2) of this subsection, in a proceeding subject to Title 3, Subtitle 2A of this article (Maryland Health Care Malpractice Claims Act) or a civil action against a health care provider, an expression of regret or apology made by or on behalf of the health care provider, including an expression of regret or apology made in writing, orally, or by conduct, is inadmissible as evidence of an admission of liability or as evidence of an admission against interest.**

(2) **An admission of liability of fault that is part of or in addition to a communication made under paragraph (1) of this subsection is admissible as evidence of an admission of liability or as evidence of an admission against interest in an action described under paragraph (1) of this subsection.**

See, Md. Cts. & Jud. Proc. Code Ann. § 10-920 (2005)

### *Basic Concepts:*

In over-simplified terms, the Maryland statute establishes that certain apologies made by a health care provider to a patient will not be admissible in evidence at trial in the course of a medical malpractice lawsuit. This means a jury or finder of fact would never know about the apology.

The statute anticipates two types of apologies:

(1) the simple "expression of regret or apology" which does not include any admission of fault or liability, (otherwise known as the "partial apology"), and

(2) an expression which does contain an admission of fault or liability (the "full apology").

The statute renders only the first example - the partial apology - inadmissible into evidence in a medical malpractice trial "as evidence of an admission of liability or as evidence of an admission against interest."

The second example - the full apology - is fully admissible and is given the effect of an admission of fault or liability. In other words, a jury or finder of fact would be entitled to know about the apology and could infer that the health care provider was at fault or was liable by virtue of the apology.

This new piece of legislation is one of the more recent examples of a nationwide trend towards encouraging physicians and other health care providers to express empathy, sympathy and even contrition to patients who have suffered unfortunate outcomes. Thus, the legislatures of California, Colorado, Florida, Illinois, Massachusetts, Michigan, North Carolina, Ohio, Oklahoma, Oregon, Tennessee, Texas, Washington State and Wyoming have passed "I'm Sorry" laws that, with some variation in theme, place limitations upon the admissibility of apologies. The purpose of these statutes is to provide health care providers with a shield to some degree so that they may more freely offer expressions of apology, regret, condolence and, in some cases, even acceptance of fault and regrets, without fear that the expression will come back to haunt them if a lawsuit is filed and they find themselves before a jury trying to defend against allegations of negligence. The hope is that those expressions of apology will have the effect of limiting the overall number of new malpractice lawsuits by providing the

patients with some degree of satisfaction, thereby reducing their motivation to seek redress through litigation.

The new statutes follow in the wake of a handful of studies which have attempted to show a correlation between an apology made by the health care provider and a patient's willingness to forego legal action in the face of a medical injury, or, at least, to settle a claim more favorably. See, e.g., Hickson, "Factors that Prompted Families to File Medical Malpractice Claims Following Perinatal Injuries," 267 JAMA 1359 (1992); Gallagher, "Patients' and Physicians' Attitudes Regarding the Disclosure of Medical Errors," 289 JAMA 1001 (2003); Vincent, et al., "Why do People Sue Doctors? A Study of Patients and Relatives Taking Legal Action," 343 Lancet 1609 (1994).

Whether the statutes are effective either in diminishing the number of lawsuits or in minimizing the settlement of existing suits remains to be seen. Indeed, it is questionable as to whether Maryland's new statute is even consistent with the various studies. What is certain, however, is that Maryland's new "I'm Sorry" statute should be understood before it is relied upon in charting one's course of conduct with regard to a dissatisfied patient who may be contemplating a lawsuit.

## *Issues with the Statute:*

1. PARTIAL APOLOGY NOT ENTIRELY INADMISSIBLE:

The first thing to note about this statute is that it does not render all apologies inadmissible. As referenced above, the statute provides no protection, whatsoever, with regard to the apology which contains an admission of fault or liability. Thus, the statement, "I'm very sorry that I negligently nicked your aorta and caused you a near-death experience" would be admissible and would be deemed an admission of liability under the statute.

Even as to the partial apology - the simple statement, "I'm sorry", or the slightly more elaborate statement, "I'm sorry for your condition" - the statute does not provide an absolute immunity. It provides a qualified shield against admissibility. The statement "is inadmissible as evidence of an admission of liability or as evidence of an admission against interest." The statute does not preclude the possibility that the statement may be admissible for other reasons and to prove other points. Once admitted, the jury may take it upon themselves to interpret it as an admission of fault even though it was not admitted into evidence for that purpose. Presumably, the alternate reasons for admitting such a statement into evidence would be few and far between, and a jury would be instructed that the statement was not to be considered an admission of liability or fault. However, even with those provisos, it is significant that the statutory language does not render the limited apology inadmissible for any and all reasons. It does not cloak the statement with a true, unqualified privilege.

2. PARTIAL APOLOGY vs. FULL APOLOGY - WHAT LANGUAGE DISTINGUISHES THEM?

The second factor to note is that the statute provides no guidance as to what distinguishes an apology without an admission of fault from an apology containing an admission of fault. Again, presumably, the bare statement, "I'm sorry", without more, would be an apology without an admission of fault, and would thus be inadmissible in evidence. Even that statement, however, can take on connotations of fault recognition in certain contexts. For instance, if the statement is offered in response to the patient's accusation of fault, (i.e., the patient exclaims: "Doctor, you've ruined my life with your carelessness", to which the physician replies, "I'm sorry.") it might very well be seen as an admission of liability, in which case it may be admissible as evidence of liability.

The gray area between the simple, "I'm sorry" at one end of the spectrum, and the full-blown "I'm sorry, and I'm fully at fault" at the other end, remains entirely undefined by the statute. Further, to date, there is no appellate case law interpreting the statute. Thus, if a judge's interpretation of an apology differs from that of the health care provider's interpretation of his or her own words, that health care provider may find that his or her statement is admissible into evidence, after all.

3. WHOSE RECOLLECTION/INTERPRETATION WILL PREVAIL?

It is important to remember that an apology provides one more area for litigants to disagree as to the facts. Thus, while a health care provider may remember saying only, "I'm sorry"(and therefor may have assumed his or her statement would be forever inadmissible in a court of law), the patient may well remember that the physician stated with resolve and crystal clarity, "I'm sorry and I'm fully at fault." The result may be a question of weight rather than a question of admissibility, which means that a judge could very well permit the patient/plaintiff to testify before the jury with regard to his or her recollection of the statement, and permit the doctor to rebut the testimony with his or her differing recollection, thereby eviscerating, entirely, the statutory protection which the physician assumed would attend the apology.

4. STUDIES CONCERNING EFFECTS OF PARTIAL VS. FULL VS. NO APOLOGY:

Finally, a number of studies have investigated the effect of the partial apology, the full apology and no apology upon the patient's willingness to sue or to settle favorably. A recent study published in the Michigan Law Review contained findings that suggest a partial apology has no greater impact than the lack of an apology upon a patient's attitude toward litigation, at least with regard to favorable settlements. See, Jennifer K. Robbennolt, "Apologies and Legal Settlement: An Empirical Examination," 102 Mich. L. Rev. 460 (December, 2003). In that article, the author came to the conclusion that in certain circumstances, a "partial apology" (one which does not contain an admission of liability or fault) has no greater effect upon the patient's attitude toward litigation than no apology, at all; in other circumstances, a partial apology actually worsened the patient's attitude. Thus, the author stated,

**Notably, there is some evidence that a partial apology can be particularly detrimental when the resulting injury is severe or when there is strong evidence of the offender's responsibility.**

**On the whole, partial apologies did not appear to facilitate settlement in the ways hoped for by proponents. The most consistent finding was that partial apologies tended to be no better (or worse) than not offering an apology at all.**

See, 102 Mich. L. Rev 460, 497, 506 (December, 2003).

Maryland's statute provides protection only with regard to the "partial apology" which Robbennolt referenced, above. To be fair, she found that partial apologies did have some beneficial effect in cases involving less severe injuries, or where the physician's fault was questionable.

## *Conclusion:*

The Maryland Legislature has made the decision to attempt to foster an atmosphere of openness between health care providers and patients in the face of an untoward outcome in the belief that this openness will lead to greater patient satisfaction and that eventually we will begin to see a reduction in the number of malpractice lawsuits as a result. The new "I'm Sorry" statute is the product of that decision. Whether it will achieve that goal will not be known for years to come.

This article should not be taken as a substitute for sound legal advice nor for the exercise of proper judgment. It is intended only to point out new legislation and some of the potential issues that may arise in the future as the result of the legislation.