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AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES
February 12, 2007

RECOMMENDATION

RESOLVED, That the American Bar Association supports enactment of state and territorial legislation that provides that all statements, affirmations, gestures, or conduct expressing apology, sympathy, commiseration, condolence, compassion, or a general sense of benevolence which relate only to the pain, suffering, or death of a person which are made by a medical provider or the staff of a medical provider to that person, that person's family, representative or friend, 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 for any purpose in a civil action for medical negligence.

REPORT

Various state legislatures have considered and are considering whether there should be legislation to preclude permitting apologies from being admissible into evidence as proof of fault in medial malpractice cases. As of July 24, 2006, there are 25 states (Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Maryland, Massachusetts, Montana, North Carolina, Ohio, Oklahoma, Oregon, South Carolina, Texas, Utah, Vermont, Virginia, Washington, and West Virginia) that have enacted or are in the process of passing statues that allow doctor and other healthcare professionals to apologize and offer condolences without their words being used against them in court. Attached are the various state statutes. Legislation has also been introduced on this subject in the U.S. Congress.

Providers of health care are concerned that their apologies could be admitted into evidence to prove liability in court proceedings unless legislation is enacted to exclude apologies from admissibility. Apologies fall into two categories: 1) an expression of sympathy or remorse without an admission of fault, mistake or error causing an injury suffered by a patient ("I'm sorry that you are hurt") and; 2) an expression of sympathy or remorse with an admission of fault, mistake or error causing an injury suffered by a patient ("I'm sorry that what I did caused your injury").

The State of Massachusetts first enacted apology legislation directed at accidents in 1986. The legislation provides: "Statements, writings, or benevolent gestures expressing sympathy or a general sense of benevolence relating to pain, suffering or death of a person involved 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."[i]

Next, the State of Texas enacted a statute similar to Massachusetts' except that it specifically states that it does not protect "a statement . . . concerning negligence or culpable conduct." The Texas Law provides that a communication that "expresses sympathy or a general sense of benevolence relating to the pain, suffering or death of an individual involved in an accident" is inadmissible. However, a communication "which also includes a statement or statements concerning negligence or culpable conduct pertaining to an accident or event, is admissible to prove liability." [ii] These statutes illustrate the different approaches to apology legislation that apply to accidental injuries. Subsequent to the enactment of the Texas statute, several other states enacted similar statutes.[iii]

In 2003, Colorado enacted the first state statute to specifically protect health care providers and their employees. The State of Colorado enacted legislation to prevent expressions of sympathy and admission of fault by a medical provider who injures a patient from being used against a provider in a medical malpractice action. The statute provides that:

> All statements, affirmations, gestures, or conduct expressing apology, fault, sympathy commiseration, condolence, compassion, or a general sense of benevolence which are made by a health care provider or an employee of a health care provider to the alleged victim, a relative of the alleged victim, or a representative 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.[iv]

The State of Oregon next enacted an apology statute in 2003 that protects a licensed medical professional's statement of "apology or regret" but gives no further definition of those terms.[v]

Such legislation raises many questions. First, should some form of apology legislation be enacted that would protect statements of apology by those providing medical care from being offered into evidence? Second, if apologies are to be excluded from admissibility, what part of an apology should be excluded? Should the legislation only exclude apologetic expressions of sympathy and benevolence after a patient is injured or should it also exclude full apologies that include an admission of fault? And third, should such legislation be enacted at the state and territorial level or at the federal level?

The Standing Committee believes that carefully drafted apology legislation should be enacted at the state and territorial level that protects expressions of sympathy or benevolence. Doctors say that if they make a mistake, they often do not apologize for fear that the apology will be used against them to prove liability. Further, some patients who sue their doctors say they would not have sued if only the doctor had apologized.

The Standing Committee believes laws excluding expressions of sympathy and benevolence from admissibility make good sense and that further initiatives in this area should be supported. The law should encourage doctors and other medical personnel to offer expressions of sympathy and benevolence relating to the pain and suffering or death of a patient. Legislation should be enacted to assure medical personnel that they are free to express sympathy and that an expression of sympathy will not be used against them in a court of law. Because a statement by a doctor that merely expresses sympathy or benevolence has little probative value on the issue of fault, precluding juries from hearing such expressions would not be a major change in trial practice and would not adversely impact on an injured patient.

Apology legislation should be enacted at the state and territorial level and not at the federal level. The state and territorial courts and legislatures are the appropriate bodies to modify tort laws. For over 200 years they have handled the medical liability laws and should be allowed to continue to do so without congressional interference. In addition, federal legislation might interfere with the initiatives currently underway at the state, territorial and local level.

The Standing Committee believes it is important for doctors and other healthcare providers to receive training to assist them in determining the most effective ways of communicating information concerning unanticipated outcomes to patients and families.

Janice Mulligan
Chair, Standing Committee on Medical Professional Liability
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[i] MASS. GEN. LAWS ANN. ch. 233, § 23D (2000).
[ii] TEX. CIV. PRAC. & REM. CODE ANN., § 18.061 (2004 & Supp. 2005).
[iii] Cohen, Jonathan *Legislating Apology: The Pros and Cons* 70 U.Cinn.L.R. 819, 835-37 (2002).
[iv] COLO. REV. STAT. ANN. § 13-25-135 (2003).
[v] OR. REV. STAT. § 677.082 (2003).