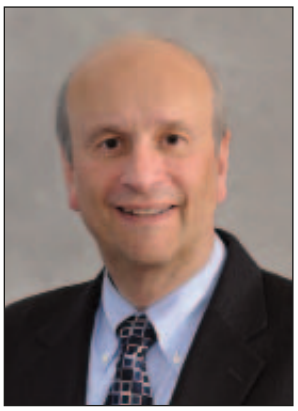
Physician Apologies



Samuel D. Hodge, Jr. is Professor and Chair, Department of Legal Studies, Temple University. Professor Hodge teaches both law and anatomy. He is also a skilled litigator and national lecturer who has written multiple articles and books on medicine and trauma. Professor Hodge graduated from Temple University, Beasley School of Law and is an alumnus of the Graduate Legal Studies Division of the Law School. He is also a member of the Pennsylvania Bar and the American Academy of Legal Medicine. He can be reached at temple885@aol.com.

Nicole Saitta is an assistant to Professor Samuel D. Hodge Jr., Chair of the Legal Studies Department at Temple University. She received an M.A. in English Literature from Villanova University and obtained a certificate from New York University's Publishing Institute in the School of Continuing and Professional Studies. An experienced academic researcher with a background in pre-medical studies, she is particularly interested in research pertaining to the intersection of law and medicine. She can be reached at nicolesaitta5100@gmail.com

Nicole Saitta and Samuel D. Hodge, Jr.

While not a panacea, physician apologies are growing in popularity as a way to soothe some of the wounds from an unhappy medical outcome.

A PROMPT APOLOGY BY A PHYSICIAN has been shown to reduce the financial consequences of an adverse medical outcome. However, is an expression of empathy admissible in a malpractice lawsuit? What about a doctor's statement pertaining to a medical error, such as "It is my fault" or "I made a mistake"? Thirty-five jurisdictions including the District of Columbia have enacted laws to encourage heath care professionals to apologize for adverse medical outcomes without these expressions of regret constituting an admission of liability. Apology laws vary by jurisdiction with some states precluding an admission of a medical mistake while others limit the disclosure to an expression of sympathy. Many legislative pronouncements restrict the disclosure to the patient and immediate family members while others include the person's friends and legal representative. One statute even includes a domestic partner. This article will discuss physician apologies and their effect on malpractice claims while providing an overview of the evidentiary laws on the issue.

INTRODUCTION • An apology provides a number of benefits for all parties involved. As noted in Psychology

Today, an apology is "an important ritual, a way of showing respect and empathy for the wronged person." Beverly Engel, *The Power of Apology,* Psychology Today http://www.psychologytoday.com/articles/200208/the-power-apology published July 1, 2002. (Last visited Oct. 2011.)Words of empathy have the ability to defuse anger, and they can undo the negative effects of an action even if they cannot undo the harmful action itself. *Id.* Emotional healing occurs since an individual no longer perceives the wrongdoer as a personal threat. *Id.* For the wrongdoer, apologizing helps rid that person of guilt or self-reproach while simultaneously reducing arrogance and promoting self-respect. *Id.*

REQUIREMENTS FOR DISCLOSURE OF A MEDICAL ERROR • The American Medical Association's Code of Ethics provides: "It is a fundamental ethical requirement that a physician should at all times deal honestly and openly with patients…. Concern regarding legal liability, which might result following truthful disclosure, should not affect the physician's honesty with a patient." Frank Federico, *Disclosure: Challenges and Opportunities,* Risk Management Foundation of the Harvard Medical Institutions, 23 Forum 2 (May 2003).

The American College of Physicians has a similar position, and the Joint Commission on the Accreditation of Healthcare Organizations (JCAHO) requires institutions to have a process in place to inform patients and their families of unanticipated medical outcomes. *Id.* Nevertheless, some doctors avoid speaking with a patient or family regarding an adverse medical outcome. But what may be the cause for this silence? There are a multitude of diverse reasons including something as simple as the physician being unaware of the error and resulting harm, especially if the injury is not immediately evident or thought to be a result of the medical condition. Frank Federico, supra. Physicians are also not trained to convey "bad news" and may choose to avoid these unpleasant encounters. *Id.* A study by the University of Michigan Health System even found that barriers to disclosure include a "deny and defend" strategy by physicians as well as legal and cultural barriers. University of Michigan Health Systems, *Full Disclosure of Medical Errors Reduces Malpractice Claims and Claim Costs for Healthy Systems,* Agency for Healthcare Research and Quality Health Care Innovations Exchange, 2001, http://www.innovations.ahrq.gov/popup.aspx?id=2673&type=1&isUpdated=False&isArchived=False&name=print. (Last visited Oct. 2011.) For instance, health care providers believe that frank communications may imply responsibility even when the required standard of care has been followed. *Id.*

Some doctors are afraid of the professional and legal ramifications that may stem from the disclosure of a medical error or apology being seen as an admission of responsibility. Frank Federico, supra. A recent study reveals that "physicians generally endorsed the importance of disclosing harmful errors to patients." Gallagher, Studdert, and Levinson, *Disclosing Harmful Medical Errors to Patients,* 356 New Eng. J. Med. 2713 (2007). *Also see* Thomas Gallagher, et al. *US and Canadian physicians' attitudes and experiences regarding disclosing errors to patients,* 166 Archives Internal Med. (2006); 166: 1605-11. Whether the fear of apologizing is on the decline or not, doctors take understandable precautions to protect themselves from lawsuits, and these measures include withholding an apology if they feel it could be utilized against them. After all, the "monetary costs, damage to professional reputation, risk to licensure, and the emotional burdens that come with lawsuits," coupled with the challenge to authority and integrity, makes health care providers especially cautious of things that might lead to litigation. Marlynn Wei, *Doctors, Apologies and the Law: An Analysis and Critique of Apology Laws,* Yale Law School Legal Scholarship Repository (2006). Doctors fear the unpredictability of the malpractice system, and thus try to avoid it, even if that means avoiding a disclosure or making an apology. *Id.* at 39. Additionally, the advice of

lawyers, insurers, and hospital executives may act as a deterrent to an apology, for "hospital executives want 'to do the right thing,' but their lawyers or insurers are resisting." Rae Lamb, *Disclosure: A Visiting Journalist's Perspective,* Risk Management Foundation of the Harvard Medical Institutions, 23 Forum 13 (May 2003).

REASONS PEOPLE SUE PHYSICIANS • Besides the obvious pecuniary motivation, there are a number of reasons people sue medical professionals including wanting to prevent a recurrence of a similar situation, seeking a proper explanation and/or apology, wanting to be returned to the positions they were in before the alleged malpractices, and desiring punishment for the emotional consequences of the harm. *Apology,* Electronic Handbook of Legal Medicine, 2008, http://www.medlit.info/member/medical_error_news/menv12i4/apology.htm. (Last accessed Oct. 2011.) While many plaintiffs who file suit seek to make sure the mistake does not happen to others, they also want an explanation and an admission of fault; they ultimately want a feeling that justice has been served. Marlynn Wei, supra, at 40. *See also* Charles Vincent et al., *Why do people sue doctors? A study of patients and relatives taking legal action,* 343 The Lancet 1609 (1994).

The propensity to sue is compounded when patients believe information is being withheld, thus lawsuits often have a foundation in anger. *Id.* In fact, "numerous case studies suggest that anger is a main motivator for litigation and can overcome the patient's aversion to the legal arena." On the other hand, "research reveals that physician apologies reduce patient anger, increase communication, and reduce the patient's motivation to litigate." Elaine Liu and Benjamin Ho, *Does Sorry Work? The Impact of Apology Laws on Medical Malpractice,* Johnson School Research Paper Series, No. 04-2011, October 2010, p.9. *See also,* Gerald Hickson et al., *Factors that prompted families to file medical malpractice claims following prenatal injuries,* 267 JAMA 1359 (1992); Carol Leibman and Chris Hyman, *A mediation skills model to manage disclosure of errors and adverse events to patients,* Health Aff. 23 (4), 2004, 22-32; Liebman and Hyman, *Medical error disclosure, mediation skills, and malpractice litigation: A demonstration project in Pennsylvania,* March 2005; Marlynn May and Daniel Stengel, *Who sues their doctors? How patients handle medical grievances*, 24 Law & Soc'y Rev. 105 (1990); Ohbuchi et al., *Apology as aggression control: Its role in mediating appraisal of and response to harm,* 56 J. Personality & Soc. Psychol. 219 (1989) FrankSloan and Chee Hsieh, *Injury, liability, and the decision to file a medical malpractice claim,* 24 Law & Soc'y Rev. 29(3), 1995, 413-435; Vincent et al., *Why do people sue doctors? A study of patients and relatives taking legal action,* The Lancet 343(8913), 1994, 1609. Full disclosure not only assists in defending a lawsuit because it demonstrates respect for the claimant, but it may also decrease the chances of a claim being presented since patients, families, and juries are favorably impressed by caring gestures. Frank Federico, supra.

THE BENEFITS OF APOLOGY PROGRAMS AND LAWS • Studies have demonstrated that the number of lawsuits decline after an apology. For instance, a study by the University of Michigan Health Services demonstrated that "per case payments decreased 47% and the settlement time dropped from 20 months to 6 months since the introduction of their 2001 Apology and Disclosure Agreement." *Id.* Papers from Cornell University and the University of Houston, which examined hospitals in those states with apology laws, found that expressions of regret increased the incident of closed cases due to faster settlement times. *Id.* at 5. In the short run, the number of resolved cases increased, and the payments involving minor injuries went down in those states with apology laws. *Id.* at 26. These types of laws also reduced the amount of time required in reaching a resolution, and in the long run, "evidence suggests there could be fewer cases overall." *Id.*

APOLOGIES AND THE FEDERAL RULES OF EVIDENCE • While many state statutes help protect a doctor's words of empathy, the Federal Rules of Evidence have a negative effect on apologies. For instance, Federal Rules of Evidence Rule 408 only increases a physician's reluctance to apologize since it provides an exception to the hearsay rule by noting that an apology made by the defendant outside of settlement negotiations or mediation may be admissible in court. Robin Ebert, *Attorneys, Tell Your Clients To Say They're Sorry: Apologies in the Health Care Industry,* 5 Ind. Health L. Rev. 337, 342 (2008). Federal Rule of Evidence 801 (d)(2) "allows admissions by party-opponents, meaning that any statement made by the opposing party in a civil or criminal trial is not considered and excluded as hearsay, even if made out of court. The estoppel-based rationale behind this rule suggests that a party's own statement is considered reliable enough to use against that party in court." Maria Pearlmutter, *Physician Apologies and General Admissions of Fault: Amending the Federal Rules of Evidence.* 72 Ohio St. L. J. 687, 692; *see also,* Fed. R. Evid. 801 (d)(2).

Federal Rule of Evidence 403 has sometimes been cited to exclude apologies "because this Rule prohibits evidence where its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury," but this strategy has not met with much success. Maria Pearlmutter, supra, at 693, *see also,* Fed. R. Evid. 403.

STATE RESPONSES TO ENCOURAGE PHYSICIAN APOLOGIES • A growing number of states have passed laws to encourage expressions of sympathy by physicians without the words of condolences being misconstrued as an admission of liability. Massachusetts led the way in 1986 by enacting the first legislative response designed to protect apologies. Robin Ebert, supra, at 346. Currently, 35 states including the District of Columbia have statutes that do not allow the admission of an expression of sympathy or benevolence by a healthcare provider. *See* Washington RCWA 5.64.010, South Carolina Code 1976 §19-1-190, Nebraska NE ST §27-1201, Utah Rules of Evidence, Rule 409, Connecticut C.G.S.A. §52-184d, Oklahoma 63 Okl. St. Ann. §1-1708.1H, Virginia VA Code Ann. § 8.01-581.20:1, Vermont 12 V.S.A. §1912, Montana MCA 26-1-814, Oregon O.R.S. §677.082, Maine 24 M.R.S.A. §2907, Louisiana LSA-R.S. 13:3715.5, Massachusetts M.G.L.A. 233 §23D, North Carolina Rules of Evid., G.S. §8C-1, Rule 413, Delaware 10 Del.C. §4318, Maryland MD Code, Courts and Judicial Proceedings, §10-920, South Dakota SDCL §19-12-14, Indiana 34-43.5-1-4, Hawaii HRS §626-1, Rule 409.5, California Ann.Cal.Evid.Code §1160, Arizona A.R.S. §12-2605, North Dakota NDCC, 31-04-12, Ohio R.C. §2317.43, Georgia Ga. Code Ann. §24-3-37.1, Colorado C.R.S.A. § 13-25-135, Texas TX CIV PRAC & REM §18.061, Florida FL ST §90.4026, Tennessee TN R Rev Rule 409.1, Wyoming WY ST §1-1-130, West Virginia WV ST §55-7-11a, Illinois IL ST CH 735 §5/8-1901, Missouri MO ST 538.229, New Hampshire NH ST §507-E:4, Idaho ID ST §9-207, Iowa IA ST §622.31, District of Columbia DC Code §16-2841.

Most of these laws apply to "any statements, gestures, or expressions of apology, benevolence, sympathy, or commiseration made by a health care provider to an alleged victim of an unanticipated outcome or the victim's relative or representative" and, in most states, the "statement, gesture or expression must be related to the discomfort, pain, suffering, injury or death of the alleged victim." *I'm Sorry Laws: Summary of State Laws,* American Medical Association Advocacy Resource Center, July 2007 http://www.physicianspractice.com/all/p2files/images/publication/charts/11_2007_TheLaw_Chart1.pdf. (Last accessed Oct. 2011.) North Dakota's and Utah's laws do not state that the expression must be related to the discomfort, pain, suffering, injury or death of the alleged victim. (Last accessed Oct. 2011.) Depending upon the jurisdiction, apologies

made orally or written are covered. *Id.* Maryland and Oregon laws apply to apologies made orally, in writing, or by conduct; Hawaii covers written or oral apologies as well as benevolent gestures; and Vermont law applies to oral expressions.

These state laws were enacted to encourage communications between doctor and patient and to help "regulate medical malpractice interest rates and policies so that they are fair to both the insurers and insured" by providing an alternative to trials through negotiations. Wash. Rev. Code §5.64.010 2006, ch, 8 §1. Some legislatures place a time limit during which an apology is inadmissible to encourage swifter communication. For example, Washington and Vermont provide that a doctor must notify a patient within 30 days of a medical error, or within 30 days of when the provider knew or should have known of the consequences of the error. If the doctor complies with this mandate, any expression of sympathy is inadmissible. Washington RCWA 5.64.010; Vermont 12 V.S.A. §1912. Illinois provides a stricter time constraint with an apology being inadmissible only if it is made "within 72 hours of when the provider knew or should have known of the potential cause of such outcome." Illinois IL ST CH 735 §5/8-1901. But, even while encouraging expressions of sympathy, some state legislatures distinguish an apology from a statement of fault which they consider to be admissible. For instance, Maine's apology law provides that "Nothing in this section prohibits the admissibility of a statement of fault," Maine 24 M.R.S.A. §2907, and the law in Louisiana notes: "A statement of fault, however, which is part of, or in addition to, any such communication shall not be made inadmissible pursuant to this Section." Louisiana LSA-R.S. 13:3715.5. Louisiana, Maryland, South Dakota, Nebraska, Virginia, Illinois, Missouri, New Hampshire, Idaho, Vermont, Indiana, Hawaii, California, Florida, Tennessee, and the District of Columbia also contain legislation in which a statement of fault is admissible separate from an inadmissible apology. Nebraska NE ST § 27-1201, Virginia VA Code Ann. §8.01-581.20:1, Vermont 12 V.S.A. §1912, Maryland Code, Courts and Judicial Proceedings, §10-920, South Dakota SDCL §19-12-14, Indiana 34-43.5-1-5, Hawaii HRS §626-1, Rule 409.5, California Ann. Cal. Evid. Code §1160, Florida FL ST §90.4026, Tennessee TN R Rev Rule 409.1, Illinois IL ST CH 735 §5/8-1901, Missouri MO ST 538.229, New Hampshire NH ST §507-E:4, Idaho ID ST §9-207, District of Columbia Code §16-2841. Most states contain wording similar to this, though Vermont's wording is a little different: "doesn't limit access to information that is otherwise discoverable." While most of these statutes fall under rules of evidence pertaining to a medical error, a number of jurisdictions protect sympathetic communication regardless if the outcome resulted from an act of malpractice. Robin Ebert, supra, at 348.

COURT RULINGS ON APOLOGIES • Even without a statute that bars an apology, not every expression of sympathy or regret is equivalent to an admission of a medical mistake. This principle was noted in *Phinney v. Vinson*, 605 A.2d 849 (Vt. 1992), in which the Vermont court found that a physician's alleged admissions to another doctor that he had performed an "inadequate resection" and his apology to the patient "for his failure to do so" were insufficient to raise a jury issue on applicable standard of care, breach of that standard, and causation as elements of medical malpractice. *Id.*

One of the frequently cited cases in this area is *Senesac v. Associates*, 449 A.2d 900 (Vt., 1982). The plaintiff filed a claim against her health care providers for negligently performing an abortion. In sustaining a ruling in favor of the defendants, the court opined that a statement by the doctor "that she 'made a mistake, that she was sorry, and that it [the perforation of the plaintiff's uterus] had never happened before' did not establish departure from the standard of care." *Id.* Even though no legislative pronouncement on apologies existed at the time,

the court reached the same conclusion at the subsequent remedial legislation on the issue. The court stated that a doctor's individual belief that she deviated from her own standards of care and skill does not reflect a departure from the requisite standards of care normally exercised by physicians in the absence of expert medical evidence.

One of the most frequently cited cases dealing with extrajudicial statements by a doctor following a medical error is *Lashley v. Koerber,* 156 P.2d 441, 445 (Cal. 1945). The complaint in that matter alleged that the defendant negligently diagnosed and treated a fractured terminal phalanx of one of the plaintiff's fingers by failing to take an x-ray. According to the testimony of the plaintiff's husband, the doctor admitted "that he should have had an X-ray taken in the beginning" and "I know, it is not your fault…it is all my own." The court noted that an extrajudicial admission of fault, "may amount to no more than an admission of bona fide mistake or misfortune, and thus be insufficient to establish negligence."

Likewise, in *Giles v. Brookwood Health Services, Inc.*, 5 So.3d 533 (Ala. 2008), the plaintiff's lawsuit asserted that a doctor negligently removed the patient's right ovary after diagnosing a cyst on the left ovary. The patient claimed that the physician had apologized for this mistake, but the Alabama Supreme Court upheld the granting of the defendant's Motion for Summary Judgment. It noted that the doctor's statement of empathy did not constitute expert testimony that he injured the plaintiff by breaching the applicable standard of care. The apology, at most, amounted to an admission that he operated on the patient while he was under the impression that the right ovary, rather than the left, was the ovary that had been previously diagnosed with a cyst. The apology also did not contradict the doctor's testimony or that of his expert which stated that the physician's actions fell within the standard of care. Therefore, the patient's account of the apology did not create a genuine issue of material fact with regard to the claim that the physician committed an error.

In *Schaaf v. Kaufman,* 850 A.2d 655, 664 (Pa. Super. Ct., 2004), the plaintiff was scheduled to have a colonoscopy which ultimately revealed cancer of the bowel. Three days before the procedure, the patient slurred his words, and his wife discussed the issue with the cardiologist who allegedly committed malpractice by not recognizing that the patient had suffered an episode of atrial fibrillation. The family maintained that the doctor did not take the proper steps to prevent a stroke that occurred after the procedure. The plaintiff's wife testified that, when she complained to the doctor about her husband's slurred speech, the physician said she was "just looking for trouble." After the stroke, the wife confronted the doctor with this statement, and the cardiologist said he was sorry. The Pennsylvania court ruled that saying "I apologize" or "I am sorry" without more information is ambiguous. After all, it was not clear if the doctor was referring to his remark to the wife, about the sad situation, or for making a mistake. "One can be sorry about or apologize for an event without meaning to say one was at fault." *Id.* at 664.

Cases Under Apology Statutes

In *Rodriques v. Leffers,* 2004 WL 5825606 (Mass. Super.), the Massachusetts court considered the admissibility of an apology. The facts show that a patient sued her physician for negligently performing a biopsy. Following the procedure, the doctor stated "I'm sorry I cut the nerve," and Rodriques sought to use these words as proof of negligence. The physician sought a preclusion of his statements based upon Massachusetts' Apology law, that "benevolent statements, writing or gestures are inadmissible as evidence of liability in all civil actions." *Id.* The trial judge allowed the apology into evidence, but that evidentiary ruling was reversed on appeal because the expression of empathy had "no probative value as an admission of responsibility or liability." *Id.* Al-

lowing such evidence would be "highly prejudicial" and would not add anything of "probative value to the medical issues involved in the case." *Id.*

The Georgia case of *Airasian v. Shaak*, 657 S.E. 2d 600 (Ga. Ct. App., 2008), involved an action against a doctor who removed a portion of the patient's colon and then later had to perform an emergency colostomy because the remaining portion became necrotic. After the second surgery, the physician told the patient's wife, "This was my fault." While not necessarily an apology, this statement was indicative of the physician's remorseful wrongdoing. The court on appeal determined that the trial judge properly excluded this statement pursuant to its state's apology law:

"In any claim or civil action brought by or on behalf of a patient allegedly experiencing an unanticipated outcome of medical care, any and all statements, affirmations, gestures, activities, or conduct expressing benevolence, regret, apology, sympathy, commiseration, condolence, compassion, mistake, error, or a general sense of benevolence which are made by a health care provider...to a patient, a relative of the patient, or a representative of the patient and which relate to the unanticipated outcome shall be inadmissible as evidence and shall not constitute an admission of liability or an admission against interest."

Id at 601., *see also,* OCGA §24-3-37.1.

The Georgia apology law covers expressions made to "family members and representatives of the patient," which was applicable to the case at hand since the doctor's apology was made to the patient's wife. Some state apology laws, however, do not specifically mention to whom the apology may be given which can leave open for interpretation the application of the law to a given situation. States' apology laws that do not specifically mention the admissibility of expressions of sympathy to a family member, friend, or representative of the patient include: Washington West's RCWA 5.64.010, Vermont 12 V.S.A. §1912, Maryland MD Code, Courts and Judicial Proceeding, §10-920, South Dakota SDCL §19-12-14, Indiana 34-43.5-1-1, Hawaii HRS §626, Rule 409.5, Oregon O.R.S. §677.082, and North Carolina, Rules of Evid., G.S. §8C-1, Rule 413. For instance, would an apology to a domestic partner or to the patient's friend be protected? Maine's Apology Law specifically covers "a domestic partner relationship with an alleged victim." Maine 24 M.R.S.A. §2907. The apology laws of Montana and Delaware apply to the victim, the person's family or "a friend of the person." Montana MCA 26-1-814; Deleware 10 Del. C. §4318. The Apology laws of Connecticut, Virginia, and Ohio cover an apology made to any person who has a family-type relationship with the victim. Connecticut C.G.S.A. §52.184d; VA Code Ann. §8.01-581-20:1; Ohio Rev. Code §2317.43.

In a recent Ohio court decision, a patient died following back surgery, and her husband filed suit against her orthopedic surgeon. *Davis v. Wooster Orthopaedics & Sports Medicine,* 952 N.E.2d 1216 (Ohio Ct. App. 2011). The doctor's standard of care was found to be subpar, for he "negligently performed a lumbar microdiscectomy…and fail[ed] to timely diagnose and treat the medical condition that arose thereafter." *Id.* at 1218. Although the jury was told about the surgeon's conversation with the decedent's family, stating he nicked an artery and took full responsibility for the error, they never heard any testimony in which the surgeon said he was sorry for his mistake. *Id.* The Ohio appellate court upheld the ruling that the doctor's admission of fault could be introduced as evidence of negligence because the Ohio apology law's purpose "was to protect pure expressions of apology, sympathy, commiseration, condolence, compassion or a general sense of benevolence, but not admissions of fault. This interpretation comports with the explanation of Ohio's General Assembly as well as the policy espoused by

majority of states that have adopted apology statutes with an explicit distinction between sympathy and fault." *Id.* at 1221. Since no apologies were admitted into evidence, the award was upheld on appeal. This ruling is different from *Airasian v. Shaak*, supra, in which the Georgia Court of Appeals did not allow the statement "This was my fault" into evidence. Both state statutes are very similar and both cases have taken place within the past five years, so while an actual "I'm sorry" may clearly not be admitted as evidence at trial, the statements in that grey area of admitting fault may still be admissible.

Federal Court Litigation

A similar apology was made to the plaintiff's wife in *Wooding v. United States of America*, 2007 WL 951494 (W.D. Pa. Mar. 27, 2007); *See also* Docket No. 37-3, Ex. 13, paragraph 3. This case, however, was brought in the United States District Court where apologies are governed by the Federal Rules of Evidence. The facts show that a veteran of the military claimed his surgeon was negligent when the patient's dura was punctured during spinal surgery causing an excessive amount of spinal fluid to leak out and breach his abdominal peritoneum. The veteran claimed that the surgeon told both his wife and himself "that he was sorry, that he poked a hole in my spine and that he didn't catch the leak in time and that because of that too much spinal fluid leaked." *Id.* at *4 n. 8. The plaintiff also stated that the way the doctor "looked and acted when he told me that he was sorry was that he was ashamed about how he performed the operation, that he was negligent in performing [the] surgery." *Id.* The court refused to consider the plaintiff's inference of negligence and stated that "an apology is not equivalent of an admission…an apology is not the equivalent of establishing that a variance in accepted medical practice occurred. Consequently, the plaintiff's claim fails based upon the lack of expert testimony establishing negligence." *Id.* at *4. Furthermore, the court noted that, even if the surgeon's apology was equivalent to an admission, the plaintiff's lawsuit would still fail under Pennsylvania law since he did not provide expert testimony of wrongdoing. *Id.*

Cases In Which An Apology Law Has Not Helped The Doctor

Apology laws are not always helpful to the health care provider. For example, in the Utah case of *Woods v. Zeluff*, 158 P. 3d 552 (Utah Ct. App., 2007), a patient sued his doctors for unsuccessful foot surgery that disabled him. During a post-operative visit, the surgeon stated, "I don't think we should have done this surgery," "I've missed something," and "I jumped the gun." *Id.* at 554. Utah's Rules of Evidence are modeled after the Federal Rules of Evidence and require a balancing test as to whether the unfair prejudicial potential of the evidence outweighs its probative value. While not necessarily an apology, this admission had the effect of the doctor's admitting responsibility for his action, and this statement is not unfairly prejudicial. The defendants argued that the statements were "words of compassion and remorse," so the evidence should be excluded. *Id.* at 555. The Utah Court of Appeals held that "exclusion of the testimony was prejudicial to the patient." *Id.* at 556. Even assuming that the physicians are correct in their position that the physician's statement by itself is insufficient to support a finding of malpractice, "the statements are nonetheless clearly probative." *Id.* It must be noted, however, that this case arose before Utah implemented its Apology law in 2010, and one must question whether the result would be the same if the issue again surfaced in that state. Fi-

nally, a few states even protect admissions of fault by excluding them from evidence. These jurisdictions include Arizona, Colorado, Connecticut, Washington, Georgia, and South Carolina. South Carolina, Code 1976 §19-1-190; Connecticut C.G.S.A. §52-184d; Colorado, C.R.S.A. §13-25-135; Arizona A.R.E.S. §12-2605; Georgia, Ga. Code Ann. §24-3-37.1; and Washington, RCWA 5.64.010.

CONCLUSION • Apology laws have been implemented in order to encourage communications between physicians and patients while also protecting a doctor from liability for such an expression of empathy. However, apologies support exchanges between doctors and their patients which often provides closure for an unexpected or adverse medical outcome.