

**Gestures of Apology, Sympathy
and Even Fault in Hopes of
Preventing a Lawsuit**

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- The information contained in this presentation has been prepared with the understanding that the author is not engaged in rendering legal, financial, medical or other professional advice.

Legal Principles

- Medical malpractice and patient compensation laws
- Medicare care availability and reduction of error laws
- Mandatory reporting of errors
- Court rules of evidence governing admissibility of statements or offers

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Ethical Principles

Autonomy	Personal freedom
Beneficence	Promote good
Nonmaleficence	Do no harm
Veracity	Tell the truth
Fidelity	Keep your promises
Best interests	Assist decision making
Justice	Treat fairly and equally
Respect	Respect others

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Industry and Professional Standards

- Accreditation
- Certification
- Conditions of participation
- Quality report cards
- Professional standards

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Defined Terms

- Adverse event. Error harms a patient.
- No-harm event. Mistake made but patient avoids injury as matter of luck or chance.
- Near miss. Mistake is made but caught before treatment occurs.

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Defined Terms (cont.)

- Apology. Expression of contrition and remorse for something done wrong.
- Sympathy. Sharing of unhappiness or suffering.
- Admission. Statement that may be used in court against the person making it.

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Rationale ... or Why Do It?

- Health care providers should deal honestly and openly with patients.
- We live in an age of transparency.
- We have a fiduciary duty to disclose the truth.
- To hide the truth is yet another wrong.

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Objections ... or Why Not Do It?

- Health care is full of uncertainties.
- To err is human.
- Disclosing the truth encourages litigation.
- Admitting responsibility can undermine bargaining power.

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Scenario

- Surgery.
- Anesthesiologist turned off ventilator support during x-ray; distracted and failed to restart ventilator; no documentation.
- Patient cardiac arrest; failed to regain consciousness despite CPR.
- Persistent vegetative state; family consented to withdraw life support; patient expired.
- Anesthesiologist (and other) obligations?

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The Four “Rs” of Apology

- Recognition
- Regret
- Responsibility
- Remedy

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Recognition

- A perceptive response by a provider that acknowledges
 - The provider’s own feelings and those of the patient and family
 - Any changes in the behavior of the patient or family
 - Any evidence of unmet expectations on the part of the patient and family

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Regret

- An empathetic response by the provider to let the patient know the provider understands their experience and feels badly about it.
- I am so sorry. I know this outcome is not what you expected. It is not what I expected either.

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Responsibility

- A statement of transparency that attempts to answer the patient's questions about their unexpected outcome
 - What happened?
 - Why it happened?
 - How it will affect my health status?
 - What steps were taken to prevent reoccurrence?

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Remedy

- An offering of remedy that attempts to answer the patient's questions about the error
 - What is being done to correct my problem?
 - How will this affect my health status?
 - Am I going to be responsible for the cost of this error or complication?

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Resources

- Aaron Lazare, On Apology (Oxford Press 2004)
 - Acknowledging the offense
 - Remorse, explanations and reparation
 - Why people apologize
 - Why people don't apologize
 - Timing and delay of apologies
 - Apology and forgiveness
 - The future of apologies

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Resources (cont.)

- Michael Woods, Healing Words: The Power of Apology in Medicine (Doctors in Touch, 2004)
 - A case of failing to say “I’m sorry”
 - Roadblocks to apology
 - The four “r’s” of apology
 - Ethical debate about disclosure
 - Boot camp for authentic relationships

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Resources (cont.)

- Winslade and McKinney, “To Tell or Not to Tell: Disclosing Medical Error,” American Society of Law, Medicine and Ethics (Winter 2006).
 - Types of medical error
 - Reasons for recommending disclosure
 - Objections and concerns about disclosure
 - Attorney’s role

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Resources (cont.)

- Webber, “Hospitals Adopting New Approach: Apologizing,” Indianapolis Star (Sept. 21, 2006)
 - Hospital administrator public apology following two newborn deaths resulting from a heparin overdose

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Resources (cont.)

- Guadagnino, “Effects of Medical Error Disclosure and Apology,” Physician News Digest (Feb. 2005)
 - Research on handling medical mistakes
 - Advice from insurance companies and their counsel regarding use/non-use of apology
 - Data that measures impact of apology on resolving claims

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Resources (cont.)

- Taft, “Apology and Medical Mistake: Opportunity or Foil?” Annals of Health Law (Winter 2005).
 - Philosophical shifts in physician-patient communication
 - Apology
 - Disclosure: Communicated unexpected outcomes

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Resources (cont.)

- Wojcieszak et al, “The Sorry Works! Coalition: Making the Case for Full Disclosure,” Journal of Quality and Patient Safety (June 2006)
 - Prepared by coalition of doctors, lawyers, insurer and patient advocates
 - Numerous goals, including education, overcoming obstacles and changing health care culture

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Resources (cont.)

- Robbennolt, “What We Know and Don’t Know About the Role of Apologies in Resolving Health Care Disputes,” Georgia State University Law Review (Summer 2005)
 - Legislative developments
 - What we know
 - Unanswered questions

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Resources (cont.)

- Walling, “Having to Say Your Sorry: A More Effective Medical Malpractice Model,” Contingencies (Nov./Dec. 2006)
 - Profile of current states’ “I’m sorry” laws
 - Impact of laws on disclosures, use of apology

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