

# SHOULD DOCTORS BE ALLOWED TO APOLOGIZE?: A CLOSER LOOK AT MEDICAL MALPRACTICE LAWS

## ABSTRACT

*Saying I'm sorry is easy for a five-year-old child, but in the professional world, it is the last thing most physicians would think of saying. A simple apology has different implications within the world of professionals. While we ingrain social niceties into boys and girls throughout childhood, those niceties fall by the wayside as we grow into productive members of society. Psychologists and sociologists have no doubt hypothesized the reasoning behind how our society changes as we age. Yet, regardless of the reasoning, state and federal laws can be changed to integrate apologies back into the world of professionals.*

*Apologies have the power to heal individuals emotionally and mentally, and studies have shown apologizing can have a wide range of positive implications for patients, physicians, and society at large. However, apologies are often discouraged by those in the legal profession. Fortunately, there has been a recent movement throughout state legislatures to protect physicians for expressing regret or empathy to patients who experience some kind of negative result. This Note reviews the differing state and federal apology laws, the impact they have already had, and how they can further change interactions within the medical profession.*

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## I. INTRODUCTION

I'm sorry! Thinking of these two simple words brings images of an elementary student being admonished for teasing a fellow classmate or a passenger on an airplane after tipping over another's beverage.<sup>1</sup> Unfortunately, saying sorry has a very different implication in the world of professionals.<sup>2</sup> When thinking about saying sorry, no one is likely to think of lawyers giving advice to their clients in order to avoid possible litigation.<sup>3</sup> But why not? Some blame modern media and television shows, such as *Law & Order* or *Scandal*, that perpetuate the stereotype of bickering and uncompromising lawyers who will do anything to win.<sup>4</sup> Others hold a slightly more cynical view of the legal field and society at large.<sup>5</sup> They hypothesize that somewhere between childhood and adulthood, society exterminates one of the most basic moral lessons and, in part, blames the legal system for this change.<sup>6</sup> Professor Jonathan Cohen argues the legal system typically encourages denial and has made immorality the new normal.<sup>7</sup>

Apologizing can have the power to heal a bruised psyche; however, it is often discouraged by lawyers and the law.<sup>8</sup> But we can change this overly pessimistic view of the legal system by changing the laws themselves. At least 37 states and the District of Columbia have laws that offer physicians some kind of legal protection for expressing regret or empathy to patients who experience some kind of negative result at the physician's hand.<sup>9</sup> However,

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1. See Matthew Pillsbury, *Say Sorry and Save: A Practical Argument for a Greater Role for Apologies in Medical Malpractice Law*, 1 S. NEW ENG. ROUNDTABLE SYMP. L.J. 171, 171 (2006).

2. See *id.*

3. See *id.*

4. See *id.*

5. See Jonathan R. Cohen, *The Immorality of Denial*, 79 TUL. L. REV. 903, 904 (2005).

6. *Id.*

7. *Id.*

8. Pillsbury, *supra* note 1, at 171.

9. Chandler Farmer, *Striking a Balance: A Proposed Amendment to the Federal Rules of Evidence Excluding Partial Apologies*, 2 BELMONT L. REV. 243, 252 (2015); Kevin B. O'Reilly, "I'm Sorry": Why Is That So Hard for Doctors to Say?, 53 AM. MED.

laws still vary in what can protect a doctor from admissibility in court, and most medical malpractice insurers discourage doctors from apologizing out of fear for how it can be used in court.<sup>10</sup> To complicate matters further, the Federal Rules of Evidence do not currently contain any provision that bars a doctor’s apology to a patient from being admitted as evidence to prove fault.<sup>11</sup> Differing state and federal laws complicate matters for the medical field, but implementing apology statutes can encourage honest communication between doctors and patients while also protecting doctors from liability should the patient file a medical malpractice lawsuit.<sup>12</sup>

## II. AN OVERVIEW OF APOLOGY LAWS

An increasing number of state legislatures have enacted statutes to encourage doctors to express regret or empathy without these words being used as an admission of liability.<sup>13</sup> While there have been impressive reform initiatives—which have been criticized by some as being largely ineffective<sup>14</sup>—to create apology statutes on a state-by-state level, these measures have not been adopted on a federal level.<sup>15</sup> With our current legal system, which serves as a safety net for fruitless apologies that prevent physicians from expressing true compassion and benevolence, the law, as it stands today, may very well perpetuate a system of ineffective apologies.<sup>16</sup> Apologies are an important and often effective dispute resolution tool; however, our legal system does not protect doctors who apologize, despite research that an encompassing apology statute is “good business and consistent with U.S.

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NEWS (Feb. 1, 2010),  
<https://amednews.com/article/20100201/profession/302019937/4#top>  
[\[https://perma.cc/F6VF-FGM7\]](https://perma.cc/F6VF-FGM7).

10. Farmer, *supra* note 9, at 244.

11. Lauren Gailey, “*I’m Sorry*” as Evidence? *Why the Federal Rules of Evidence Should Include a New Specialized Relevance Rule to Protect Physicians*, 82 DEF. COUNS. J. 172, 173 (2015).

12. Nicole Marie Saitta & Samuel D. Hodge, Jr., *Is It Unrealistic to Expect a Doctor to Apologize for an Unforeseen Medical Complication?—A Primer on Apologies Laws*, 82 PA. B. ASS’N Q. 93, 110 (2011) [hereinafter Saitta & Hodge, *Primer on Apologies*].

13. *Id.* at 102.

14. See Jeffrey S. Helmreich, *Does ‘Sorry’ Incriminate? Evidence, Harm and the Protection of Apology*, 21 CORNELL J.L. & PUB. POL’Y 567, 576 (2012).

15. See Maria Pearlmutter, *Physician Apologies and General Admissions of Fault: Amending the Federal Rules of Evidence*, 72 OHIO ST. L.J. 687, 694 (2011).

16. Robert Ward, *Foreword: On Apology*, 1 S. NEW ENG. ROUNDTABLE SYMP. L.J. 166, 166 (2006).

cultural values.”<sup>17</sup>

### A. *The Federal Rules of Evidence*

Under the Federal Rules of Evidence, there is almost no evidentiary protection provided to apologies.<sup>18</sup> The Federal Rules of Evidence provide that apologies are generally admissible in order to prove liability.<sup>19</sup> Federal Rule of Evidence 801(d)(2) states an opposing party’s statement is not hearsay and therefore admissible, whether it admits any fault, as long as it is “made by the party in an individual or representative capacity.”<sup>20</sup> In addition, even if the doctor is not available to testify at trial, the apology may still be allowed in as evidence under Rule 804(b)(3).<sup>21</sup> Accordingly, apologies under the Federal Rules of Evidence are generally admissible, but there are still several other rules that may preclude an apology from being admitted.<sup>22</sup>

First, Federal Rule of Evidence 403 may be able to exclude apologies as it permits the court to “exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”<sup>23</sup> Despite this possibility, many courts find these statements to be probative and not unfairly prejudicial.<sup>24</sup>

Next, Federal Rule of Evidence 408 provides that compromise offers and negotiations are “not admissible —on behalf of any party —either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction.”<sup>25</sup> An apology made

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17. Michael B. Runnels, *Apologies All Around: Advocating Federal Protection for the Full Apology in Civil Cases*, 46 SAN DIEGO L. REV. 137, 160 (2009).

18. Farmer, *supra* note 9, at 249.

19. FED. R. EVID. 801(d)(2).

20. *Id.* at 801(d)(2)(A); Farmer, *supra* note 9, at 249–250.

21. FED. R. EVID. 804(b)(3) (providing an exception to the hearsay rule where the declarant is both unavailable and made a statement against the declarant’s own interest); Pearlmutter, *supra* note 15, at 692 (“This rule assumes that a statement that may subject the speaker to civil or criminal liability is more likely to be true and is, therefore, more reliable than other out of court statements.”).

22. Farmer, *supra* note 9, at 250.

23. FED. R. EVID. 403.

24. *See, e.g., Woods v. Zeluff*, 158 P.3d 552, 555 (Utah Ct. App. 2007); Pearlmutter, *supra* note 15, at 693.

25. FED. R. EVID. 408.

during settlement negotiations is inadmissible in court.<sup>26</sup> However, the apology must be made during formal settlement negotiations, so it therefore must take place after a lawsuit has already been filed.<sup>27</sup> In addition, an apology made during settlement negotiations may be admitted for another purpose, “such as proving a witness’s bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.”<sup>28</sup>

Finally, Federal Rules of Evidence 407 and 409 can shield evidence of regret or offers to pay for medical care.<sup>29</sup> Rule 407 forbids “evidence of . . . subsequent measures . . . to prove: negligence; culpable conduct; a defect in a product or its design; or a need for a warning or instruction.”<sup>30</sup> Rule 409 forbids, “Evidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses resulting from an injury is not admissible to prove liability for the injury.”<sup>31</sup> Neither of these rules address apologies; therefore, a negligent doctor can take steps to prevent the mistake in the future while also paying for the patient’s medical bills without these actions being used as evidence in court.<sup>32</sup>

The Federal Rules of Evidence have exacerbated doctors’ reluctance to apologize to patients after a negative outcome for fear of impending litigation and admissibility of their apologies.<sup>33</sup> These rules go against doctors’ ethical considerations to their patients and instinctual responses to negative outcomes.<sup>34</sup> Yet, despite the Federal Rules of Evidence’s failure to adopt an apology exception, apologies are still finding their way into the legal system through state legislatures.<sup>35</sup>

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26. See *id.*

27. Pearlmutter, *supra* note 15, at 692–93.

28. FED. R. EVID. 408.

29. Nancy L. Zisk, *A Physician’s Apology: An Argument Against Statutory Protection*, 18 RICH. J.L. & PUB. INT. 369, 381 (2015).

30. FED. R. EVID. 407.

31. *Id.* at 409.

32. Pearlmutter, *supra* note 15, at 693.

33. Robin E. Ebert, *Attorneys, Tell Your Clients to Say They’re Sorry: Apologies in the Health Care Industry*, 5 IND. HEALTH L. REV. 337, 342 (2008).

34. *Id.*

35. Elizabeth Latif, *Apologetic Justice: Evaluating Apologies Tailored Toward Legal Solutions*, 81 B.U. L. REV. 289, 301 (2001).

### B. State Regulations

Until fairly recently, “apologies were typically admitted as evidence of liability against the person who issued them,” and this unsurprisingly discouraged doctors from making any apologies.<sup>36</sup> In response, a variety of states amended their evidence codes to allow for expressions of regret or empathy without allowing these apologies to be used as an admission of liability in a civil lawsuit.<sup>37</sup> State statutes allowing apologies vary widely, with some precluding an admission of mistake and others limiting the apology to an expression of sympathy.<sup>38</sup> Historically, most states had rules of evidence analogous to the Federal Rules of Evidence and therefore offered almost zero protections for apologies made by doctors.<sup>39</sup> Recently, an increasing number of states have enacted additional statutes promoting the protection of doctors’ apologies such as additional evidentiary rules or confidentiality statutes.<sup>40</sup>

#### 1. Massachusetts

In 1986, Massachusetts was the first state to enact legislation intended to protect apologies from being entered as evidence to prove liability.<sup>41</sup> As Lee Taft, writing for the Yale Law Journal, describes, the origin of Massachusetts’ statute is heartbreaking:

In the 1970s a Massachusetts legislator’s daughter was killed while riding her bicycle. The driver who struck her never apologized. Her father, a state senator, was angry that the driver had not expressed contrition. He was told that the driver dared not risk apologizing, because it could have constituted an admission in the litigation surrounding the girl’s death. Upon his retirement, the senator and his successor presented the legislature with a bill designed to create a “safe harbor” for would-be apologizers.<sup>42</sup>

The Massachusetts’ statute, which was approved on December 24, 1986, and is adequately named “Admissibility of benevolent statements,

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36. Gailey, *supra* note 11, at 178.

37. Latif, *supra* note 35, at 301.

38. Nicole Marie Saitta & Samuel D. Hodge, Jr., *Physician Apologies*, PRAC. LAW., Dec. 2011, at 35, 37–39.

39. See Farmer, *supra* note 9, at 252–53.

40. *Id.*

41. Ebert, *supra* note 33, at 346.

42. Lee Taft, Essay, *Apology Subverted: The Commodification of Apology*, 109 YALE L.J. 1135, 1151 (2000).

writings or gestures relating to accident victims,” provides in pertinent part: “Statements, writings or benevolent gestures expressing sympathy or a general sense of benevolence relating to the 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 . . . .”<sup>43</sup>

Massachusetts’ Apology Statute enabled the Massachusetts Alliance for Communication and Resolution following Medical Injury (MACRMI) to develop a program entitled CARE.<sup>44</sup> CARE, an acronym that stands for Communication, Apology, and Resolution, is a program developed by several Massachusetts hospitals and health care organizations.<sup>45</sup> The goal of the program is to provide an alternative to litigation following a medical injury, which is often expensive, time-consuming, and emotionally difficult for both patients and physicians.<sup>46</sup>

## 2. State Review of Apology Statutes

Other states have followed Massachusetts’ lead, and currently, 37 states and the District of Columbia have now enacted state statutes or evidentiary rules that protect doctors’ apologies in some, but certainly not all, situations.<sup>47</sup> Some states have enacted partial apology statutes that only apply in the context of medical malpractice.<sup>48</sup> These states include the following: Alaska,<sup>49</sup> Delaware,<sup>50</sup> the District of Columbia,<sup>51</sup> Idaho,<sup>52</sup>

43. MASS. GEN. LAWS ANN. ch. 233, § 23D (West 2019).

44. Alicia Gallegos, *Candor Laws Growing, but Are They Effective?*, MD EDGE (Jan. 6, 2016), <https://www.mdedge.com/internalmedicineneeds/article/105592/health-policy/candor-laws-growing-are-they-effective> [https://perma.cc/D9ED-36L4]; *About CARE*, MACRMI, <http://www.macrmi.info/about-macrmi/about-dao/#sthash.qyuWJfMh.xdTzx973.dpbs> [https://perma.cc/3HNE-THPE].

45. Gallegos, *supra* note 44.

46. Debra Beaulieu, *Disclosure, Apology and Offer: A New Approach to Medical Liability*, VITAL SIGNS, June 2012, at 1, [http://www.macrmi.info/files/3413/5523/9411/final\\_255939CM\\_VS\\_reprint\\_0812\\_2.pdf](http://www.macrmi.info/files/3413/5523/9411/final_255939CM_VS_reprint_0812_2.pdf) [https://perma.cc/5M3P-G7KD].

47. Farmer, *supra* note 9, at 252.

48. *Id.* at 245–46 n.15.

49. ALASKA STAT. ANN. § 09.55.544 (West 2019).

50. DEL. CODE ANN. tit. 10, § 4318 (West 2019).

51. D.C. CODE ANN. § 16-2841 (West 2019).

52. IDAHO CODE ANN. § 9-207 (West 2019).

Louisiana,<sup>53</sup> Maine,<sup>54</sup> Maryland,<sup>55</sup> Michigan,<sup>56</sup> Nebraska,<sup>57</sup> Ohio,<sup>58</sup> and Virginia.<sup>59</sup> Each state's statute differs slightly, but all of these states provide protection under their evidence rules for physicians who express "a general sense of sympathy or benevolence."<sup>60</sup> As an example, Nebraska's partial apology statute, aptly titled "Unanticipated outcome of medical care; civil action; health care provider or employee; use of certain statements and conduct; limitations," states, in pertinent part:

In any civil action brought by an alleged victim of an unanticipated outcome of medical care, or in any arbitration proceeding related to such civil action, any and all statements, affirmations, gestures, or conduct expressing apology, 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 and which relate to the discomfort, pain, suffering, injury, or death of the alleged victim as a 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. A statement of fault which is otherwise admissible and is part of or in addition to any such communication shall be admissible.<sup>61</sup>

Other states have enacted apology statutes that apply broadly.<sup>62</sup> These states include California,<sup>63</sup> Florida,<sup>64</sup> Hawaii,<sup>65</sup> Indiana,<sup>66</sup> Missouri,<sup>67</sup> New

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53. LA. STAT. ANN. § 13:3715.5 (2019).

54. ME. REV. STAT. ANN. tit. 24, § 2907 (2019).

55. MD. CODE ANN., CTS. & JUD. PROC. § 10-920 (West 2019).

56. MICH. COMP. LAWS ANN. § 600.2155 (West 2019).

57. NEB. REV. STAT. ANN. § 27-1201 (West 2019).

58. OHIO REV. CODE ANN. § 2317.43 (West 2019).

59. VA. CODE ANN. § 8.01-52.1 (West 2019).

60. Farmer, *supra* note 9, at 245.

61. NEB. REV. STAT. ANN. § 27-1201.

62. Farmer, *supra* note 9, at 245 n.15.

63. CAL. EVID. CODE § 1160 (West 2019).

64. FLA. STAT. ANN. § 90.4026 (West 2019).

65. HAW. REV. STAT. § 626-1, R. 409.5 (West 2019).

66. IND. CODE ANN. § 34-43.5-1-4 (West 2019).

67. MO. ANN. STAT. § 538.229 (West 2019).



Hampshire,<sup>68</sup> Tennessee,<sup>69</sup> Texas,<sup>70</sup> and Utah.<sup>71</sup> Many of these statutes do not expressly exclude various statements of fault, yet courts have interpreted these statutes as if they do.<sup>72</sup> The wording of each state's statute differs slightly, yet all of them include more general apology provisions.<sup>73</sup> As an example, Missouri's statute, entitled "Certain statements, writings, and benevolent gestures inadmissible, when —definitions," states in pertinent part:

The portion of statements, writings, or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering, or death of a person and made to that person or to the family of that person shall be inadmissible as evidence of an admission of liability in a civil action. However, nothing in this section shall prohibit admission of a statement of fault.<sup>74</sup>

Additional states have partial apology statutes, but they have not been the subject of litigation yet.<sup>75</sup> These states include Iowa,<sup>76</sup> Massachusetts,<sup>77</sup> Montana,<sup>78</sup> North Carolina,<sup>79</sup> North Dakota,<sup>80</sup> Oklahoma,<sup>81</sup> Oregon,<sup>82</sup> South Dakota,<sup>83</sup> West Virginia,<sup>84</sup> and Wyoming.<sup>85</sup> Despite these state legislatures' efforts to transform evidence rules, state apology statutes are still largely ineffective at protecting doctors who apologize to patients.<sup>86</sup>

68. N.H. REV. STAT. ANN. § 507-E:4 (2019).

69. TENN. R. EVID. 409.1.

70. TEX. CIV. PRAC. & REM. CODE ANN. § 18.061 (West 2019).

71. UTAH CODE ANN. § 78B-3-422 (West 2019).

72. See, e.g., *Stewart v. Vivian*, 91 N.E.3d 716, 721 (Ohio 2017); *Lawrence v. MountainStar Healthcare*, 320 P.3d 1037, 1051 (Utah Ct. App. 2014).

73. Farmer, *supra* note 9, at 254–55.

74. MO. ANN. STAT. § 538.229 (West 2019).

75. Farmer, *supra* note 9, at 245 n.15.

76. IOWA CODE § 622.31 (2019).

77. MASS. GEN. LAWS ANN. ch. 233, § 23D (West 2019).

78. MONT. CODE ANN. § 26-1-814 (West 2019).

79. N.C. GEN. STAT. ANN. § 8C-1, Rule 413 (West 2019).

80. N.D. CENT. CODE ANN. § 31-04-12 (West 2019).

81. OKLA. STAT. ANN. tit. 63, § 1-1708.1H (West 2019).

82. OR. REV. STAT. ANN. § 677.082 (West 2019).

83. S.D. CODIFIED LAWS § 19-19-411.1 (2019).

84. W. VA. CODE ANN. § 55-7-11a (West 2019).

85. WYO. STAT. ANN. § 1-1-130 (West 2019).

86. Gailey, *supra* note 11, at 179.

A majority of the state legislatures listed above have enacted limited apology statutes to cover only partial apologies.<sup>87</sup> States with partial apology statutes “exclude[] what are thought to be essential features of apologies, such as expressions of regret or remorse.”<sup>88</sup> Thus, only expressions of sympathy are protected while admissions of fault are not protected from being used as evidence of liability.<sup>89</sup> For example, if a doctor says “I’m sorry, I was wrong,” the apology would be split into two statements, “with the first part (‘I’m sorry’) being inadmissible, while the second part (‘I was wrong’) could be used” to show the doctor’s liability.<sup>90</sup>

### 3. Iowa

Iowa’s partial apology statute, nicknamed CANDOR, was approved and signed by Governor Terry Branstad in April 2015.<sup>91</sup> Iowa’s CANDOR law, an acronym that stands for Communication and Optimal Resolution, went into effect on July 1, 2015, and was “designed to facilitate conversation and resolution between physicians and patients after an unanticipated outcome.”<sup>92</sup> As of 2016, Iowa was the “latest state to launch a unique strategy that aims to reduce medical malpractice lawsuits and bolster doctor-patient communication after poor outcomes, while encouraging swift resolution.”<sup>93</sup> On May 5, 2017, additional expansions to Iowa’s CANDOR law were signed into law.<sup>94</sup>

Iowa’s partial apology statute provides, in pertinent part, that in professional negligence actions,

that portion of a statement, affirmation, gesture, or conduct expressing sorrow, sympathy, commiseration, condolence, compassion, or a

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87. *Id.*

88. Helmreich, *supra* note 14, at 576.

89. Pearlmutter, *supra* note 15, at 700.

90. *Id.*

91. *Candor Legislation Leads the Conversation*, U. IOWA PHYSICIANS NEWSL. (Univ. of Iowa Physicians, Iowa City, Iowa), Aug. 2015, [https://medicine.uiowa.edu/uiphysicians/sites/medicine.uiowa.edu.uiphysicians/files/wysiwyg\\_uploads/UIP\\_Newsletter\\_August%202015.pdf](https://medicine.uiowa.edu/uiphysicians/sites/medicine.uiowa.edu.uiphysicians/files/wysiwyg_uploads/UIP_Newsletter_August%202015.pdf) [<https://perma.cc/3MQM-8H37>].

92. *Id.*

93. Gallegos, *supra* note 44.

94. *Candor: Communication and Optimal Resolution*, Iowa Medical Society Resource Guide, IOWA MED. SOC’Y (2016), [https://www.iowamedical.org/iowa/Iowa\\_Public/Resources/Center\\_for\\_Physician\\_Advocacy/Candor/Iowa\\_Public/Issues/Candor/Candor.aspx](https://www.iowamedical.org/iowa/Iowa_Public/Resources/Center_for_Physician_Advocacy/Candor/Iowa_Public/Issues/Candor/Candor.aspx) [<https://perma.cc/K8CZ-4VW2>].

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general sense of benevolence that was made by the person to the plaintiff, relative of the plaintiff, or decision maker for the plaintiff that relates to the discomfort, pain, suffering, injury, or death of the plaintiff as a result of an alleged breach of the applicable standard of care is inadmissible as evidence.<sup>95</sup>

Proponents of Iowa's CANDOR law boasted it would offer faster and more in-depth answers for patients who experienced an adverse outcome, while also emphasizing a reduction of recurrence.<sup>96</sup> The law was devised to strengthen the physician–patient relationship by encouraging patients and physicians to “discuss adverse health care incidents and possible solutions in a privileged, confidential conversation that is not admissible in court.”<sup>97</sup> Yet an interesting part of Iowa's law is that the conversation must be initiated by the provider.<sup>98</sup> In order to trigger the protections provided under Iowa's CANDOR law, “[T]he provider must provide the patient with a written early disclosure notification.”<sup>99</sup> The University of Iowa Physicians, a publication by the University of Iowa Health Care, explained Iowa's CANDOR law:

Following an adverse outcome, a provider has 180 days from when they knew or should have known about the incident to notify the patient, in writing, of the provider's desire to have such a conversation.

The notice must inform the patient of their right to receive medical records and seek legal counsel, and let them know that information shared in the requested open discussion is inadmissible.

If the patient agrees to the discussion, all parties receive further notice of the privileged and confidential nature of the information to be shared.

During this privileged conversation, a provider can discuss the results of an investigation into the incident, and talk about the steps they and/or UI Hospitals and Clinics will take to prevent future occurrences. They may also discuss compensation—orally, if no compensation is

95. IOWA CODE § 622.31 (2019).

96. *Candor Legislation Leads the Conversation*, *supra* note 91.

97. *Id.*

98. *Id.*

99. *Candor: Communication and Optimal Resolution*, *Iowa Medical Society Resource Guide*, *supra* note 94.

warranted, or in writing if compensation is offered.<sup>100</sup>

An important step in Iowa's CANDOR law is that patients must receive specific notifications from their providers.<sup>101</sup> This step must be well-documented to ensure patients who participate in discussion under the CANDOR law have received the required notifications and, perhaps more importantly, acknowledge and understand the legal rights they may be giving up.<sup>102</sup> Iowa's CANDOR law also "allows either party to invite other individuals, such as family members or legal representatives," to engage in the discussion.<sup>103</sup> These third-party individuals must also be provided with specific notifications, showing they acknowledge and understand the legal protection the CANDOR law affords as well as the confidential nature of the discussions.<sup>104</sup>

Currently, only eight states have full apology laws that protect both expressions of sympathy and admissions of fault.<sup>105</sup> These states include Arizona,<sup>106</sup> Colorado,<sup>107</sup> Connecticut,<sup>108</sup> Georgia,<sup>109</sup> South Carolina,<sup>110</sup> Vermont,<sup>111</sup> Washington,<sup>112</sup> and Wyoming.<sup>113</sup> States with full apology statutes are often more effective at encouraging communications between doctors and patients, as partial apology statutes leave the unresolved issue of what apologetic statements are protected from admissibility.<sup>114</sup> These conflicts between state and federal laws can create extensive problems for professionals who want to rely on these privileges for apologetic statements, and it has led many to call for a national medical malpractice reform, including an amendment to the Federal Rules of Evidence to protect

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100. *Candor Legislation Leads the Conversation*, *supra* note 91.

101. *Candor: Communication and Optimal Resolution*, *Iowa Medical Society Resource Guide*, *supra* note 94.

102. *Id.*

103. *Id.*

104. *Id.*

105. Pearlmutter, *supra* note 15, at 700 n.75.

106. ARIZ. REV. STAT. ANN. § 12-2605 (2019).

107. COLO. REV. STAT. ANN. § 13-25-135 (West 2019).

108. CONN. GEN. STAT. ANN. § 52-184d (West 2019).

109. GA. CODE ANN. § 24-4-416 (West 2019).

110. S.C. CODE ANN. § 19-1-190 (2019).

111. VT. STAT. ANN. tit. 12, § 1912 (West 2019).

112. WASH. REV. CODE ANN. § 5.64.010 (West 2019).

113. WYO. STAT. ANN. § 1-1-130 (West 2019).

114. *See* Farmer, *supra* note 9, at 253.

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doctors' apologies.<sup>115</sup>

### *C. The Need to Amend the Federal Rules of Evidence*

Medical malpractice is a state tort, yet most state statutes are inadequate at protecting doctors when they apologize to patients.<sup>116</sup> As previously mentioned, most state statutes are limited apology statutes that cover only partial apologies.<sup>117</sup> Partial apologies are essentially flawed in two major ways. First, the limited scope of protection afforded by partial apology statutes leads to self-censorship and has a "chilling effect" when doctors fail to show fault or remorse, making them seem disingenuous.<sup>118</sup> Second, patients view partial apologies as incomplete and ineffective when doctors provide only vague statements about what happened and prevent them from gaining assurance that the mistake will not happen again.<sup>119</sup>

Accordingly, the protection afforded to doctors' apologies through most state statutes only applies to specific phrases, causing most attorneys and physicians to stay away from extending apologies altogether out of fear the apology will communicate an admission of liability and jeopardize a future case.<sup>120</sup> Since the Federal Rules of Evidence influence a majority of state evidence statutes,<sup>121</sup> an amendment to the Federal Rules of Evidence protecting apologies would be a clear-cut model for states to follow.<sup>122</sup> Such an amendment would reduce confusion, reassure attorneys and doctors that expressing an apology will not be used against them, and possibly reduce the number of medical malpractice lawsuits.<sup>123</sup> Going one step further, if an amendment were made to the Federal Rules of Evidence that clearly protected any kind of doctor apologies, an attorney who continues to counsel

115. *Id.* at 255 (emphasizing the differing approaches); Gailey, *supra* note 11, at 181 (recommending amendment of the federal rules); Latif, *supra* note 35, at 316 (highlighting the benefits of a uniform rule); Pearlmutter, *supra* note 15, at 693 (highlighting national efforts to reform the apology rule).

116. Pearlmutter, *supra* note 15, at 703; *see also supra* Parts II.A–B.

117. Helmreich, *supra* note 14, at 576.

118. Gailey, *supra* note 11, at 180.

119. Pearlmutter, *supra* note 15, at 704.

120. *Id.* at 703–04.

121. *See* Farmer, *supra* note 9, at 252.

122. *See* William M. McDonnell & Elisabeth Guenther, *Narrative Review: Do State Laws Make It Easier to Say "I'm Sorry?"*, 149 ANNALS INTERNAL MED. 811, 812 (2008) (analyzing the differing policies amongst states).

123. Pearlmutter, *supra* note 15, at 703–04.

against apologies may find a suit of legal malpractice filed against themselves.<sup>124</sup>

### III. APOLOGY LAWS: DO WE NEED THEM?

The intricate details of state-specific statutes that allow physicians to apologize or show some kind of benevolence toward their patients takes a backseat to the overall question: Do we want apology laws?<sup>125</sup> The specifics of each state's laws may differ, yet the overarching goal of each is to allow physicians to be transparent and candid with patients without being afraid of the looming legal ramifications and eventual litigation.<sup>126</sup> However, these statutes must almost necessarily be put into place in a way that does not preclude patients from pursuing their legal right to litigation of the matter in the future.<sup>127</sup> Proponents have argued that without some form of apology laws, society would descend into moral degradation, wherein physicians would be forced to contemplate only the looming litigation instead of showing compassion and remorse toward a patient who had just been subjected to a medical mishap.<sup>128</sup>

#### A. Benefits to Protecting Apologies

In recent years, tort reformers have set their sights on limiting medical malpractice lawsuits as part of their overall agenda to eradicate what they perceive as excessive liability.<sup>129</sup> Tort reform is based on the contentious belief that litigation is fundamentally biased in favor of plaintiffs and should therefore be diminished as much as possible.<sup>130</sup> Tort reformers, or "Legal Apologists," argue apologies are socially desirable as they lead to lower levels of litigation, increase the likelihood of settlement offers, and allow efficiency in the court systems.<sup>131</sup>

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124. *Id.*

125. See generally Yonathan A. Arbel & Yotam Kaplan, *Tort Reform Through the Back Door: A Critique of Law and Apologies*, 90 S. CAL. L. REV. 1199, 1201 (2017).

126. See, e.g., *Candor Legislation Leads the Conversation*, *supra* note 91.

127. See Jeffrey I. H. Soffer, *Apologize First; Mediate Second; Litigate . . . Never?*, 34 REV. LITIG. 493, 503 (2015) (explaining the three models for an apology and subsequent dispute resolution).

128. Christopher J. Robinette, *The Synergy of Early Offers and Medical Explanations/Apologies*, 103 NW. U. L. REV. COLLOQUY 514, 519 (2009).

129. Arbel & Kaplan, *supra* note 125, at 1200.

130. *Id.*

131. *Id.* at 1215–16; Ashley A. Davenport, *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, 104 (2006); Soffer, *supra* note 127, at 501.

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### 1. Preventing Litigation

Legal Apologists argue apologies from physicians to their patients after an adverse medical outcome help decrease the amount of litigation by “dissipating [the] victims’ anger and need for vengeance.”<sup>132</sup> While some argue apology laws may minimize the value of an apology, legal scholars have found “encouraging apologies to occur early on may prevent many injuries from escalating into legal disputes.”<sup>133</sup> There have been a number of studies, including public examples, in the recent years that show the power a simple apology can have on resolving conflicts and avoiding litigation.<sup>134</sup> One study suggested when physicians apologized and disclosed the details of their errors, the chance of litigation was reduced by half.<sup>135</sup> However, others argue Legal Apologists often overemphasize the importance of apologies from physicians in controlling litigation.<sup>136</sup>

### 2. Encouraging Settlement Discussions

In addition to preventing costly, timely, and emotionally draining litigation, apology laws may encourage more settlement discussions earlier.<sup>137</sup> In today’s society, apologizing is viewed as a common courtesy.<sup>138</sup> When a person fails to apologize for wrongdoing, or alleged wrongdoing, the injured party may feel the wrongdoer is not truly remorseful or

132. Arbel & Kaplan, *supra* note 125, at 1215–16.

133. Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009, 1061 (1999) [hereinafter Cohen, *Advising Clients*].

134. See, e.g., AARON J. LAZARE, ON APOLOGY 5–11 (2004) (finding public apologies help resolve conflict); Richard C. Boothman et al., *A Better Approach to Medical Malpractice Claims? The University of Michigan Experience*, J. HEALTH & LIFE SCI. L., Jan. 2009, at 125, 143 (disclosing the results of a study by the University of Michigan Health System that found honest disclosure reduces the instance of malpractice suits by more than 200 percent); Lucinda E. Jesson & Peter B. Knapp, *My Lawyer Told Me to Say I’m Sorry: Lawyers, Doctors, and Medical Apologies*, 35 WM. MITCHELL L. REV. 1410, 1422–23 (2009); Kevin Sack, *Doctors Say I’m Sorry Before ‘See You in Court’*, N.Y. TIMES, May 18, 2008, at A1.

135. See MICHAEL S. WOODS & JASON I. STARR, HEALING WORDS: THE POWER OF APOLOGY IN MEDICINE 52–53 (2d ed. 2007).

136. Arbel & Kaplan, *supra* note 125, at 1215.

137. Aviva Orenstein, *Apology Excepted: Incorporating a Feminist Analysis into Evidence Policy Where You Would Least Expect It*, 28 SW. U. L. REV. 221, 247 n.140 (1999).

138. Ebert, *supra* note 33, at 339.

empathetic.<sup>139</sup> Advocates of apology laws point to recent studies that suggest (and the recent trend of legislation that confirms) effective communication between physicians and patients can alleviate tensions and lead to settlement instead of litigation.<sup>140</sup> A recent study by the University of Michigan Health Services (UMHS) reported that after the introduction of its Apology and Disclosure Program in 2001, payments per case decreased by 47 percent, and settlement time dropped from 20 months to 6 months.<sup>141</sup> After a similar program was implemented at COPIC Insurance Company, a large, medical malpractice insurance carrier based in Colorado, medical malpractice claims dropped by 50 percent, and settlement costs dropped by 23 percent.<sup>142</sup>

### 3. *Judicial Efficacy*

As a final argument, Legal Apologists often argue, “A sincere apology can help promote judicial economy by unlocking stalled settlement negotiations.”<sup>143</sup> Furthermore, when apologies are offered by physicians soon after the adverse medical outcome, the apology can help ensure disputes are avoided entirely.<sup>144</sup> This is best put by former First Lady and Secretary of State Hillary Clinton and President Barack Obama in their discussion of medical malpractice legislation, wherein they state, “By promoting better communication, this legislation would provide doctors and patients with an opportunity to find solutions outside the courtroom.”<sup>145</sup>

#### B. *Drawbacks of Protecting Apologies*

Those opposed to apology laws argue they should not be necessary to encourage physicians to do what they otherwise ought to do.<sup>146</sup> Some go as far as saying, “[I]t is a mistake to attempt to use evidentiary standards to

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139. *Id.*

140. Boothman et al., *supra* note 134, at 143; Charles Vincent, Angela Phillips & Magi Young, *Why Do People Sue Doctors? A Study of Patients and Relatives Taking Legal Action*, 343 LANCET 1609, 1612 (1994).

141. Helmreich, *supra* note 14, at 574.

142. Boothman et. al., *supra* note 134, at 147.

143. Farmer, *supra* note 9, at 244.

144. See Max Bolstad, *Learning from Japan: The Case for Increased Use of Apology in Mediation*, 48 CLEV. ST. L. REV. 545, 569 (2000) (describing an apology as a means to defuse contentious mediation). Similarly, an apology could serve to defuse doctor-patient conflicts, perhaps avoiding litigation entirely. See Vincent, *supra* note 140, at 1612.

145. Hillary Rodham Clinton & Barack Obama, *Making Patient Safety the Centerpiece of Medical Liability Reform*, 354 NEW ENG. J. MED. 2205, 2207 (2006).

146. Zisk, *supra* note 29, at 391.



improve physician-patient communication.”<sup>147</sup> While a physician’s apology may help a patient forgive and halt litigation, it may also keep patients from using evidence in court to prove liability, lead to abuse by physicians, and have negative effects on medical malpractice insurance.<sup>148</sup>

### 1. Inability of Patients to Prove Liability

While apology laws may have a plethora of societal benefits, they could end up harming plaintiffs who wish to rely on a physician’s apologies as evidence of liability and guilt.<sup>149</sup> Some legal scholars argue (and common sense may justify) if physicians’ statements help patients forgive the physician for negligent or reckless behavior and those statements help plaintiffs state a legal claim later on, then physicians should accept responsibility for their errors.<sup>150</sup> In many cases, a physician’s apology may help avoid a lawsuit, but where an apology does not suffice, some argue physicians should, at the very least, simply say they are sorry and own up to that apology—especially considering they deal with life and death on a daily basis.<sup>151</sup> In cases where physicians do apologize but patients continue with litigation, evidence of apologies may be inadmissible in court and lead to frustrating results for patients.<sup>152</sup>

### 2. Abuse of Fault-Admitting Apologies

In spite of the benefits that apology laws may bring, there is still a potential for abuse.<sup>153</sup> Patients who settle through apology laws and programs may only be offered a small portion of the total range of damages of which they could be entitled.<sup>154</sup> For example, research by the UMHS

147. Jesson & Knapp, *supra* note 134, at 1411.

148. See Cohen, *Advising Clients*, *supra* note 133, at 1025; Gabriel H. Teninbaum, *How Medical Apology Programs Harm Patients*, 15 CHAP. L. REV. 307, 332 (2011); Jay M. Zitter, Annotation, *Admissibility of Evidence of Medical Defendant’s Apologetic Statements or the Like as Evidence of Negligence*, 97 A.L.R.6th 519 § 6 (2014).

149. See generally Strout v. Cent. Me. Med. Ctr., 94 A.3d 786 (Me. 2014); Stewart v. Vivian, 91 N.E.3d 716 (Ohio 2017); Ronan v. Sanford Health, 809 N.W.2d 834 (S.D. 2012); Phinney v. Vinson, 605 A.2d 849 (Vt. 1992).

150. Zisk, *supra* note 29, at 391.

151. *Id.*

152. See Zitter, *supra* note 148, § 6.

153. Teninbaum, *supra* note 148, at 331–32.

154. Richard E. Quinn & Mary C. Eichler, *The 3Rs Program: The Colorado Experience*, 51 CLINICAL OBSTETRICS & GYNECOLOGY 709, 710 (2008).

found out of the patients who participated, “71 [percent] admitted that they accepted less in settlement than they would have had they litigated the case.”<sup>155</sup> Additionally, it is possible physicians will simply “issue apologies knowing that there’s no real risk involved, but naive injured parties will think these apologies are meaningful—that they do involve risk. Injured parties will think the injurers are putting their necks on the line when in fact they aren’t.”<sup>156</sup> Apology laws could be an avenue for physicians to take advantage of emotional patients, instead of admitting their wrongdoing and accepting the consequences for their actions.<sup>157</sup>

### 3. Effect on Medical Malpractice Insurance

Despite the advantages apology laws may have on decreasing the amount and cost of litigation, they are not favorable to healthcare providers.<sup>158</sup> In fact, some insurance policies for medical malpractice specifically prohibit the insured physician from assuming any type of liability.<sup>159</sup> A physician who apologizes and assumes some form of liability following an adverse medical outcome, without the insurance company’s prior approval, may be facing a void in coverage.<sup>160</sup> Courts have interpreted these provisions differently depending on the type of statement made by the physician; however, this distinction may be one many physicians are not willing to rely on.<sup>161</sup>

## IV. CONCLUSION

Like any set or subset of laws, there are a variety of positive and negative attributes that accompany apology laws.<sup>162</sup> However, an important aspect to include in the discussion is how the medical community also stresses the importance of honest communication between physicians and

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155. J. Sybil Biermann & Richard Boothman, *There Is Another Approach to Medical Malpractice Disputes*, 4 J. ONCOLOGY PRAC. 148, 148 (2006).

156. Jonathan R. Cohen, *Legislating Apology: The Pros and Cons*, 70 U. CIN. L. REV. 819, 856 (2002).

157. Taft, *supra* note 42, at 1157.

158. Robinette, *supra* note 128, at 515.

159. Cohen, *Advising Clients*, *supra* note 133, at 1025.

160. Steven E. Raper, *No Role for Apology: Remedial Work and the Problem of Medical Injury*, 11 YALE J. HEALTH POL’Y L. & ETHICS 267, 297 (2011).

161. 8 JOHN A. APPLEMAN & JEAN APPLEMAN, INSURANCE LAW AND PRACTICE § 4780 (1981).

162. See generally Saitta & Hodge, *Primer on Apologies*, *supra* note 12, at 94–95, 97; Teninbaum, *supra* note 148, at 329–32.

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patients.<sup>163</sup> The American Medical Association's Code of Ethics states: "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."<sup>164</sup>

Simply saying *sorry* often has a different meaning in the world of professionals, but with appropriate apology laws, physicians could show empathy and benevolence toward patients without unnecessarily subjecting themselves to liability in future litigation.<sup>165</sup> A simple apology—"I am sorry this happened to you"—could change the lives of both physicians and patients.<sup>166</sup> A majority of states have already started paving the way to a brighter—and possibly more honest—future in medical practice by passing legislation that would allow physicians to get back to the basics of their profession: caring for their patients.<sup>167</sup>

*Alysun Bulver\**

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163. Saitta & Hodge, *Primer on Apologies*, *supra* note 11, at 95.

164. Frank Federico, *Disclosure: Challenges and Opportunities*, *Risk Management Foundation of the Harvard Medical Institutions*, FORUM, May 2003, at 2, 2.

165. *See* Pillsbury, *supra* note 1, at 193.

166. *Id.*

167. Farmer, *supra* note 9, at 252; O'Reilly, *supra* note 9.

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