

IT'S OKAY TO BE SORRY

The New South Carolina Unanticipated Medical Outcome Reconciliation Act

By Mary Margaret Hyatt

Apology laws are an increasingly proactive solution to growing medical malpractice costs and tort reform proposals. With the passage of 2006 Act Number 373, South Carolina joined a majority of other states that have adopted or are considering apology laws.

South Carolina's apology law, referred to as the South Carolina Unanticipated Medical Outcome Reconciliation Act, or the 'I'm Sorry' law, allows health care providers, their employees or representatives, to make any "statements, affirmations, gestures, activities, or conduct expressing benevolence, regret, apology, sympathy, commiseration, condolence, compassion, mistake, error, or a general sense of benevolence" to patients, their family members or representatives, following an unanticipated outcome of medical care without the admissibility of the expressions as evidence in any subsequent civil proceedings. Under South Carolina's Act, the expressions cannot be construed as a statement of culpability or an admission against the health care provider's interest. To qualify for the Act's 'immunity,' the statements must be made during a designated meeting scheduled by the health care provider and the patient, or their representatives, to discuss the unanticipated outcome.

The South Carolina General Assembly expressly indicated in the statute its support of encouraging communication between health care providers and patients, especially in cases of unanticipated outcomes, and limiting the admissibility of such communications in civil actions. "This makes sense," says Senator Joel Lourie, one of the 'I'm Sorry' law bill sponsors. "From South Carolina's perspective, this is an opportunity to encourage open dialogue between health care providers and patients. The research has shown that when implemented properly, it helps eliminate less meritorious cases from being filed, while helping to expedite the settlement process in those cases that justify legal action. It really promotes a more cooperative spirit amongst all the parties."

In contrast to some states that mandate prompt, formal disclosure of any errors to patients and state authorities, South Carolina's law allows for permissive disclosure between providers and patients. The 'immunity' provided by South Carolina's 'I'm Sorry' law, however, is not absolute. Because the law only protects communications and actions made in a "designated meeting," statements or actions expressing benevolence, regret, apology, condolence, mistake, or error made by a health care provider that are not part of the designated meeting may still be admissible as evidence. The law also does not otherwise affect the South Carolina Rules of Evidence, so statements made by a provider to a patient or patient's family immediately after a medical outcome, such as in the patient or waiting room after surgery or just following an emergency-type treatment situation, do not appear to qualify for 'immunity.'

The 'I'm Sorry' law does not provide a guarantee that disclosure and communications between providers and patients will not result in medical malpractice actions. The law does, however, provide flexibility to providers should patients proceed with malpractice actions. Under the law, defendants in medical malpractice actions may choose to waive the inadmissibility of statements and actions made in designated meetings with patients. Providers and their legal counsel may decide that it is to their benefit to have apologies and expressions of grief brought into court if a malpractice lawsuit is initiated. Studies show that a sympathetic defendant who the jury perceives as having done the right thing is a lousy target in the courtroom.

At recent graduation ceremonies for the State University of New York's Downstate Medical Center, its president, John LaRosa, offered some advice to graduates: "I'm sorry.' Say the words. Mean them. And move on." While the 'I'm Sorry' law may not be a panacea, it is a step toward restoring communication in the provider-patient relationship, and hopefully, a step toward decreasing medical malpractice costs.
