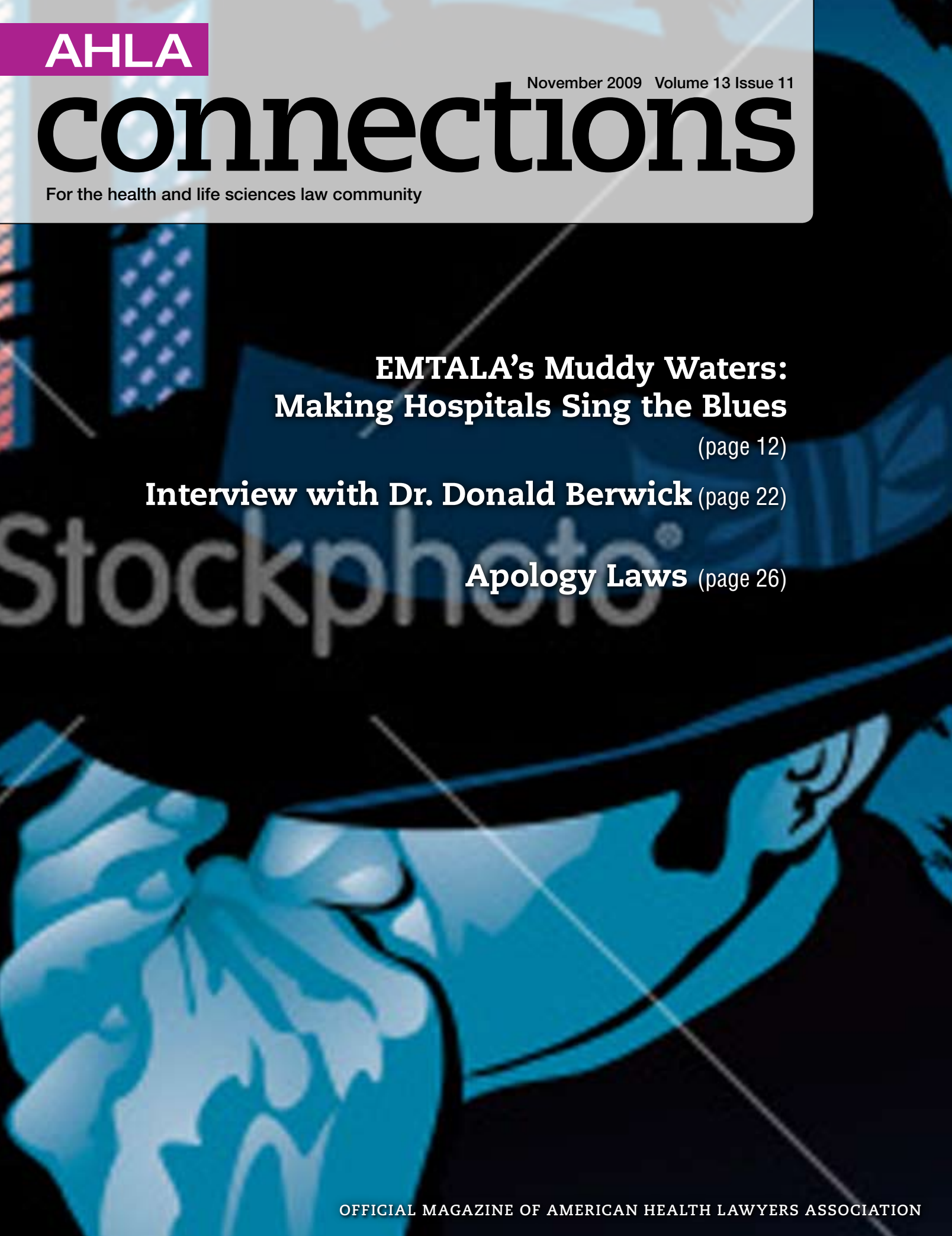
AHLA
November 2009 Volume 13 Issue 11

connections

For the health and life sciences law community



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OFFICIAL MAGAZINE OF AMERICAN HEALTH LAWYERS ASSOCIATION

Analysis

Apology Laws: A Variety of Approaches to Discussing Adverse Medical Outcomes with Patients and Others

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It is an unfortunate fact that patients entering our healthcare system may suffer from medical mistake or errors. It is also unfortunate all patients simply do not achieve the results they expect or hope for. Against this backdrop, the spectra of medical liability looms large over healthcare providers when a patient has an unanticipated medical outcome. Healthcare providers have long been cautioned to "say nothing" about unanticipated outcomes because of the potential their statements may be used in subsequent litigation. Silence on the topic of an unanticipated outcome is often received by the patient to mean his or her healthcare provider is callous and indifferent to the situation. The fear of being named in a medical malpractice suit often makes a bad situation worse.

In an effort to open the lines of communication, removing a healthcare provider's fear of discussing unanticipated outcomes, many states have adopted what are referred to as "sorry statutes" or "apology statutes." These statutes generally prevent the admissibility of comments made by healthcare providers when expressing an apology or sympathy to a patient for an unanticipated medical outcome. By legally assuring healthcare providers their words will not be used against them, it is hoped that better communication between a physician and patient will emerge. Some states such as Massachusetts have had these statutes on the books for a number of years. Many other states have enacted such statutes only recently. At present, 34 states support some variety of an "apology statute." In recent years, organizations such as "SorryWorks," The Center for Health Transformation, and the American Medical Association have all advocated for these types of statutes. In 2005, then-Senator Barack Obama introduced legislation promoting protection for healthcare providers when addressing an anticipated medical outcome.[1]

What seems on the surface as a relatively simple idea becomes complex and varied once applied. The same statement that might be protected in one state would be considered unprotected or admissible in another state court proceeding. The future admissibility of a healthcare provider's statement following an unanticipated medical outcome may depend upon not only what is said but to whom and when that statement is said.

Is a Statement of Fault Admissible?

The first major divide in states having "apology statutes" involves whether a statement of fault is admissible. A majority of the 34 states with apology statues follow Maine's approach, whose statute provides "Nothing in this section prohibits the admissibility of a statement of fault."[2] Under such a provision, a healthcare provider's apology will become admissible and lose all protection if he or she admits fault. Thus, a simple act of saying that the healthcare provider is sorry for an unanticipated medical outcome is protected and inadmissible at a later court proceeding but an admission of fault is not. While Maine's statute exemplifies the majority of state apology laws on the admissibility of admissions of fault, other states do not follow this approach.

For example, in Colorado statements of fault are inadmissible as later evidence of liability. Colorado's statute states,

> any and 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 an 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 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.[3]

Other state statutes are silent on the issue of whether an admission of fault is protected from admission in subsequent court proceedings. Georgia's statute does not specifically address statements admitting fault,[4] although in one recent case a state appeals court found a physician's statement that "this was my fault" in relation to an emergency colostomy following a colon surgery he performed clearly fell "within the plain meaning of the statute" and was inadmissible.[5]

Other states also have a less than clear approach to statements of fault. Indiana Code § 34-43.5-1-5 states: "A court may admit a statement of fault into evidence, including the statement of fault that is part of a communication of sympathy, if otherwise admissible under the Indiana Rules of Evidence."

However, Indiana Code 34-43.5-1-4 states: "Except as provided in section 5 of this chapter, a court may not admit into evidence a communication of sympathy that relates to causing or contributing to . . . (2) an injury. . . ."

These statutes read together seem to indicate a statement that relates to the causing of an injury is inadmissible but a statement as to fault for an injury or medical outcome is admissible. That said, a physician is left to guess how a court would interpret the two statutes read together.

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Whose Statements Are Protected?

The diverse statutory approaches to statements of fault pale in comparison to the wide variation on who is protected when offering the apology. Some states limit protection of statements of apology to a narrow universe of individuals. For example, Oregon's statutory protection extends only to "a person who is licensed by the Oregon Medical Board, or any other person who makes an expression of regret or apology on behalf of a person who is licensed by the Oregon Medical Board . . ."[6]

North Dakota takes a broader approach and offers protection for statements expressing apology made not only by a licensed provider but also by "a hospital or clinic, including an ambulatory surgery center or group of physicians operating a clinic or out-patient care facility, or a professional corporation or other professional entity comprised as such health care providers as permitted by the laws of this state . . ."[7]

South Carolina has the most comprehensive and broadest protection for individuals and entities offering apologies.[8] Its statute covers statements made by such diverse entities as renal dialysis facilities, nursing homes, and institutional general infirmaries—such as those offering care to inmates with illnesses.

Healthcare providers should carefully review their state's statute to determine whether they fall within its scope. While a qualified physician may be able to offer a protected apology, a hospital administrator may not under a given state's statutory law.

To Whom Is the Apology Made?

Complexity is further increased when considering to whom the apology is made. All 34 states with apology laws obviously include statements made to patients. The statutes are less uniform, however, in their treatment of an apology that is offered to individuals other than patients. For example, Arizona limits protection to statements made "to the patient, a relative of the patient, the patient's survivors or a health care decision maker for the patient . . ."[9]

Washington extends statutory protection to statements of apology offered to domestic partners of an injured party,[10] while Nebraska covers statements of apology to "any person who has a family-type relationship with the patient."[11] Perhaps the broadest statute in this respect can be found under Delaware law, which includes not only the patient and family members, but also the patient's friends.[12] This approach seems to acknowledge the reality that close friends often accompany patients for medical procedures. Finally, some states fail to specify the individual to whom a statement of apology may be made. For example, Hawaii addresses only the statement itself and not the audience for the statement.[13]

How Is the Apology Made?

The form in which the statement of apology is made also matters in certain states. The majority position on this issue is set forth under Louisiana's apology statute, which covers "Any communication, including but not limited to an oral or written statement, gesture, or conduct by a health care provider . . ."[14]

Under this approach, it is clear that the apology may be made in either written or oral form to the patient. Other state statutes, however, cover only verbal apologies. For example, Vermont's statute extends protection only to "an oral expression of regret or apology, including any oral good faith explanation of how a medical error occurred, made by or on behalf of a health care provider . . ."[15]

Thus, in Vermont, a handwritten note from the physician to the patient would be admissible.

Offers of Additional Assistance

Some state statutes afford protection for actions going beyond an apology. For example, offers of additional assistance to a patient who has suffered an unanticipated medical outcome could arguably be beyond the scope of a traditional apology or indication of regret. While the majority of state statutes do not specifically address this issue, several include offers of additional assistance within the scope of future inadmissible testimony. For example, North Carolina's statute provides:

> Statements by a health care provider apologizing for an adverse outcome in medical treatment, offers to undertake corrective or remedial treatment or actions, and gratuitous acts to assist affected persons shall not be admitted to prove negligence or culpable conduct by the health care provider in any action brought under Article 1B of Chapter 90 of the general statutes.[16]

California's Evidence Code takes a similar position.

> Evidence that person has, in compromise or from humanitarian motives, furnished or offered or

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> promised to furnish money or any other thing, act, or service to another who has sustained or will sustain or claims that he or she has sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his or her liability for the loss or damage or any part of it.[17]

Timing of the Apology

While the vast majority of state statutes do not address the timing of the statement of apology, a few do impose certain limits. Under Vermont's statute, expressions of regret or apology must be provided *within 30 days* of when the healthcare provider or healthcare facility knew or should have known "of the consequences of the error" to be treated as inadmissible in a later court proceeding.[18] Whether or not a state statute sets a timetable for statements of apology, practical reality dictates that "sooner is better than later."

Patient Response

Finally, what about the patient's response to the apology? To the best of the authors' knowledge, only one state addresses this issue. Iowa's statute states: "Any response by the plaintiff, relative of the plaintiff, or decision maker for the plaintiff to such statement, affirmation, gesture, or conduct is similarly inadmissible as evidence."[19]

While it would seem that equity and fairness would dictate both parties to the apology conversation should receive the same degree of protection, only Iowa codifies statements made *by patients* as inadmissible in future litigation.

Conclusion

Have apology statutes made a difference vis-à-vis professional liability litigation/costs? A recent study released from the University of Michigan reported on its comprehensive program to use apologies and offer financial compensation up front following an unanticipated outcome. According to a 2009 article in the *Journal of Health and Life Science Law*, malpractice claims against the University of Michigan Health System fell from 121 claims in 2001 to 61 claims in 2006.[20] The average time to process claims decreased as well—from 20 months in 2001 to eight months in 2007. Finally, the average cost of a claim over the same time period fell by approximately 50%.[21]

University of Michigan's experience is not unique. Since implementing a similar apology program in 2006, the University of Illinois noted a 50% reduction in malpractice claims. According to a *New York Times* report on the University of Illinois' experience, "in the 37 cases where the hospital acknowledged a preventable error and apologized, only one patient has filed suit. Only six settlements have exceeded the hospital's medical and related expenses."[22]

Marc E. Williams, President of DRI-The Voice of Defense Bar, authored an article for *The National Law Journal* earlier this year entitled "Sorry Works." Mr. Williams notes that even if an apology program "does not deter a case from a being filed, there is no doubt in our estimation that it provides a well-merited advantage during the course of the lawsuit. All good corporate trial lawyers know that, to prevail with a jury, they must humanize their clients.[23]

Given the objective success of apology programs in high-profile health systems, and the endorsement of these programs by entities such as the American Medical Association and the Center for Health Transformation, it is reasonable to assume more states will adopt statutes affording protection to healthcare providers offering apologies to patients.[24] As demonstrated by the above analysis, providers and healthcare institutions must learn the nuances of their state laws before formally implementing such a program. Current evidence seems to suggest that a thoughtful application of an apology program by healthcare providers and administrators can generate significant benefits for both patients and providers.

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Endnotes

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