Wisconsin Medical Society

Your Doctor. Your Health.

TO: Assembly Committee on Health
Representative Erik Severson, MD, Chair

FROM: Mark Grapentine, JD
Senior Vice President - Government Relations

DATE: May 29, 2013

RE: Support for Assembly Bill 120

On behalf of more than 12,000 members statewide, the Wisconsin Medical Society thanks the committee for this opportunity to share our strong support for Assembly Bill 120, promoting statements of apology or condolence following an unexpected or negative health care event. The bill would provide statutory protection for such statements, promoting more full and frank communications between a physician and a patient or the patient's family at a time when such communication is needed the most. We urge the committee to approve the bill.

The Society believes physicians should not be forced into a situation where they feel compelled to avoid frank or sympathetic conversations with patients or family members because they fear that any statements could be used against them in a lawsuit. In today's litigation environment, that is too often the case. Studies show that timely communication with a patient and/or a patient's family following an adverse event can greatly reduce the incidence of medical liability lawsuits. Laws such as AB 120 promote that goal of timely communication between physicians and patients or patients' families.

The Society supports broad protections for these important conversations – the corollary is that the Society opposes amending the bill to restrict the types of statements, gestures or forms of conduct that are covered under the introduced version of the bill. Indeed, recent analysis of various states' laws show that ideally, nothing should interfere with potential physician-patient communication – including any situation where a physician is forced to choose his or her words carefully for fear of stepping over a legal line. All topics need to be covered in order for the law to work as intended. Otherwise, rather than a frank discussion, physicians might worry about the legal ramifications of their word choice and limit their communication with a patient or patient's family due to fear of legal exposure.

The attached *Health Affairs* article, "The Flaws in State 'Apology' And 'Disclosure' Laws Dilute Their Intended Impact on Malpractice Suits," analyzes the weaknesses in some statutory constructs that do not go far enough to protect statements of sympathy as well as responsibility. The article specifically discusses states with laws protecting statements of sympathy or promoting disclosure of an adverse event:

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> Our analysis reveals that most of these laws have structural weaknesses that may discourage comprehensive disclosures and apologies and weaken the laws' impact on malpractice suits. Disclosure laws do not require, and most apology laws do not protect, the key information that patients want communicated to them following an unanticipated outcome. Patients view the apology and disclosure processes as inextricably intertwined, seeking not only an expression of sympathy but also information about the nature of the event and why it happened, and how recurrences will be prevented.
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> . . .
>
> Legislation can be ineffective or even counter-productive if it is drafted too narrowly, if health care providers overestimate the protection it offers, or if the resulting disclosures or apologies are interpreted by patients as insincere.

Therefore, in order to promote the overall goal of better communication between a physician and a patient/patient's family, the breadth of the kinds of protected language in AB 120 needs to remain as it is currently drafted. When emotions are running strong, that is not the time for a physician to feel a need to choose words cautiously – the discussion needs to be full and frank for the patient or family members to trust what the physician is saying. And in the current lawsuit environment, those conversations will not occur as often as they could without legislative protection.

Finally, it is important to note what the bill does not do. It does nothing to remove the ability of a capable plaintiff's attorney to utilize current discovery methods and other legal means to explore whether a medical outcome warrants a lawsuit. AB 120 is a well-reasoned bill in the critical area of physician-patient communications, nothing more.

Thank you again for this opportunity to share the Society's support for Assembly Bill 120. If you have questions about this or other issues, please feel free to contact us at any time.

Wisconsin Medical Society

Your Doctor. Your Health.

TO: Interested Parties

FROM: Mark Grapentine, JD
Senior Vice President - Government Relations

RE: Key Findings of *Health Affairs* article on Apology Laws

The *Health Affairs* article "The Flaws in State 'Apology' and 'Disclosure' Laws Dilute Their Intended Impact on Malpractice Suits" makes a strong case for: 1) enactment of legislation to promote honest communication between physicians and patients/family members following an adverse or unexpected outcome, and 2) those legislative protections need breadth to be adopted and effective. The following are some key takeaways from the article:

Current Behavior is Often Anti-Communication

> *Lawyers and insurance carriers have traditionally advised clients to avoid expressions of sympathy, explanations, and admissions of fault to patients out of concern that such statements could be used in litigations. Worries about stimulating rather than ameliorating litigation persist.* (page 1612)

This is what creates the "wall of silence" following a negative medical outcome. Any amount of this "go to your corners" mentality detracts from potentially-helpful communication at the most difficult time. And that, quite often, leads to litigation.

The Case for Passing a Physician-Patient Communication Law

> *The failure of health care providers to communicate information about unanticipated outcomes may impair patients' decision making, increase their distress, and heighten their desire to seek legal redress.* (page 1611)

It's an irony: the fear of litigation actually promotes behavior that can eventually manifest into a lawsuit due to a patient's or family member's need to break through the "wall of silence."

Most States' "Apology" Laws are not Only Ineffective, but Could Make Things Worse

> *Our analysis reveals that most of these laws have structural weaknesses that may discourage comprehensive disclosures and apologies and weaken the laws' impact on malpractice suits. ... [M]ost apology laws do not protect the key information that patients want communicated to them following an unanticipated outcome. ... [M]ost apology statutes protect only an expression of sympathy, failing to appreciate the importance of providing additional information to patients.* (page 1614-15, punctuation removed)

This is the main reason for a "strong" apology law – passing a weaker law would not foster a change in communication behavior, as legal advisors to clinics and other health care facilities would quickly identify the flaw inherent in protecting only statements of apology or condolence: that physicians would quickly find themselves answering follow-up questions not protected by the law. This, the research surmises, leads to more ill-will between the parties.

> *Where legal protections are unclear or perceived to be inadequate, health care workers and facilities might not provide all of the information that patients want about unanticipated outcomes. Merely expressing sympathy without sharing information about an injury's cause and prevention or accepting responsibility* ***may strike patients as insincere, provoking rather than appeasing a potential plaintiff.*** (page 1616)

If you have any further questions, please feel free to get in touch at any time.

By Anna C. Mastroianni, Michelle M. Mello, Shannon Sommer, Mary Hardy, and Thomas H. Gallagher

The Flaws In State 'Apology' And 'Disclosure' Laws Dilute Their Intended Impact On Malpractice Suits

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ABSTRACT **Apologies are rare in the medical world, where health care providers fear that admissions of guilt or expressions of regret could be used by plaintiffs in malpractice lawsuits. Nevertheless, some states are moving toward giving health care providers legal protection so that they feel free to apologize to patients for a medical mistake. Advocates believe that these laws are beneficial for patients and providers. However, our analysis of "apology" and "disclosure" laws in thirty-four states and the District of Columbia finds that most of the laws have major shortcomings. These may actually discourage comprehensive disclosures and apologies and weaken the laws' impact on malpractice suits. Many could be resolved by improved statutory design and communication of new legal requirements and protections.**

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Patients justifiably expect that they will be told about mistakes or errors—sometimes known in the medical industry as "unanticipated outcomes"—in their care.[1,2] This expectation is increasingly being codified into state laws, accreditation requirements for health care facilities, and medical society consensus statements.[3–5] However, a sizable gap exists between current practice and the expectation that patients will be notified of a medical error.[6–8] The failure of health care providers to communicate information about unanticipated outcomes may impair patients' decision making, increase their distress, and heighten their desire to seek legal redress.[9–12]

A key barrier to more-open communication between health care providers and patients is the concern that such conversations might precipitate lawsuits, especially when an adverse health outcome may have been preventable.[1,13–15] In response, many states have recently passed laws encouraging health care providers to discuss unanticipated outcomes with patients.[16–17]

One approach uses what are called "apology laws" to protect aspects of a provider's conversation with a patient from use as evidence of liability in a lawsuit.[18] A second approach, using "disclosure laws," typically mandates disclosure of certain unanticipated outcomes to patients and may protect the communication from being used in a legal or administrative action. Both types of laws are intended to encourage providers to share more information about unanticipated outcomes with patients by reducing liability exposure and shaping standard practices.

Although these laws are motivated by noble intentions, it is unclear whether they will achieve their goals. It is too early for a rigorous empirical evaluation of these initiatives, and key data on disclosures and malpractice litigation costs are not systematically collected outside of individual institutions. Predicting the effect of these laws is further hampered by the scarcity of research exploring the impact of specific communication strategies on patients' intent to sue.[19]

Notwithstanding this lack of evidence, both state and federal policy makers remain intensely interested in disclosure and apology approaches. For example, the U.S. Department of Health and Human Services (HHS) has committed $23 mil-

lion to funding pilot projects of innovative medical liability reforms, including several institutional programs that provide for disclosure, apology, and rapid offers of compensation.[20]

Because such programs generally do not bar patients from filing suit, the scope of legal protection in existing state laws is important. State disclosure and apology laws may also influence what is communicated to patients through these programs, and in what form.

In this article we contribute preliminary findings to inform these policy deliberations, based on an analysis of existing statutes (Appendix Exhibit 1).[21] We then address three policy questions. First, are the existing laws likely to foster transparency around medical injuries and reduce malpractice litigation? Second, do the strengths and weaknesses of disclosure and apology laws suggest best practices for designing future laws? Finally, on balance, are these laws worth adopting, or can their goals be more effectively achieved through alternative public or private initiatives such as disclosure and settlement offer programs?

Background

DISCLOSURE AND APOLOGY Disclosure and apology are conceptualized differently in the medical literature than they are in state statutes. In the medical literature, the term "disclosure" refers to informing the patient that an unanticipated outcome has occurred and providing some explanation for it.[1] Specifically, studies have shown that the information that patients desire following an unanticipated outcome includes an explanation of what happened, whether the outcome was caused by an error, how it happened, and plans for preventing recurrences.[22,23] The term "apology" refers at a minimum to an expression of sympathy, although some commentators suggest that a "full" apology for an unanticipated outcome caused by an error also includes providing an explanation, accepting responsibility, and making amends.[24–26]

CONVERSATION ABOUT UNANTICIPATED OUTCOMES In contrast, state laws recognize three distinct components of conversations with patients about unanticipated outcomes: "expression of sympathy," "explanation," and "admission of fault." The first two are roughly equivalent to the concepts of apology and disclosure. However, "admission of fault" does not have a close analogue in current disclosure guidelines promulgated by the medical profession, such as those from the National Quality Forum.[27]

The growing interest in communication between health care providers and patients about unanticipated outcomes has been stimulated in part by research suggesting that such communication might improve outcomes, including a reduction in litigation, amounts awarded, and greater patient satisfaction.[28–30] Nonetheless, health care workers and the institutions where they work still identify fear of malpractice suits as a major barrier to disclosure conversations.[31]

LEGAL RAMIFICATIONS Lawyers and insurance carriers have traditionally advised clients to avoid expressions of sympathy, explanations, and admissions of fault to patients out of concern that such statements could be used in litigation.[32–34] Worries about stimulating rather than ameliorating litigation persist. One group of scholars recently described disclosure as "an improbable risk management strategy."[29]

Study Data And Methods

We identified and reviewed statutes, regulations, judicial cases, and legislative histories of the fifty states and the District of Columbia that concerned the use in litigation and other legal proceedings of health care providers' statements of apology and disclosure to patients following unanticipated outcomes. The review is current through June 18, 2010.

We used online legal databases (LexisNexis and Westlaw) and annotated compilations of state laws. We then analyzed the laws for common themes (Appendix Exhibit 1),[21] categorizing them through a rigorous classification scheme. In states that have adopted both an apology law that is specific to the medical context and a more general apology statute that applies to other kinds of accidents, we analyzed only the law that would apply to medical malpractice litigation. (Appendix Exhibit 2 provides legal citations by state.)[21]

Study Results

PREVALENCE OF LAWS Thirty-four states and the District of Columbia have adopted an apology law, and nine states have adopted a disclosure law.[35] Six states have both types of laws, and thirteen have neither.[36] Among the states with apology laws, eleven have laws of general applicability,[37] and twenty-five have laws specific to the medical context. One state, Washington, has both a general apology law and an apology law specific to the medical context.

Sixteen states do not currently have any apology law. In these states, sympathetic statements by a provider could be used by a plaintiff as evidence of provider liability.

VARIATIONS IN FEATURES OF APOLOGY LAWS The vast majority of the apology laws—found

in twenty-five states and the District of Columbia—are sympathy-only laws, which protect only the expression of sympathy made after an unanticipated outcome (Exhibit 1). Although some experts assert that a meaningful apology includes an explanation for the injury and an acceptance of responsibility,[38] the legal protection provided by sympathy-only laws does not inherently extend to statements of explanation or fault. Indeed, more than half of the sympathy-only laws explicitly indicate that expressions of fault made in conjunction with an expression of sympathy are admissible in litigation.[39]

These laws suggest that portions of a statement that explain or acknowledge responsibility—such as, "I'm sorry *I hurt you*," or, "I'm sorry *I made a mistake when I administered the wrong medication*"—could be used in litigation.

In the remaining sympathy-only laws, the statutes are less clear about whether a statement of fault embedded in a statement of sympathy would be admissible in litigation. In states with those laws, any expression of fault or liability would be likely to be admissible, as other evidence rules generally permit plaintiffs to use such statements against defendants.

Three states have sympathy and explanation-apology laws. These laws protect expressions of sympathy as well as the description of the event, such as, "I'm sorry you had an unexpected reaction to the medication." Like the sympathy-only laws, they do not explicitly protect expressions of fault. Therefore, the portions of statements that identify the responsible party—for example, "I'm sorry you were hurt *when I prescribed the wrong dose of medication*"—may be admissible in litigation.

Six states have laws that protect both a provider's expression of sympathy and any admission of responsibility or fault. We assumed in our

EXHIBIT 1

Characteristics Of State Apology Laws

Provision	Number
CONTENT OF COMMUNICATION RECEIVING LEGAL PROTECTION	
Statement of sympathy, explanation, and fault	0
Statement of sympathy and fault	6
Statement of sympathy and explanation	3
Statement of sympathy	26
COVERED PARTIES	
Not restricted to health care providers	9
Institutional and individual health care providers	25
Institutional health care providers only	1
TRIGGERING EVENT	
All accidents[a]	6
Unanticipated outcomes of medical care[a]	25
Serious unanticipated outcomes of medical care	0
Medical errors/alleged negligence	4
TIMING OF COMMUNICATION	
No time frame specified	33
Communication must be made within *X* days of discovery	2[b]
FORM OF COMMUNICATION	
May be oral, written, or by conduct	34
May be oral or written	0
Must be written	0
Must be oral	1
Must be both oral and written	0
RECIPIENT OF COMMUNICATION	
Not limited to certain recipients	7
Recipient must be injured patient, family, representative, or friend	3
Recipient must be injured patient, family, or representative	23
Recipient must be injured patient	1
Recipient must be family (wrongful death cases only)	1

SOURCE Authors' analysis of LexisNexis and Westlaw searches of state statutes, regulations, and case law, last updated June 18, 2010.
NOTES $N = 35$, which includes thirty-four states and the District of Columbia. [a]The category "all accidents" includes statutes that do not specify a triggering event, if the statute is not limited to incidents involving health care providers. The category "unanticipated outcomes of medical care" includes statutes that do not specify a triggering event, if the statute is limited to health care providers. [b]30 days (VT, WA).

classification scheme that the protection for admissions of fault would be construed to cover any accompanying explanation of the event, and therefore that these sympathy-and-fault statutes provide the most expansive legal protection for providers.

In most jurisdictions, the protected communication may be verbal or nonverbal. For example, oral and written "statements," "affirmations," "gestures," "activities," or "conduct" are forms of protected communication. One state, Vermont, protects only oral communications. Two states encourage timely disclosure by protecting statements made within a defined time period. Although nearly all of the laws apply to apologies for unanticipated medical outcomes, four statutes apply more narrowly to medical errors or allegedly negligent care.

VARIATIONS IN FEATURES OF DISCLOSURE LAWS Since 2002, seven states have passed mandatory disclosure laws, and two have passed discretionary disclosure statutes (Exhibit 2). Mandatory disclosure laws require health care facilities to notify patients or their families, or both, of unanticipated outcomes of medical care. The discretionary disclosure law in Washington allows health care facilities to determine when disclosure of unanticipated outcomes to patients is appropriate. Oregon's discretionary law allows hospitals to voluntarily participate in the state's patient safety program, which mandates patient disclosures of serious unanticipated outcomes.

Six of the nine states with mandatory or discretionary disclosure laws provide legal protection for the communication in subsequent litigation. In five of those states, the protected communication is limited to a statement that an unanticipated outcome occurred, such as, "During the operation, your ureter was injured." Only one state, Washington, also protects explanations and expressions of sympathy such as, "I'm sorry your ureter was injured during the surgery." All six of the states whose disclosure laws provide legal protection also have separate apology laws that may be relevant.[40] The remaining three states offer no protection.

Among the nine states with mandatory or discretionary disclosure laws, Washington's approach is unique, offering the most comprehensive protection of disclosure conversations for health care providers. It adopted what reads like a combination disclosure-and-apology law. The statute explicitly provides protection for an explanation of the event and an expression of sympathy offered as part of a voluntary disclosure conversation with the patient, such as, "I'm sorry your ureter was injured when a surgical tool malfunctioned during the operation." Washington also has a separate apology law that could extend protection to an admission of fault.

Except in Florida, state disclosure laws apply to health care facilities only, not to individual providers. Although most apology laws apply to all unanticipated outcomes, disclosure laws typically apply only to events that have caused serious harm. Only two states—Oregon and Pennsylvania—require that the notification be in writing. For these two states, oral communications are permitted but not sufficient. Four states' disclosure laws require that the communication be made within a specified time frame.

All nine state disclosure statutes require institutions to inform patients that an unanticipated outcome occurred, but none requires disclosure of specific information. One state requires disclosure of the patient's legal rights in certain situations. None requires or even suggests that the institution explain what happened, what impact it will have on the patient's health, or how institutions will follow up on the incident. Thus, an institution could adhere to the letter of the law simply by telling a patient, "The outcome of your surgery was unanticipated."

Discussion

Our research revealed that more than two-thirds of states have apology laws. The majority of such laws protect only the provider's voluntary expression of sympathy to the patient from use by a patient in malpractice litigation. A small number of states also protect explanations of the event or expressions of fault, or both. The definitions and scope of coverage vary in other ways, including requirements for timely communication in two state laws.

Nine states have disclosure laws, most of which require health care facilities to notify patients of events that have caused serious harm. States vary on whether the disclosure receives protection from subsequent use by a plaintiff in malpractice litigation. For the most part, states provide limited, if any, procedural guidance; some states require written—versus oral—communication or timely communication.

LIKELY EFFECTIVENESS OF EXISTING LAWS Our analysis reveals that most of these laws have structural weaknesses that may discourage comprehensive disclosures and apologies and weaken the laws' impact on malpractice suits. Disclosure laws do not require, and most apology laws do not protect, the key information that patients want communicated to them following an unanticipated outcome. Patients view the apology and disclosure processes as inextricably intertwined, seeking not only an expression of sympathy but also information about the

EXHIBIT 2

Characteristics Of State Disclosure Laws

Provision	Number
CONTENT OF COMMUNICATION RECEIVING LEGAL PROTECTION	
Statement of sympathy, explanation, and fault	0
Statement of sympathy and fault	0
Statement of sympathy and explanation	1
Statement of sympathy	0
Statement that an unanticipated outcome occurred	5
None	3[a]
COVERED PARTIES	
Not restricted to health care providers	0
Institutional and individual health care providers	1
Institutional health care providers only	8
TRIGGERING EVENT	
Unanticipated outcomes of medical care	1
Serious unanticipated outcomes of medical care	7
Preventable serious adverse outcomes of medical care	1[b]
Medical errors	0
TIMING OF COMMUNICATION	
No time frame specified	5
Communication must be made within *X* days of discovery	4[c]
FORM OF COMMUNICATION	
May be oral, written, or by conduct	0
May be oral or written (not specified)	6
Must be written	2
Must be oral (if patient is available)	1
Must be both oral and written	0
RECIPIENT OF COMMUNICATION	
Not limited to certain recipients	0
Recipient must be injured patient, family, or representative	9
VOLUNTARINESS	
Communication is mandatory	7
Communication is discretionary	2
INFORMATION REQUIRED TO BE CONVEYED	
Statement that unanticipated outcome occurred	9
Explanation of facts, context of unanticipated outcome	0
Acknowledgment of harm	0
Explanation of impact on treatment plans or health status, or both	0
Explanation of investigation or follow-up done or to be done	0
Explanation of cause of unanticipated outcome	0
Offer of support services	0
Statement of accountability or responsibility	0
Statement of patient's legal rights	1

SOURCE Authors' analysis of LexisNexis and Westlaw searches of state statutes, regulations, and case law, last updated June 18, 2010. **NOTE** $N = 9$. [a]One state (TN) has no explicit statutory protection for patient notification but does provide explicit liability protection for hospitals reporting the same event to the state. [b]This state (NJ) also requires disclosure of adverse events arising from allergic reactions. [c]Range: 24 hours to 7 days (NJ, CA, NV, PA).

nature of the event and why it happened, and how recurrences will be prevented.[1,2,41]

Yet disclosure laws require only a bare-bones statement that an unanticipated outcome occurred. And most apology statutes protect only an expression of sympathy, failing to appreciate the importance of providing additional information to patients.[16]

A related problem is that some disclosure laws do not appear to extend protection to communications about events that occur outside the narrow context specified in the law. Pennsylvania has no apology law. However, the state does protect certain communications under a mandatory disclosure law that requires a health care facility to provide written notification to patients affected by a "serious event."[42] A reasonable interpretation of this law is that a clinician who

orally apologizes to a patient risks having that communication used by a plaintiff as evidence of fault. Physicians may be unaware of such limitations and may mistakenly assume that an entire disclosure conversation is legally protected.

Where legal protections are unclear or perceived to be inadequate, health care workers and facilities might not provide all of the information that patients want about unanticipated outcomes. Merely expressing sympathy without sharing information about an injury's cause and prevention or accepting responsibility may strike patients as insincere,[43] provoking rather than appeasing a potential plaintiff.

Similarly, laws that protect only expressions of sympathy and explanation may make for awkward communications, as it may be difficult to explain an error without discussing the different but closely related issues of responsibility or fault. For these reasons, narrowly crafted disclosure and apology laws might not achieve their objectives of fostering transparency and deterring lawsuits.

Because apology and disclosure statutes are fairly new, it is unclear how they will be interpreted and implemented in practice. For example, in a sympathy-only state, the legal system will have to determine exactly what language constitutes a protected expression of sympathy and what constitutes an unprotected explanation or admission of fault.

Lastly, the impact of mandatory disclosure laws may be limited by the difficulty of enforcing them.[28] To our knowledge, none of the states with disclosure laws has plans to monitor the occurrence or quality of disclosures.

Many of these problems could be resolved by improved statutory design and communication of new legal requirements and protections. But even well-designed laws might not dampen some patients' propensity to file malpractice claims and indeed could stimulate claims.[29] Although a provider's words to a patient may be legally protected, the communication can still alert the patient to a potential legal claim. The legal discovery process can then be used to obtain independent evidence to prove malpractice.

Even a sincere apology might not dissuade some patients from suing, particularly if the injury entails large economic losses and there is no offer of compensation. These considerations do not mean that providing legal protections for disclosures and apologies is valueless, but they should militate against unqualified optimism about the impact of improvements in transparency on malpractice claims.

Determining the effectiveness of these laws will ultimately hinge on future research. As institutions, insurers, and states begin tracking the disclosure and apology process, research projects can assess the real-world impact of different communication and compensation strategies on patient trust and satisfaction, on provider distress and burnout, and on malpractice claims and malpractice insurance premiums.[44–48]

BEST PRACTICES FOR DISCLOSURE AND APOLOGY LAWS Research into patients' needs surrounding unanticipated outcomes of care, the National Quality Forum's recommendations on disclosure, and analysis of existing disclosure and apology laws suggest some recommendations for future statutory design (Exhibit 3).[27,49] Several principles should inform design choices: Disclosure requirements should acknowledge both patients' needs and providers' anxieties about legal risk; disclosure and apology should be considered as an integrated process; and legal protection should be broad, in order to encourage comprehensive disclosures and willingness to accept responsibility for error.

These principles suggest that apology and disclosure laws should be drafted in more expansive terms than most existing statutes. Legal protections should apply to individual as well as institutional health care providers; to both oral and written communications; and to statements of explanation and fault as well as sympathy.

The principles also point toward greater specificity in disclosure laws. Such laws should require the disclosure of all serious unanticipated outcomes and articulate a minimum set of information to be disclosed, beyond a simple statement that an unexpected event occurred. Legislatures should delegate responsibility for specifying the information set to a state agency, so that modifications can be implemented in response to evolving knowledge about best practices without legislative amendment.

Based on current research about patients' needs, disclosures should include what is known about the event's cause, plans for prevention, and available patient support services. Disclosure laws should also provide mechanisms for monitoring disclosures to ensure compliance with the law, such as reporting and audit provisions.

What accounts for the gap between current laws and best practices in provider-patient communication? The language on the books probably reflects political compromises in the legislative process. Some legislatures have been motivated to pass apology laws because of the potential emotional benefit to providers and patients of more-open communication.

The most common rationale, though, has been that apologies could decrease medical malpractice litigation and related costs. State trial law-

EXHIBIT 3

Best-Practice Recommendations For State Disclosure And Apology Laws

Provision	Recommended practice
Protected content	Disclosure and apology laws should be drafted broadly to protect statements that an unanticipated outcome occurred and statements of sympathy, explanation, and fault
Covered parties	Disclosure and apology laws should cover individual and institutional health care providers
Triggering event	Apology laws should apply to statements made in response to any unanticipated outcome; disclosure laws should require disclosure of all unanticipated outcomes
Timing of communication	Apology laws should not limit protection to a specific time frame; disclosure laws should specify a time frame in which communications must be made The time frame should encourage prompt initial disclosures that an unanticipated outcome occurred but should permit additional investigation time before an explanation of the outcome is required
Form of communication	Apology laws should protect oral statements, written statements, and conduct; disclosure laws should require both oral and written notification for serious unanticipated outcomes, but should permit oral communications to suffice for less serious events The statute should provide a definition of a serious unanticipated outcome
Recipient of communication	Disclosure and apology laws should apply only to communications made to the injured patient, his or her family, representative, or friend
Voluntariness[a]	Disclosure laws should mandate communications following unanticipated outcomes
Required content	Disclosure laws should require that the communication include a statement that an unanticipated outcome occurred, an explanation of the facts or context of the event, an acknowledgment of harm, an explanation of the impact on the patient's treatment plans and health status, an explanation of the investigation or follow-up done or to be done, and an offer of support services, where available

SOURCE Authors' analysis. [a]Applicable to disclosure laws only.

yers' associations do not share that goal and have often opposed apology laws, concerned that evidentiary exclusions make it more difficult to bring successful malpractice claims. The limited scope of protection in the laws eventually passed may have been an attempt to accommodate such concerns.

Disclosure laws, on the other hand, have typically been enacted as part of patient safety reform efforts and are frequently paired with provisions that mandate state reporting. We can only speculate, but the lack of specificity about disclosure content may be a response to health care providers' concerns about liability exposure for explanations of the cause of an injury, particularly in states where apology protection is limited or absent.

ALTERNATIVE MECHANISMS FOR ENCOURAGING DISCLOSURE Are apology and disclosure laws a desirable means of fostering transparency in health care? On balance, the answer is yes.

Some experts have argued that the aims of apology and disclosure laws can be more effectively pursued through private initiatives. In particular, health care institutions can implement their own disclosure policies, accompanied by early settlement programs.[50] Although none of the existing institutional programs has yet been studied by external evaluators, program administrators report success in fostering transparency around medical injuries and reducing malpractice litigation costs.[28,48]

These programs show promise, but they are best viewed as complements, rather than alternatives, to apology and disclosure laws. They now exist at only a handful of institutions, and widespread change beyond these early adopters is unlikely in the current legal environment without substantial legislative encouragement. Further, although some programs appear to be flourishing even in the absence of a law, others have benefited from having such legal structures in place.[28] Colorado's comprehensive apology law, for example, has been credited with contributing to the success of the program implemented by COPIC Insurance, which reimburses patients up to $30,000 for "loss of time" and out-of-pocket expenses associated with adverse events, without regard to whether the standard of care was met.[51]

Particularly in programs like COPIC's that extend beyond the walls of a single institution, the legal environment in a state may greatly influence providers' willingness to participate in disclosure, although insurers could promote disclosure by making it a condition of having

an incident covered by malpractice insurance. In contrast, in closed systems such as self-insured academic medical centers, the institution can exert greater leverage over its physicians, and the legal regime may play a secondary role in shaping practices.

States should recognize that advances in disclosure and apology are likely to continue at individual institutions and support institutions committed to transparency. Legislators can also collaborate with other state agencies to support institutional disclosure and apology programs. COPIC, for example, believes that its program's success is linked not only to the state's apology law and tort reforms, but also to close ties with key stakeholders, including the state board of medicine and the state insurance commissioner's office.[51]

Conclusion

Honest communication with patients is a moral imperative.[52] States are to be commended for confronting the serious deficiencies in how patients are currently informed about unanticipated outcomes. Substantial conceptual and practical problems, however, are likely to diminish the effectiveness of existing apology and disclosure laws.

Legislation can be ineffective or even counterproductive if it is drafted too narrowly, if health care providers overestimate the protection it offers, or if the resulting disclosures or apologies are interpreted by patients as insincere. Policy makers and health care providers need to have realistic expectations about what these laws will accomplish. They should not rely on laws as the primary means of changing the culture of communication with patients following unanticipated outcomes. Such culture change is likely to be most effective when it originates from within institutions that develop systems to support health care workers in conducting these difficult conversations.[5]

Practical policy options do exist for state legislators to increase transparency with patients. By understanding the relationship between disclosure and apology; ensuring that broad legal protections for disclosed information are in place; and collaborating with all key stakeholders, including health care institutions, states can support the development, evaluation, and dissemination of effective disclosure and apology programs. ■

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Testimony of Jeffrey A. Pitman
on behalf of the
Wisconsin Association for Justice
before the
Assembly Health Committee
Rep. Erik Severson, Chair
2011 Assembly Bill 120
May 29, 2013

Representative Severson and Committee members my name is Jeff Pitman. I am a partner with the Milwaukee law firm of Pitman, Kyle, Sicula & Dentice, S.C. I serve as the President of the Wisconsin Association for Justice (WAJ). Thank you for giving me the opportunity to speak against Assembly Bill 120 (AB-120).

A foundation of Wisconsin's system of justice is that people injured by the negligence of another should receive fair compensation for their injuries. AB-120 does nothing to reduce healthcare costs or improve patient safety. Improving patient/doctor communication should be a goal of the legislation; instead AB-120 can be used as a shield to protect negligent healthcare providers from accountability.

Despite a duty that doctors are ethically and morally required to inform patients and families of injuries caused by medical error, many patients experience a lack of communication between themselves and the healthcare providers. Often family members don't learn what happened to a loved one except through an autopsy and lawsuit. Studies have shown that it is a lack of communication that leads to distrust with health care providers. That is why several VA hospitals and the University of Michigan Health System have programs to tell patients and their families immediately when something goes wrong and do what they can to fairly compensate the injured people.

The policy of full disclosure and compensation began at the Veterans Affairs Medical Center in Lexington, KY, in 1987. The policy resulted in an average payout of $14,500, well below the average payout rates of $413,000 nationally.

The University of Michigan Health System adopted a process of full disclosure of medical negligence and compensation in 2001. Case filings were cut in half by 2006. The program generated a significant savings to the institution.

There is no immunity involved, but those institutions have learned that the "I'm sorry" system has reduced malpractice costs because the problem is addressed and the patient and family can move forward in recovery. By 2005, 69% of health care institutions nationally had established error disclosure policies. Many healthcare organizations in Wisconsin have adopted error disclosure and compensation policies without any "I'm Sorry" law. They include Aurora Healthcare, Wheaton Franciscan Healthcare, Columbia St. Mary's Hospitals, The Medical College of Wisconsin, and University of Wisconsin Hospitals and Clinics Authority.

WAJ welcomes the concept of the inadmissibility of a health care provider's statement of apology, condolences, or sympathy because encouraging such communications may help the doctor-patient relationship. But the bill goes too far. WAJ objects to the inadmissibility of statements relating to "fault," "liability" or "responsibility."

Attached is a chart that lists states with "I'm Sorry" legislation. Thirty-five states have "I'm Sorry" legislation. Of the states with legislation, only six go as far as AB-120. Of the 29 states that preclude the admissibility of expressions of apology, benevolence, compassion, condolence, remorse, or sympathy, 20 of them expressly allow admissions of fault into evidence so that justice can be served. (CA, DE, FL, HI, ID, IN, LA, MA, ME, MD, MI, MO, NE, NH, OR, SD, TN, TX, VA, and WA.)

An example would be Missouri, "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 family of that person shall be inadmissible as evidence of liability in a civil action. However, nothing in this section shall prohibit admission of a statement of fault." Mo. Stat. Rev. § 528.229.

The broadness of the application of AB-120 is seen in the example that Rep. Jon Richards asked based on the identical bill from last session, 2011 AB 147, to Staff Attorney Brian T. Larson at Legislative Council. In a memo dated October 3, 2011, Attorney Larson writes:

> You raised the example of a legal deposition after a patient is injured in a hospital medical procedure. In your example, a hospital nurse is required to attend the deposition to answer questions from the patient's lawyer. The nurse testifies that "the attending physician was drunk" during the procedure and committed an error resulting in the permanent incapacity of the patient.

Your questions, based on the example, are whether Assembly Bill 147 would make the nurse's testimony inadmissible under the following scenarios:

1. If Assembly Bill 147 were enacted as currently drafted.

2. If Assembly Bill 147 were enacted without the inclusion of the words "fault," "liability," and "responsibility" in the bill.

The answer to these questions will depend on how a court would interpret the bill, which cannot be predicted with certainty. However, the likely answers are as follows:

- In the case of Question #1, the answer is likely yes – Assembly Bill 147 as currently drafted would make the nurse's testimony inadmissible. The bill does not contain limitations for time or context of the types of statements covered by the bill. Thus, regardless of the fact that the nurse's statement was made at a deposition rather than in the immediate aftermath of a medical procedure, a court would likely find that the elements of the bill were met.

- In the case of Question #2, the answer is likely no – the bill would not make the nurse's testimony inadmissible in that case. If Assembly Bill 147 were enacted without the words "fault," "liability," and "responsibility," the bill's standard for statements or conduct leading to inadmissibility would be more limited, and the nurse's testimony would not likely be considered inadmissible.

The broadness of the exclusion in AB-120 is also seen in a case where the doctor apologized, but also provided factual information about the cause of death to a family member. Here is a statement from an actual deposition of a family member:

Q Okay. And then your statement says, "[The doctor] sat
5 me down and said," quote, "I'm sorry. Simply due to
6 fatigue, I made an error. I was tired and had
7 accidentally pulled the wrong line. It filled his
8 heart with air and killed him"?
9 A Yes.

Under the AB-120, it would appear that nothing in the doctor's statement would be admissible.

What if later at trial, and the doctor testifies but he

- denies he was fatigued; or
- denies he made an error; or
- denies he accidentally pulled the wrong line; or
- denies he killed him.

Would the statement at the deposition still be inadmissible despite the differences? What about for impeachment purposes?

Not only does AB-120 apply to healthcare providers, it expands the individuals covered by the bill: "people working at an adult family home as defined in s. 50.01 (1), and a residential care apartment complex, as defined in s. 50.01 (6d)." This expansion covers a whole new crop of individuals who are not licensed healthcare providers and do work not in any type of healthcare setting. The addition of this language means people who work in Community-based Residential Facilities or adult group homes would now get the same protection as healthcare providers. It would protect workers if they admit fault, but not allow the workers to ever be held accountable. There is no justification for this expansion.

Enactment of AB-120 without deleting the words "fault," "liability," and "responsibility" would make it even more difficult than it already is for Wisconsin citizens injured by medical negligence to recover compensation.

Few people injured by medical negligence receive compensation for their injuries in Wisconsin. In 2012 only 140 people filed a request for mediation with the Medical Mediation Panels and then only 117 people filed a medical malpractice lawsuit in Wisconsin circuit courts. In the past ten years the number of medical malpractice cases filed in circuit courts have declined by 50 percent, from 238 to 117 cases.

The National Practitioner Data Bank, which was established by Congress in 1986, tracks all payments made to patients as a result of doctor negligence. Only 53 people in Wisconsin recovered compensation for injuries or death caused by doctor negligence in 2011. Wisconsin ranked 50th of the fifty states and the District of Columbia in the number of payments per population in 2011, 1:107,769.

In Wisconsin, we see firsthand the impact of fewer malpractice cases on the Injured Patients and Families Compensation Fund. It had assets on June 30, 2012, of *over $1 billion dollars* with a net equity (surplus) of $361,261,614. It reported a negative loss payment for fiscal year 2012, meaning the *Fund recovered more money than it paid out.*[1] In fact the assets of the Fund increased almost $94 million the last fiscal year and it is expected that the surplus will increase by a similar amount this year. The Fund currently has *$202 million more in assets than it has paid to all medical negligence victims since the Fund began in 1975.*

[1] The IPFCF paid out $3.4 million in three claims in fiscal year 2012, but two people with future medical claims died and the money from those "accounts" reverted to the Fund for a loss of ($524,000). In other words a gain of that sum of money to the Fund.

From 1991 through 2011, the medical professional liability insurers in Wisconsin had, by far, the lowest loss ratio of the fifty states and the District of Columbia, 49 percent. For every dollar of premium collected, the Wisconsin insurers paid 49 cents in claims and defense costs. The national average was 83 percent.

Wisconsin patients are entitled to both health care provider responsibility and accountability. The proposed bill lets healthcare providers and other non-healthcare workers, admit responsibility for causing an injury, but takes away the ability to hold them accountable for the avoidable harm they caused. The Legislature should focus on protecting patients from needless harm and encourage accountability. As written, AB-120 should be opposed.

WAJ supports legislation where oral statements, writings and benevolent gestures of regret, sympathy or benevolence because of an unanticipated outcome in a healthcare setting are inadmissible. However, admissions of "fault," "liability" or "responsibility" should not be included in this legislation. Wisconsin should remain with the majority of states that let statements of "fault," "liability" or "responsibility" continue to be admissible.

Thank you for your time.

WISCONSIN ASSOCIATION *for* JUSTICE

I Am Sorry Legislation

States with I Am Sorry legislation where saying "It was my fault," or "I am liable," or "It was my responsibility" **CANNOT** be used in a medical malpractice case	States with I Am Sorry legislation where saying "It was my fault," or "I am liable," or "It was my responsibility" **CAN** be used in a medical malpractice case	States without I Am Sorry legislation; general rules of evidence apply and "It was my fault," or "I am liable," or "It was my responsibility" **CAN** be used in a medical malpractice case
1. Arizona 2. Colorado 3. Connecticut 4. Georgia 5. Massachusetts 6. South Carolina	1. California 2. Delaware 3. Florida 4. Hawaii 5. Idaho 6. Indiana 7. Iowa 8. Louisiana 9. Maine 10. Maryland 11. Michigan 12. Missouri 13. Montana 14. Nebraska 15. New Hampshire 16. North Carolina 17. North Dakota 18. Ohio 19. Oklahoma 20. Oregon 21. South Dakota 22. Tennessee 23. Texas 24. Utah 25. Vermont 26. Virginia 27. Washington 28. West Virginia 29. Wyoming	1. Alabama 2. Alaska 3. Arkansas 4. Illinois 5. Kansas 6. Kentucky 7. Minnesota 8. Mississippi 9. Nevada 10. New Jersey 11. New Mexico 12. New York 13. Pennsylvania 14. Rhode Island 15. Wisconsin

Wisconsin Chapter
American College of
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TO: **Rep. Erik Severson, MD, Chair**
Members, Assembly Committee on Health

DATE: **May 29, 2013**

RE: **Support for Assembly Bill 120 – Physician Condolences**

The Wisconsin Chapter, American College of Emergency Physicians asks for your support for Assembly Bill 120 – "physician condolences" legislation.

When first considered by the Wisconsin Legislature a few sessions ago, this legislation was a relatively novel concept that few states had adopted. Despite nearly enacting this valuable legislation twice, Wisconsin now finds itself part of a small and shrinking minority of states who have not.

From an early age, we teach our children that apologizing and expressing condolences to others is a way to show respect, kindness, empathy and regret. Sometimes we say it as an apology for saying something mean, or spilling our milk or making an error. Often, saying "I'm sorry" is simply an expression of condolence for a sad or unfortunate event in someone else's life. Learning to offer condolences or say, "I'm sorry" rarely come easy for children, yet as parents we persevere with frequent hints and reminders until this most basic of decent human interactions becomes a part of their social repertoire.

As much as we would like to believe it is, medicine is not an exact science. Unexpected events happen, unpredictable complications arise, and bad outcomes occur – none of them means a physician was negligent. When bad things occur, patients want their physician to care, to be compassionate, and to tell them as much as they know about what happened. It is something basic decency dictates, and it is something we strive to teach our children. But it is something often prevented by the fear of litigation in the practice of medicine as physicians measure their words in an effort to follow their legal advisor's advice, or simply avoid altogether. This alone often leads patients to litigate even where there was no negligence.

AB 120 would protect this compassionate and respectful communication between physicians and patients by making statements of "apology, benevolence, compassion, condolence, fault, liability, remorse, responsibility or sympathy" to a patient inadmissible in a civil lawsuit. These protections are purposely broad because research now shows that narrower legislation (for example, protecting only statements of apology or condolence) actually discourages the communication it seeks to inspire, as physicians and their legal advisors further parse words in order to avoid crossing arbitrary or uncertain legal boundaries created by incomplete legislation. (*See, Health Affairs, "The Flaws in State 'Apology' and 'Disclosure' Laws Dilute Their Intended Impact on Malpractice Suits", September 2010.*)

It is time for Wisconsin to finally join this growing majority of states – please support AB 120.

WISCONSIN HOSPITAL ASSOCIATION, INC.

Date: May 29, 2013

To: Members of the Assembly Health Committee – Representative Erik Severson, Chair

From: Dr. Charles Shabino – Chief Medical Officer, Wisconsin Hospital Association

Re: Support for AB 120, Relating to inadmissibility of a statement of apology or condolence by a health care provider

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The Wisconsin Hospital Association (WHA) asks you to support Assembly Bill (AB) 120, which would allow health care providers to express an apology, condolence, or sympathy to a patient or patient's family without those statements being used as evidence against the provider.

While simple, this bill has a very powerful objective. When a health care outcome is not what was planned or expected, when an error has occurred, or when any other combination of events has led a patient or patient's family to be deeply disappointed by the health care they received, a heartfelt statement of concern or apology not only is often appropriate, but also can be very helpful.

An expedited healing process begins when both practical and emotional feelings are taken into consideration. A patient and often the patient's family want to know that the outcome is being addressed and that all those involved empathize with their situation. Unfortunately, statements expressing apology or condolence are often not made because of the provider's concern that these words will be used against the provider in a medical malpractice action.

This bill would encourage open conversation among providers, patients, and families, encouraging a better resolution of unfortunate events. Statements of concern by all providers involved in patient care can allow the patient, family, and provider to move toward solution and resolution. These positive outcomes are more difficult to achieve when there are barriers to good communication.

WHA believes that open and honest communication between providers and their patients results in the best health care environment and adds greatly to the provider/patient relationship. WHA urges you to support AB 120.

About WHA

The Wisconsin Hospital Association (WHA) represents over 140 hospitals and health systems in Wisconsin, nearly all of which are not-for-profit. WHA's mission is advocating for policies that enable our members to provide high quality, affordable and accessible health care services that result in healthier communities. WHA takes a leadership role in fostering a climate of collaboration, respect, and interdependency between and among various stakeholders that affect health care.

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