

I'M NOT SORRY FOR NOT SAYING I'M SORRY!

By: Steven I. Kern, Esq.*

Last month I wrote a column for Medical Economics entitled “Think Twice Before Saying ‘I’m sorry’ to a Patient”, Jan. 9, 2009. The column warned physicians that admitting error could result in legal entanglement and economic loss and that existing laws expose the physician who seeks to relieve his or her conscience following a medical error.

The column generated significant comment, ranging from outrage to applause. For example, comments from two physicians from the Department of Pediatrics at the University of Utah School of Medicine complained about my observation that disclosing errors and expressing apology may be morally correct, but there is little reward for contrition. According to them, I failed to appreciate that the apology might help avoid litigation and result in quick resolution of disputes over medical errors.

They’re wrong. My concern is that expressing apology will result in quick resolution of disputes by making it far easier for a plaintiff to bring a suit, and far more difficult to defend against it. Since the vast majority of medical errors do not result in any claim, by identifying the error and admitting fault, the likelihood of a claim being made increases dramatically.

A response from the President of Law & Medicine – an M.D., J.D., was more sympathetic to my position. He wanted to emphasize that the only published study of the value of apology comes from the VA Hospital in Lexington, Kentucky – an institution protected by the Federal Tort Claims Act which takes care of a lot of old World War II Veterans who are neither litigious nor big money plaintiffs. Yet, even among this population, the number of claims actually increased under an apology approach, though the total cost of claims slightly decreased due to reduced litigation expenses.

In another response, psychologists from the University of Utah argue that incident-reporting systems reduce errors in other industries, such as the airline industry. That is, no doubt, true. But an incident reporting system that exposes the reporter to civil liability, professional disciplinary action, and monetary ruin can’t succeed. Unlike an airline crash, where everyone knows that something went wrong, when a medical error occurs, most often, it’s not known. That may explain why only a tiny percentage of cases involving medical error currently result in claims, while just about everyone injured in an airline crash sues. If liability is not only conceded, but the patient is affirmatively advised of the liability, common sense dictates that the numbers of cases brought is likely to increase dramatically. Saying I’m sorry doesn’t stop crash victims from suing airlines and near-misses don’t result in claims against airlines.

Unfortunately, existing “apology laws” simply fail, for the most part, to protect physicians from their own apologies. While some of these laws may limit exposure, few, if any, go far enough. Even those that limit the admissibility of apologies in future civil litigation rarely limit their use in disciplinary cases or criminal cases.

Until society is ready to place systemic improvement firmly ahead of monetary compensation and assessment of individual blame, patchwork approaches will not work. While it is difficult to argue that patients should not have a right to know what went wrong, again, human nature tells us that physicians are simply not going to admit wrongdoing when the potential consequences to them are grave.

For more information on the risks and benefits of apology, visit www.Modernmedicine.com and click on my blog.

*Steven I. Kern is a principal in the healthcare law firm of Kern Augustine Conroy & Schoppmann, P.C., with offices in New Jersey, New York, Pennsylvania and affiliates in Florida and Illinois. He is a nationally recognized expert on Healthcare law, an Editorial Consultant to Medical Economics Magazine and ModernMedicine.Com, a Member of the Editorial Board of New Jersey Lawyer, and former New Jersey Deputy Attorney General assigned to the State Board of Medical Examiners.