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# STRATEGIC APOLOGIES IN MEDICAL MALPRACTICE MEDIATION

Brittany Norman\*

## I. INTRODUCTION

Mistakes happen, even in a field as serious and careful as medicine. As a result, some patients are left with unexpected results from their medical procedures such as misdiagnosis, brain injuries, medication errors, anesthesia errors, or surgery errors.<sup>1</sup> In extreme cases, these mistakes result in death.<sup>2</sup> Medical errors result in the death of around 200,000 patients each year in the United States.<sup>3</sup> Hospitals are required to inform patients of these medical errors.<sup>4</sup> However, the traditional culture of medicine is one in which medical errors are commonly not disclosed to patients by doctors and hospitals, due in part to the hospital's fear of malpractice litigation.<sup>5</sup>

Once a patient is informed of any medical errors, their case is moved from the medical realm to the legal realm.<sup>6</sup> At this point, the attorneys are called in and the focus moves to “limiting information flow, stating one’s case, making the better argument, and proving the other party wrong.”<sup>7</sup> This adversarial environment does not help the patient heal and abandons the core values of the medical field.<sup>8</sup>

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<sup>1</sup> Kathleen Michon, *Medical Malpractice: Common Errors by Doctors and Hospitals*, NOLO (last accessed January 26, 2019), <https://www.nolo.com/legal-encyclopedia/medical-malpractice-common-errors-doctors-hospitals-32289.html>.

<sup>2</sup> Demetrius Cheeks, *10 Things You Want to Know About Medical Malpractice*, FORBES (May 16, 2013, 9:23 AM), <https://www.forbes.com/sites/learnvest/2013/05/16/10-things-you-want-to-know-about-medical-malpractice/#70021eba416b>.

<sup>3</sup> *Id.*

<sup>4</sup> Deborah Josefron, *Hospitals Must Inform Patients of Errors*, NCBI (July 7, 2001), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1120704/>.

<sup>5</sup> *Id.*

<sup>6</sup> Jonathan Todres, *Article: Toward Healing and Restoration for All: Reframing Medical Malpractice Reform*, 39 CONN. L. REV. 667, 669 (2006).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* The core values of the healthcare system were an emphasis on care and healing. *Id.* Physicians have long been admired throughout history and societies held their powers of healing in high regard. *Id.* at 673. The

After a patient discovers the mistake, the next steps for them and their family vary. Some patients may decide to forgive and forget with no remedial measures necessary<sup>9</sup> and others may expect some form of compensation.<sup>10</sup> Those that expect compensation may accept the remedy the hospital offers, while other patients may fight for a higher payment and ultimately file a medical malpractice lawsuit.<sup>11</sup> For those unsatisfied with the offer, a medical malpractice lawsuit ensues, which means a lengthy and costly legal battle between the hospital and the patient in an attempt to make the injured patient feel whole again.

One of the most important steps to make an injured patient feel whole again is for the doctor to apologize to the patient for what happened.<sup>12</sup> However, an apology has the potential to make the hospital or medical professional vulnerable to potential liability issues.<sup>13</sup> To avoid this risk of liability, hospitals' legal teams have attempted to employ these apologies in the confidential setting of mediation or in ways that do not expose them to liability.<sup>14</sup> However, these apologies fail to satisfy the needs of the injured patient.<sup>15</sup>

The apologies' inability to satisfy patients has come to the attention of several hospitals.<sup>16</sup> To satisfy the needs of the patients, the hospitals have employed a variety of programs that identify mistakes early and talk openly with the patient and their family throughout the process.<sup>17</sup> The doctors and medical professionals are

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method of health care delivery has drastically changed but medicine is still meant to be an enterprise dedicated to helping those who cannot help themselves. *Id.* at 673–74.

<sup>9</sup> See generally Rachel Zimmerman, *Doctors' New Tool To Fight Lawsuits: Saying 'I'm Sorry'*, THE WALL STREET J. (May 18, 2004 11:59 PM), <https://www.wsj.com/articles/SB108482777884713711>.

<sup>10</sup> Oma Rabinovich-Einy, *See You Out of Court? The Role of ADR in Health Care: Escaping the Shadow of Malpractice Law*, 74 LAW & CONTEMP. PROB. 241, 268 (2011).

<sup>11</sup> *Id.*

<sup>12</sup> See generally Zimmerman, *supra* note 9.

<sup>13</sup> Jennifer K. Robbennolt, *Apologies and Medical Error*, NCBI (October 30, 2008), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2628492/>.

<sup>14</sup> Jeff Kichaven, *Calif. Nearer to Needed Mediation Reform*, LAW360 (April 10, 2017); Robbennolt, *supra* note 13.

<sup>15</sup> Claire Truesdale, *Article: Apology Accepted: How the Apology Act Reveals the Law's Deference to the Power of Apologetic Discourse*, 17 APPEAL 83 (2012).

<sup>16</sup> See John Tozzi, *Making it Possible for Hospitals to be Honest About Medical Errors*, INSURANCE J. (June 10, 2016), <https://www.insurancejournal.com/news/national/2016/06/10/416553.htm>. (discussing the University of Michigan Health System's Communication and Optimal Resolution); Steve S. Kraman, *John M. Eisenberg Patient Safety Awards: Advocacy: The Lexington Veterans Affairs Medical Center*, 28 JOINT COMMISSION J. QUALITY IMPROVEMENT 646 (2002) (discussing the proactive program at Veterans Affairs Medical Center in Lexington Kentucky); Robert Leflar, *Beyond Compensation: Personal Injury Compensation Systems in Japan: Values Advanced and Values Undermined*, 15 HAWAII L. REV. 742, 745 (1993) (discussing Japan's internal communication system); Frances Miller, *Medical Malpractice Litigation: Do the British Have a Better Remedy?*, 11 AM. J. L. & MED. 433, 433-35 (1986) (discussing Great Britain's Ombudsman program).

<sup>17</sup> See, e.g., Miller, *supra* note 16; Leflar, *supra* note 16; Kraman, *supra* note 16; Tozzi, *supra* note 16.

allowed to apologize and show remorse for their mistake and the injury their mistake caused.<sup>18</sup> Ultimately, these methods have resulted in a lower amount of money paid out in settlements and fewer medical malpractice lawsuits filed.<sup>19</sup>

## II. MEDICAL MALPRACTICE

The main concern of medical professionals should be patient safety, however, “the proliferation of malpractice claims has dramatically increased the costs of medical care and has adversely affected its quality due to the emergence of ‘defensive medicine’ and an ensuing ‘brain drain’ from certain medical specialties.”<sup>20</sup> Thus, malpractice has been the “single most important factor shaping the medico-legal arena.”<sup>21</sup>

These medical malpractice cases come as a result of a medical profession that failed to provide the proper medical treatment and harmed a patient.<sup>22</sup> The medical professional’s failure to provide proper treatment must meet the standard for negligence to be considered medical malpractice.<sup>23</sup> These medical malpractice suits cause a great amount of stress on the doctors, nurses, and other medical professionals in the medical field.<sup>24</sup> The insurance costs to protect medical professionals in medical malpractice are one more aspect that make this already stressful job even more stressful.<sup>25</sup> As a result, many medical professionals aim for a resolution through an alternate dispute resolution method such as a settlement or mediation.<sup>26</sup>

The rise of defensive medicine has come as a result of doctors’ fear of medical malpractice claims and refers to medical professionals being guided by their fear of a wrong decision, which could result in future liability.<sup>27</sup> This diminishes the quality of care provided by medical professionals and has caused doctors to not take responsibility or reach decisions on their own.<sup>28</sup> The added costs and stressors that result from medical malpractice suits have scared potential doctors away from the medical field, which results in the medical profession’s brain drain.<sup>29</sup> This brain

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<sup>18</sup> See e.g. *id.*

<sup>19</sup> See e.g. *id.*

<sup>20</sup> Rabinovich-Einy, *supra* note 10, at 241.

<sup>21</sup> *Id.*

<sup>22</sup> Michon, *supra* note 1.

<sup>23</sup> *Id.*

<sup>24</sup> Cheeks, *supra* note 2.

<sup>25</sup> *Id.*

<sup>26</sup> Rabinovich-Einy, *supra* note 10, at 242.

<sup>27</sup> *Id.* at 250.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 247.

drain, in addition to the availability of medical information on the internet, has resulted in more patients' refusal to trust doctors and causes patients to contest the doctor's medical decisions.<sup>30</sup> This change in the doctor-patient relationship, as well as the empowerment felt by the patients, results in an increase in medical malpractice claims.<sup>31</sup>

### III. MEDIATION

The many benefits of mediation have become more widely known, and as a result, more people turn to mediation to resolve their conflicts.<sup>32</sup> These benefits include confidentiality, timeliness, the focus on the relationship between the parties, and that the process is voluntary.<sup>33</sup> The proliferation of mediation has meshed well with several medical malpractice cases.

Medical malpractice cases have qualities that make them a particularly well-fit candidate for mediation. For example, medical malpractice cases tend to be very emotionally charged.<sup>34</sup> Emotionally charged cases are often boiled down to numbers once they are in a courtroom, which fail to satisfy the emotional needs of the injured party.<sup>35</sup> Mediation offers a chance for the parties to discuss their feelings and interests to potentially satisfy a person's need for recognition in addition to a settlement offer.<sup>36</sup>

To avoid the issue of liability and still fulfill the victim's need to receive an apology, a wrongdoer may consider mediation.<sup>37</sup> Mediation is an excellent candidate for this due to mediation's confidential nature.<sup>38</sup> For example, mediation in California is governed by the "absolute confidentiality" evidence rule.<sup>39</sup> This rule states that anything said for the purpose of the mediation, any writing prepared for the purpose of the mediation, and any communications or settlement discussions between the parties in the course of the mediation shall remain confidential.<sup>40</sup> This advantage of confidentiality leads some to believe that a confidential mediation is the

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 248.

<sup>32</sup> Catherine Regis & Jean Poitras, *Healthcare Mediation and the Need for Apologies*, 18 HEALTH L.J. 31, 33 (2010).

<sup>33</sup> Kansas State University, *What are the Advantages of Mediation?*, KAN. ST. U. (May 25, 2018), <https://www.k-state.edu/hcs/work-life/employee-relations/dispute-resolution/mediation/advantages.html>.

<sup>34</sup> Regis & Poitras, *supra* note 32, at 34.

<sup>35</sup> Truesdale, *supra* note 15, at 88.

<sup>36</sup> Regis & Poitras, *supra* note 32, at 35.

<sup>37</sup> Jeff Kichaven, *Calif. Nearer to Needed Mediation Reform*, LAW360 (April 10, 2017).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

ideal place to make an apology because these apologies are protected by federal law.<sup>41</sup>

#### IV. RISK OF AN APOLOGY

“Victims desire an apology.”<sup>42</sup> When a patient is injured as a result of medical malpractice, they want to hear the hospital admit it was the hospital’s fault and explain what it will do in the future to prevent it from happening again.<sup>43</sup> Unfortunately, these apologies come with risks.<sup>44</sup> Apologies are considered a statement against interest because taking the blame for something bad that happened would not be in the best interest of the hospital.<sup>45</sup> As statements against interest, these apologies can be introduced at trial as evidence of liability.<sup>46</sup> Thus, there is a resistance to apologies when there is a pending legal battle.<sup>47</sup>

How we approach an apology changes as we age.<sup>48</sup> When we are young, we are encouraged to apologize because it is the right thing to do.<sup>49</sup> However, as an adult, apologies are discouraged, especially by attorneys, because it implies fault or liability.<sup>50</sup> For example, if a child breaks a neighbor’s window with a baseball, we encourage them to apologize and take responsibility for their mistake.<sup>51</sup> However, if a landscaper was to have a post collapse and flood the neighbor’s house, a lawyer may advise them not to fix anything or apologize.<sup>52</sup> This is a reaction to the fear that if someone provides an apology or remedy to the problem, this could imply that the landscaper was to blame for the flood as opposed to another possible explanation.<sup>53</sup> But if this landscaper does not fix the problem, this causes the damage to worsen.<sup>54</sup> Similarly, withholding an apology can be the main reason that a conflict escalates.<sup>55</sup>

In medical malpractice cases, the doctor may want to recognize the mistake and apologize to the patient, but the legal team has instructed the doctors not to

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<sup>41</sup> Nick Smith, *Just Apologies: An Overview of the Philosophical Issues*, 13 PEPP. DISP. RESOL. L.J. 35, 92 (2013).

<sup>42</sup> Erin Ann O’Hara & Douglas Yarn, *Note & Comment, On Apology and Consilience*, 77 WASH. L. REV. 1121, 1122 (2002).

<sup>43</sup> Regis & Poitras, *supra* note 32, at 35–36.

<sup>44</sup> *Id.* at 40–41.

<sup>45</sup> O’Hara & Yarn, *supra* note 42, at 1122.

<sup>46</sup> *Id.*

<sup>47</sup> Regis & Poitras, *supra* note 32, at 42–43.

<sup>48</sup> Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009, 1010 (1999).

<sup>49</sup> *Id.* at 1009–10.

<sup>50</sup> *Id.* at 1010.

<sup>51</sup> *Id.* at 1009.

<sup>52</sup> *Id.* at 1009–10.

<sup>53</sup> *Id.* at 1010.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

contact the patient.<sup>56</sup> If the doctor refuses to recognize a mistake or even suddenly acts coldly towards a patient after building a relationship of care, this can be the trigger that causes the patient to become angry and feel deserving of an explanation for the medical mistake made.<sup>57</sup> Similar to the sitting water worsening the neighbor's porch, the feelings an injured patient has from the lack of the apology makes them feel entitled to allow negative emotions to fester.<sup>58</sup> Ultimately, this can cause the patient to demand a higher settlement from the hospital; only worsening the problem the legal team was hoping to avoid.<sup>59</sup>

An apology can help avoid litigation; whereas, no apology can cause a victim to become more irritated and spiteful.<sup>60</sup> There are several examples of people who claim they would not have felt the need to sue or would have dropped the case if the offender offered an apology, but the offender's need to protect themselves from liability was what resulted in the lawsuit.<sup>61</sup> An apology offers several benefits to both the injured and offending party, such as the possibility of forgiveness and providing the injured party with the explanation they desire.<sup>62</sup> However, the risks that come with the apology—opening yourself up to liability, voiding insurance coverage, and the feeling of vulnerability—are often deemed to outweigh those benefits.<sup>63</sup> Thus, lawyers instruct their clients to not apologize.<sup>64</sup>

## V. STRATEGIC APOLOGIES

There are times that legal and medical teams will decide the benefits of an apology outweigh the risks.<sup>65</sup> If a party decides it is in their best interest to apologize, either for legal or ethical reasons, it is important that the party knows how to carry out an apology effectively.<sup>66</sup> For example, saying "I am sorry that what I did upset you" will not satisfy the injured party.<sup>67</sup> This puts the blame on the injured

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<sup>56</sup> *Id.* at 1011.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* 1009-10.

<sup>59</sup> *Id.* at 1020-21.

<sup>60</sup> O'Hara & Yam, *supra* note 42, at 1124.

<sup>61</sup> Cohen, *supra* note 48, at 1011.

<sup>62</sup> Alan Williams, *The Cure for What Ails: A Realistic Remedy for the Medical Malpractice "Crisis"*, 23 STAN. L. & POL'Y REV. 477, 508 (2012).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> Cohen, *supra* note 48, at 1018.

<sup>67</sup> *See generally* Truesdale, *supra* note 15.

party and how they feel, as opposed to recognition of the offending party's mistake.<sup>68</sup> If instead the offending party had said "I am sorry that I said those mean things about you," the offending party would take responsibility for what they did and recognize that they were wrong.<sup>69</sup> An apology is ultimately only effective if the apology meets the needs of the receiver.<sup>70</sup> To resolve the feelings of anger and pain the injured party may feel and work towards reconciliation, the apology must be authentic.<sup>71</sup> An authentic apology has two fundamental requirements: being sorry for some harm caused to another and saying so.<sup>72</sup>

There are proponents of safe apologies that avoid these admissions of liability.<sup>73</sup> One example of a possible safe apology is for the offending party to give expressions of sympathy as opposed to an admission that they were the party that caused the injury.<sup>74</sup> However, this apology is akin to the "I am sorry that what I did upset you" apology and fails to satisfy the needs of the receiver—thus being an ineffective apology.<sup>75</sup>

Ultimately, many researchers of apologies have found that the best avenue for a "safe" apology is through mediation because of its protection of confidentiality, which would allow the offending party to withdraw their apology if the mediation does not resolve the conflict.<sup>76</sup> However, these confidential apologies also run the risk of being unsatisfactory because they come from a place of strategy as opposed to empathy.<sup>77</sup>

## VI. ETHICAL CONCERNS WITH STRATEGIC APOLOGIES

"[W]hat makes an apology work is the exchange of shame and power between the offender and the offended."<sup>78</sup> The lack of this exchange is ultimately one of the main issues with strategic apologies.<sup>79</sup> There is no exchange of power because the apologizing party knows they are able to protect themselves, and the apology does not make them any more vulnerable than they were before the

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<sup>68</sup> See generally *id.*

<sup>69</sup> See *id.*, at 91.

<sup>70</sup> Deborah Levi, *The Role of Apology in Mediation*, 72 N.Y.U. L. REV. 1165, 1166 (1997).

<sup>71</sup> Donna Pavlick, *Apology and Mediation; The Horse and Carriage of the Twenty-First Century*, 18 OHIO ST. J. DISP. RESOL. 829, 835 (2003).

<sup>72</sup> NICHOLAS TAVUCHIS, MENS CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION 22 (1991).

<sup>73</sup> Jennifer K. Robbenolt, *Article: Attorneys, Apologies, and Settlement Negotiation*, 13 HARV. NEGOT. L. REV. 349, 357 (2008).

<sup>74</sup> Cohen, *supra* note 48, at 1029-30.

<sup>75</sup> See Truesdale, *supra* note 15, at 92.

<sup>76</sup> Cohen, *supra* note 48, at 1032.

<sup>77</sup> Truesdale, *supra* note 15, at 92.

<sup>78</sup> Aaron Lazare, *Go Ahead, Say You're Sorry*, PSYCHOL. TODAY (Jan. 1, 1995), <https://www.psychologytoday.com/us/articles/199501/go-ahead-say-youre-sorry>.

<sup>79</sup> See generally Lazare, *supra* note 78.



apology.<sup>80</sup> An apology cannot be effective without this balancing of power among the parties, which would empower the injured party as a result of the offending party recognizing their wrongdoings.<sup>81</sup>

These strategic apologies falsely convey to the injured party that the offending party is vulnerable and truly feels shame for the injury they caused.<sup>82</sup> Thus, the offending party may convince the injured party that the exchange is authentic.<sup>83</sup> This would render the apology effective.<sup>84</sup> This apologetic display by the offending party raises an ethical issue; an apology is only a strategy to get the other party to believe the sentiment in an attempt to lower the amount the party will accept.<sup>85</sup>

Strategic apologies in medical malpractice mediations will frustrate many patients who feel they have been wronged.<sup>86</sup> As the case moves to the mediation stage, the hospitals have commonly made settlement offers that the patient feels are unacceptable, and thus does not accept.<sup>87</sup> These patients feel that they are owed more money than the hospital offered and that they deserve a just compensation to adequately provide for the troubles this injury caused them.<sup>88</sup> At this point, the hospital has refused to apologize or admit any amount of fault or guilt throughout the legal process and during settlement discussions.<sup>89</sup>

Now imagine if after all this, the hospital apologizes under the guise of mediation. They may bring in the doctor or a hospital official who breaks down in tears, empathizes with the patient, and then tells the patient how sorry they are and about all these measures they are putting into place to prevent this in the future.<sup>90</sup> The patient has felt that it was the hospital's fault the entire time and has wanted the hospital to put in place measures to prevent any repeat of the mistake.<sup>91</sup> Thus, hearing this from a hospital official can convince the patients that the hospital is being truthful and validates their feelings.

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<sup>80</sup> *Id.*

<sup>81</sup> Carl D. Schneider, "I'm Sorry": *The Power of Apology in Mediation*, MEDIATE.COM (Oct. 1999), <https://www.mediate.com/articles/apology.cfm>.

<sup>82</sup> *Id.*

<sup>83</sup> See generally Truesdale, *supra* note 15.

<sup>84</sup> See generally *id.*

<sup>85</sup> See generally *id.*

<sup>86</sup> See generally Matthew E. Brown, *Redefining the Physician Selection Process and Rewriting Medical Malpractice Settlement Disclosure Webpages*, 31 AM. J. L. & MED. 479 (2005).

<sup>87</sup> See generally *id.*

<sup>88</sup> Todres, *supra* note 6, at 669.

<sup>89</sup> Williams, *supra* note 62.

<sup>90</sup> Robbennolt, *supra* note 13.

<sup>91</sup> *Id.*

For some patients, this may be exactly what they needed to hear, so they settle for the amount the hospital has now offered.<sup>92</sup> An apology is effective if it gives the receiver what he or she needs.<sup>93</sup> If a chance to see the hospital admit they were wrong and for the hospital to offer to fix it for future patients is all the patient needed, then this kind of an apology will be enough for the patient.<sup>94</sup>

However, other patients may hear the strategic apology and still feel something is missing.<sup>95</sup> Then, when the patient again refuses to accept the settlement agreement, the patient would be informed that the hospital no longer admits fault and is not sorry for what happened, which completely invalidates what they had said before.<sup>96</sup> A patient who already felt wronged will once again be left unsatisfied by the same hospital that injured them.<sup>97</sup> Yet, a process that could create this outcome is still considered a viable option for a hospital.<sup>98</sup>

These strategic apologies are a commonly used tool in mediation.<sup>99</sup> This means that attorneys and mediators present may expect it and know the apology is insincere because it is only a tactic used in hopes to influence the other party to accept a lower settlement offer than they would without the apology.<sup>100</sup> The patient's attorney may hear the apology and tell their client that it is a strategic apology—suggesting that the hospital only apologized in hopes of the patient accepting a lower settlement.<sup>101</sup> This creates a higher risk for strategic apologies because even if the patient believes the apology and will settle for less, the patient's attorney may inform them that this is not the case.<sup>102</sup>

## VI. HOW TO MAKE A SATISFACTORY APOLOGY

What is required for an apology to be effective depends on the receiver of the apology. The most common elements required for an apology also differ between professionals. Some psychologists have identified that an apology includes four elements: remorse, responsibility, resolution, and reparation.<sup>103</sup> Psychologists

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<sup>92</sup> *Id.*

<sup>93</sup> *See generally* Truesdale, *supra* note 15.

<sup>94</sup> Truesdale, *supra* note 15.

<sup>95</sup> Robbenolt, *supra* note 73, at 361-62.

<sup>96</sup> *See generally* Robbenolt, *supra* note 73.

<sup>97</sup> Robbenolt, *supra* note 73, at 378.

<sup>98</sup> Jeff Kivachen, *Apology in Mediation: Sorry to Say, It's Much Overrated*, *MEDIATE.COM* (Sept. 2005), <https://www.mediate.com/articles/kivachenJ2.cfm>.

<sup>99</sup> Kivachen, *supra* note 98.

<sup>100</sup> *See generally* Kivachen, *supra* note 98.

<sup>101</sup> *See generally* Kivachen, *supra* note 98.

<sup>102</sup> *See generally* Kivachen, *supra* note 98.

<sup>103</sup> Steven J. Scher & John M. Darley, *How Effective Are the Things People Say to Apologize? Effects of the Realization of the Apology Speech Act*, 26 *J. PSYCHOLINGUISTIC RES.* 127 (1997).

claim an apology consists of remorse and an admission of responsibility for the hurtful act.<sup>104</sup> To admit responsibility for the hurtful act, the apologizer must name themselves as the person who caused the act that injured the receiver and clearly describe the act.<sup>105</sup> A mediator describes the elements of an apology as the speaker acknowledges his or her role in inflicting the injury and displays emotions such as remorse or regret.<sup>106</sup> The mediator's definition of an apology requires the speaker to be open to vulnerability and to not offer an excuse for his or her behavior, and that the receiver have the power to refuse the apology.<sup>107</sup>

For the purpose of this paper, apology will be defined as a common combination of the above definitions: accepting responsibility for the specific act that caused the injury, acknowledging the injury that occurred as a result of that specific act, and expressing remorse or regret.<sup>108</sup> This apology cannot be paired with a defense or excuse for the actions and thus would also cause the speaker to become vulnerable as the receiver could choose to not accept the apology.<sup>109</sup>

Apologies that do not have these elements will fail to satisfy the receiver of the apology and the receiver will be left feeling as if they are owed more.<sup>110</sup> Some examples of apologies that would not satisfy the receiver include expressions of sympathy that fail to accept wrongdoing and apologies followed by an excuse that come across as the speaker trying to defend themselves instead of empathize with the injured person.

The first element, accepting responsibility for the specific act that caused the injury, is the main reason that medical professionals avoid apologies.<sup>111</sup> The strategic apologies that attempt to apologize without accepting responsibility will fail to satisfy this element.<sup>112</sup> Therefore, the receiver of the apology will not be satisfied with these apologies. Another way medical professionals avoid responsibility for the act is an apology in mediation.<sup>113</sup> This apology appears to accept responsibility and

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<sup>104</sup> Janet Bavelas, *An Analysis of Formal Apologies by Canadian Churches to First Nations*, CTR. FOR STUD. RELIGION AND SOC'Y U. VICT. 1, 3 (July 2004).

<sup>105</sup> *Id.*

<sup>106</sup> Carl D. Schneider, *What it Means to Be Sorry: The Power of Apology in Mediation*, 17 MEDIATION Q. 265, 266 (2000).

<sup>107</sup> *Id.* at 267.

<sup>108</sup> Claire Truesdale, *Apology Accepted: How the Apology Act Reveals the Law's Deference to the Power of Apologetic Discourse*, 17 APPEAL 83, 84 (2012).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Robbenolt, *supra* note 13, at 380.

<sup>112</sup> Truesdale, *supra* note 108, at 84.

<sup>113</sup> *See generally* Kichaven, *supra* note 98.

convinces the receiver that the medical professional has accepted responsibility.<sup>114</sup> However, with the risks of attorneys or patients being informed about the strategy of this type of apology or the mediation not succeeding and the hospital revoking the apologies, there is a high possibility this apology will not be satisfactory for the injured patient.<sup>115</sup>

The second element, acknowledging the injury that occurred, is something that hospitals are required to do to a certain extent.<sup>116</sup> Hospitals are required to disclose when something goes wrong.<sup>117</sup> However, some hospitals avoid this in an attempt to push the mistakes under the rug in hopes that the injured patient does not notice or at least does not attempt to file a complaint or sue.<sup>118</sup> In mediations and strategic apologies, it is common for the hospital's attorneys to downplay the injury caused by the act and attempt to draw a line as to where the hospital's liability ends.<sup>119</sup>

The main way to successfully acknowledge the injury caused by the medical malpractice is to address the issue as soon as it is discovered.<sup>120</sup> Once a hospital discovers a mistake was made, the patient is switched over to the legal team and receives less information about their case in an attempt to limit the hospital's liability.<sup>121</sup> This causes the patient to feel pushed aside and as though the hospital has not acknowledged their injury.<sup>122</sup> However, if the hospital addressed the issue upon discovery, included the patient in the investigation process, and had an open conversation about policy changes and compensation, the injured patient would understand that the hospital recognizes the injury it caused.<sup>123</sup>

The third element is expressing remorse or regret.<sup>124</sup> To truly express remorse or regret, the feelings that motivate the apology have to be real.<sup>125</sup> There have been several studies done to show how to tell the difference between real and faked remorse.<sup>126</sup> Several of these studies show that an attempt to display fake remorse results in a display of a greater range of emotions than genuine remorse

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<sup>114</sup> See generally *id.*

<sup>115</sup> See generally Regis and Poitras, *supra* note 32, at 40-41.

<sup>116</sup> Josefson, *supra* note 4.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> See generally Todres, *supra* note 6, at 684 (noting that many doctors practice "defensive medicine" in order to reduce the risk of lawsuits and to limit liability).

<sup>120</sup> See generally *id.* at 685-86 (noting that one study in Britain found 37% of medical malpractice plaintiffs reported that they would not have filed their lawsuits if their doctors had immediately apologized).

<sup>121</sup> *Id.* at 670.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> See generally Oliver Diggelmann, *International Criminal Tribunals and Reconciliation: Reflections on the Role of Remorse and Apology*, J. INT'L CRIM. JUST. 1073 (2016).

<sup>125</sup> *Id.*

<sup>126</sup> See generally *id.*

does.<sup>127</sup> One of these studies shows that those who fake remorse leak positive feelings, such as happiness, or show anger, which does not coincide with regret.<sup>128</sup> A few of these studies have also found that a switch between positive and negative feelings quickly without a return to a neutral baseline is an indicator of faking remorse.<sup>129</sup>

Strategic apologies and apologies in mediation have the main purpose of a medical professional or hospital having less vulnerability to liability.<sup>130</sup> If the apologizer's motivation is rooted in protection from liability, it likely means that the apologizer is not truly feeling remorse, and is instead taking advantage of an opportunity to pay a lower settlement to the injured patient.<sup>131</sup> Therefore, in this attempt to display remorse or regret, apologizers may give off some of the signs of faking remorse.<sup>132</sup> If the receivers of the apology are aware of these signs, they will see through the apology.<sup>133</sup> Also, even if the injured patients cannot identify why they do not believe the speaker feels remorse or regret, they will still subconsciously pick up on these clues.<sup>134</sup>

To satisfactorily express remorse or regret, the medical professional and other hospital staff need to look at the apology as an opportunity to explain to the injured patient that they know they messed up and are sorry for their actions. The apology cannot be a strategic move in order to lower liability. However, "many physicians [do] express the desire to apologize to patients when an error has occurred."<sup>135</sup> If the hospitals and their legal teams allow medical professionals to communicate freely with the injured patient, medical professionals can express the remorse and regret they truly feel without worrying about a punishment from the hospital.<sup>136</sup>

An apology requires "an acceptance of responsibility for [the] specific act" that caused the injury, "acknowledgement of the injury" that occurred as a result of that specific act, "and an expression of remorse or regret."<sup>137</sup> For this to occur, a medical professional who makes a mistake must be allowed to accept responsibility

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<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *See generally id.*

<sup>135</sup> Robbennolt, *supra* note 13.

<sup>136</sup> *Id.*

<sup>137</sup> Truesdale, *supra* note 108, at 84.

as soon as it is discovered, inform the patient of the mistake, keep the patient informed and involved throughout the investigative process, and have an open and honest conversation with the injured patient about how the medical professional feels following the mistake.

## VII. PROCESSES IMPLEMENTED IN HOSPITALS

The method of apologizing under the guise of mediation ultimately pays dividends as many hospitals continue to use it.<sup>138</sup> However, the hospitals run the risk that these strategic apologies may only escalate issues further.<sup>139</sup> For example, escalation may occur when the hospital either takes the apology back or the patient does not believe the apology in the first place.<sup>140</sup> To combat these risks and still satisfy the needs of the patients, there are several methods implemented by hospitals in hopes of authentically satisfying the needs of both parties.<sup>141</sup>

Research has shown there is one significant variable that determines if patients injured by medical professionals are likely to file a claim.<sup>142</sup> This variable is whether the patient feels the doctor “maintained good communication and has not attempted to deceive the patient.”<sup>143</sup> Hospitals now recognize this and have put a variety of processes into place such as ombudsman programs, internal communication, proactive programs, and communication and resolution programs.<sup>144</sup> These programs give patients the apology they need and work to resolve the conflict in a way that promotes healing.

Great Britain, for example, has a less adversarial approach than the United States toward medical malpractice cases.<sup>145</sup> Claims in Great Britain are filed almost ten times less frequently.<sup>146</sup> In the 1980s, research found that the large majority of those injured in medical treatment in Great Britain wanted an honest explanation, an apology, and assurance that it would not happen again.<sup>147</sup> Financial compensation was viewed as a secondary matter, likely because they felt they could not get what they truly wanted from compensation.<sup>148</sup> In Great Britain, medical professionals understand that the patient wants to be a person first, not a number.<sup>149</sup> However, in

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<sup>138</sup> See, e.g., Miller, *supra* note 16; Kraman, *supra* note 16; Tozzi, *supra* note 16.

<sup>139</sup> Robbennolt, *supra* note 73, at 32-33.

<sup>140</sup> *Id.*

<sup>141</sup> Miller, *supra* note 16; Leflar, *supra* note 16; Kraman, *supra* note 16; Tozzi, *supra* note 16.

<sup>142</sup> Daniel Shuman, *Psychology of Compensation in Tort Law*, 43 KAN. L. REV. 39, 68 (1994).

<sup>143</sup> *Id.* at 68.

<sup>144</sup> Miller, *supra* note 16; Leflar, *supra* note 16; Kraman, *supra* note 16; Tozzi, *supra* note 16.

<sup>145</sup> Miller, *supra* note 16, at 433-35.

<sup>146</sup> *Id.* at 435.

<sup>147</sup> *Id.* at 434.

<sup>148</sup> *Id.* at 434, 437.

<sup>149</sup> See *id.* at 434.

the United States medical professionals hand the cases over to the legal teams that put the numbers first, resulting in the patient feeling disregarded.<sup>150</sup>

Great Britain implemented an ombudsman program to oversee complaints in regards to administrative issues.<sup>151</sup> Great Britain's ombudsman program "provides a free, relatively speedy, independent forum where aggrieved patients can receive an impartial hearing."<sup>152</sup> Great Britain has Medical Service Committees which evaluate complaints against general practitioners.<sup>153</sup> There is also a General Medical Council "which provides a forum for those patients with serious complaints about medical treatment to request professional sanctions against individual doctors."<sup>154</sup>

Thus, in Great Britain, if the issue was administrative, the patient goes to the Ombudsman; if the issue is with a general practitioner, the patient goes to the Medical Service Committees; or if the issue is a serious complaint against a practicing physician, the patient goes to the General Medical Council.<sup>155</sup> With so many potential avenues available when a patient runs into a problem with their medical services in Great Britain, a patient is able to receive a satisfactory amount of closure without having to result to the legal system.

Japanese culture puts an emphasis on the importance of apologies.<sup>156</sup> The medical malpractice law there is similar to that in the United States.<sup>157</sup> Yet, the rate of medical malpractice litigation in Japan is close to two percent of the medical malpractice litigation in the United States.<sup>158</sup> It is believed that there is an informal compensation system in Japan which occurs outside of the official avenues and remains off the books.<sup>159</sup> This method of compensation satisfies the injured parties enough so that they no longer desire to pursue litigation.<sup>160</sup> Leflar discusses an example that he heard from a colleague of a physician who inconvenienced a patient with a misdiagnosis.<sup>161</sup> This physician "went to the patient's house, made a sincere apology and presented as a token of that sincerity an envelope containing" four

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<sup>150</sup> Todres, *supra* note 6, at 688.

<sup>151</sup> Miller, *supra* note 16, at 456.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 457-58.

<sup>154</sup> *Id.* at 459.

<sup>155</sup> *Id.* at 456-59.

<sup>156</sup> Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 LAW & SOC'Y REV. 461 (1986).

<sup>157</sup> Leflar, *supra* note 16, at 745.

<sup>158</sup> *Id.* at 746. Medical malpractice litigation in Japan would have to continue to skyrocket and then it would get close to hitting one-tenth of the British rate. *Id.*

<sup>159</sup> *Id.* at 749.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

hundred U.S. dollars.<sup>162</sup> However, if this informal system results in compensation to any patients harmed by malpractice, it is likely a small minority.<sup>163</sup>

One possible reason for informal compensation system would be the value that physicians in Japan put on their reputation.<sup>164</sup> Since a report of a malpractice claim could have a substantial negative impact on physicians in Japan, it is possible that the physicians communicate internally with their patients to avoid a malpractice claim.<sup>165</sup> Especially considering that reputational losses cannot be resolved through liability insurance and would have a permanent negative impact on the physician's career.<sup>166</sup>

The Veterans Affairs Medical Center in Lexington Kentucky has implemented a proactive program to identify and resolve issues.<sup>167</sup> This program was developed after a medical error resulted in a patient's death and prompted the hospital to inform the family even though the family would likely not have found out otherwise.<sup>168</sup> The hospital now has a policy of full disclosure which includes "informing patients and/or their families of adverse events known to have caused harm or injury to the patient as a result of medical error or negligence."<sup>169</sup> In addition to disclosure of what happened, the hospital also gives an apology and discusses possible remedies and compensation.<sup>170</sup> "As of 2000, the Lexington VA hospital was averaging \$15,000 per settlement compared with an average of \$98,000 for all VA hospitals."<sup>171</sup>

However, it is important to note that this full disclosure policy has been easier for the VA hospital to implement because their liability is limited by the federal Tort Claims Act.<sup>172</sup> Consequently, the VA hospitals are self-insured and their physicians do not pay higher malpractice insurance premiums after a costly settlement.<sup>173</sup> Thus, the hospital can encourage settlements and apologies that result in liability without the staggering costs of medical malpractice insurance.

The University of Michigan Health System has formalized a new approach called "Communication and Optimal Resolution, or Candor for short."<sup>174</sup> This

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<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> Kraman, *supra* note 16, at 646.

<sup>168</sup> *Id.* at 647.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> NANCY BERLINGER, *AFTER HARM: MEDICAL ERROR AND THE ETHICS OF FORGIVENESS* 70 (2005).

<sup>172</sup> Johnathan R. Cohen, *Apology and Organizations: Exploring an Example from Medical Practice*, 27 *FORDHAM URB. L.J.* 1447, 1451 (2000).

<sup>173</sup> *Id.*

<sup>174</sup> Tozzi, *supra* note 16.



approach, developed as a result of a \$23 million federal research grant, has been “tested at [fourteen] hospitals in three health systems.”<sup>175</sup> This system is similar to that implemented at the VA hospital in Lexington.<sup>176</sup> Once a case is identified, the hospital tells the patient or their families what has happened within the hour.<sup>177</sup> As the matter is investigated, the hospital stays in contact with patients.<sup>178</sup> Staying in contact with the patient helps the patient feel like they are being treated as a person instead of a number.<sup>179</sup> The hospital also pauses the billing process so that patients and their families are not forced to deal with payment of the care they received that injured or killed them or a loved one.<sup>180</sup> Pausing the billing while the issue is investigated helps the families focus on healing, talking with the hospital, and preventing negative feelings from building up.<sup>181</sup>

The hospital is then expected to finish the investigation within two months, share the findings with patients and their families, and discuss future prevention.<sup>182</sup> If it is determined that the harm resulted from negligence, the parties will negotiate financial compensation with attorneys present.<sup>183</sup> This process, which is followed by an open discussion about financial compensation, puts the people first, focuses on the patients and their families staying updated, investigates the issues, and prevents it in the future.<sup>184</sup>

Some of these “hospitals [that] have discovered the benefits of broad communication and early resolution” have implemented an internal investigation program.<sup>185</sup> Once this internal investigation reveals there was an error, they use “disclosure, apology, and mediation” to compensate the injured parties more effectively.<sup>186</sup> This process also helps maintain the relationships as well as saves the hospital money it would have spent on defense of the disputes.<sup>187</sup>

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<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *See generally id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *See id.*

<sup>185</sup> *See* Haavi Morreim, *Malpractice, Mediation, and Moral Hazard: The Virtues of Dodging the Data Bank*, 27 OHIO ST. J. ON DISP. RESOL. 109, 111 (2012).

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

This process of open and immediate communication seems like the ideal resolution because it allows for open and honest communication between the parties. Often, the hospital discovers the error, the injured party gets the apology they desire, and the offending party gets the closure of an apology, all without having to jump through hoops to protect themselves.<sup>188</sup> However, “the National Practitioner Data Bank (NPBD) poses a major barrier.”<sup>189</sup> The NPBD has a record of “adverse professional events for physicians.”<sup>190</sup> This permanent record includes payments made to settle any medical malpractice claims.<sup>191</sup> The public does not have access to this information, but hospitals look at the NPBD when initially credentialing and then once again every two years for each physician on their staff.<sup>192</sup>

This data bank means that when physicians are faced with a medical error they must choose between two options: negotiating a settlement of the case and providing the patient with the closure they desire but also receive a negative mark in the NPBD, or face trial and fight the case with high odds of winning.<sup>193</sup> Ways around this include “paying out of pocket, oral rather than written claims, ‘corporate shield,’ and other approaches.”<sup>194</sup> However, these options create more hoops that doctors must jump through to effectively settle a claim.<sup>195</sup>

## VIII. CONCLUSION

Somewhere between 25,000 and 120,000 deaths are caused by medical malpractice each year.<sup>196</sup> This number is hard to quantify exactly due to hospitals’ attempts to report as few as possible to protect their liability.<sup>197</sup> Once hospitals inform patients of medical mistakes or the patients inform the hospital, the patients’ cases are moved to the legal realm, where they are viewed as a liability.<sup>198</sup> This shift causes the patient to feel as though the hospital does not recognize him or her, or that

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<sup>188</sup> See generally *id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 111-12.

<sup>194</sup> *Id.* at 112.

<sup>195</sup> Niran S. Al-Agba, *When Should Insurance Companies Be Held Responsible for Medical Malpractice?*, MEDPAGE TODAY’S KEVINMD.COM (Sept. 25, 2018), <https://www.kevinmd.com/blog/2018/09/when-should-insurance-companies-be-held-responsible-for-medical-malpractice.html>.

<sup>196</sup> *Medical Malpractice... By the Numbers*, CIVIL JUSTICE RESOURCE GROUP, <https://centerjd.org/cjrg/Numbers.pdf> (last visited Jan. 26, 2019).

<sup>197</sup> Josefron, *supra* note 4.

<sup>198</sup> See generally Todres, *supra* note 6, at 669.

the medical professional injured them.<sup>199</sup> This also prevents the doctors from apologizing to their patients, despite their desire to do so.<sup>200</sup>

In an attempt to apologize without vulnerability to liability, medical professionals are sometimes instructed to attempt an apology in mediation or through a strategic apology.<sup>201</sup> An apology in a mediation presents the risk that parties will recognize the apology as a strategic move.<sup>202</sup> These strategic apologies fail to satisfy the needs of the injured party and result in an escalation of the conflict.<sup>203</sup>

For an apology to be satisfactory, the apology must include acceptance of responsibility for the specific act that caused the injury, acknowledgement of the injury that occurred as a result of that specific act, and an expression of remorse or regret.<sup>204</sup> This requires informing the patient of the medical mistake soon after it is discovered, keeping them involved throughout the investigative process, and expressing true remorse or regret.<sup>205</sup> Several hospitals have implemented processes to handle medical malpractice issues that satisfies these elements in one form or another.<sup>206</sup> As a result, they have paid less in medical malpractice lawsuits.<sup>207</sup>

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<sup>199</sup> See generally *id.*; see also Troyen Brennen, *Patient Safety and Medical Malpractice: A Case Study*, ANNALS OF INTERNAL MEDICINE (Aug. 19, 2003), <https://annals.org/aim/fullarticle/716661/patient-safety-medical-malpractice-case-study>.

<sup>200</sup> Robbennolt, *supra* note 13.

<sup>201</sup> See Robbennolt, *supra* note 73, at 393-96.

<sup>202</sup> See *id.* at 355-58.

<sup>203</sup> See *id.* at 393-96.

<sup>204</sup> Truesdale, *supra* note 108, at 84.

<sup>205</sup> Robbennolt, *supra* note 13.

<sup>206</sup> See e.g. Miller, *supra* note 16; Leflar, *supra* note 16; Kraman, *supra* note 16; Tozzi, *supra* note 16.

<sup>207</sup> See e.g. *id.*