

Reviving The Lost Art of Apology

BY PATRICIA A. BRONTE

Many third-party liability policies contain “no admission” or cooperation clauses that exclude coverage if the policyholder admits or assumes liability. These clauses dovetail nicely with the traditional “deny at all costs” mentality long prevalent among insurers and defense lawyers. In recent years, however, commentators have begun to question the wisdom of the denial mentality, and both empirical studies and substantial anecdotal evidence suggest that a well-placed apology may deter a lawsuit or at least reduce the amount of the judgment or settlement. As a result, legislatures in 34 states and the District of Columbia have enacted statutes protecting certain apologies from being introduced in medical malpractice suits as admissions of liability. The statutes in eight of these states apply to any civil litigation, not just medical malpractice actions.

Although the apology statutes were enacted within a relatively short period, there are significant differences among them. All of them provide evidentiary protection for simple apologies (“I’m sorry you were hurt”); unfortunately, one study has shown this type of apology to be the least effective, and possibly counterproductive, in reducing litigation and settlement amounts. Five states have apology statutes that also protect partial apologies (“I made a mistake and I’m sorry”), but only Arizona’s statute explicitly protects full apologies (“I’m sorry, it was my fault you were hurt”). Statutes in 13 states clearly protect simple apologies and may also cover broader apologies.

Other issues remain unresolved as well. For example, most apology statutes bar evidence of an apology to be admitted as an admission of liability or an admission against interest, but are silent on other possible grounds for admissibility such as for impeachment. In addition, it is not clear how courts will deal with full or partial apologies when the statute protects only simple apologies. The literal terms of the statutes suggest that the simple apology should be excised from the broader statement, leaving the jury only with the damning admission of fault or liability without the tortfeasor’s words of sympathy.

One of the most significant uncertainties surrounding the apology statutes is whether and how they will affect the interpretation of “no admission” clauses in insurance policies. None of the statutes mentions insurance coverage or “no admission” clauses, and the American Bar Association apparently did not consider the issue when it endorsed “simple” apology statutes for medical providers. Courts generally have been reluctant to void coverage on the basis of a policyholder’s truthful statements to an injured person, either for public policy reasons or because “no admission” clauses have been construed narrowly. But many apology statutes are ambiguous about the types of apologies that are protected in the third party suit, and that ambiguity is amplified for policyholders concerned about reducing liability risk while retaining insurance coverage. Even if the apology statute clearly protects an apology, an insurer might argue that the inadmissible apology nonetheless undermined the insurer’s settlement position.

Despite the apology statutes, policyholders take care that a well-meaning apology does not result in liability, forfeiture of insurance coverage, or both.

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