

# Policy Issues



## Apologies and Insurance Coverage

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There has been much recent dialogue among health care providers about the value and importance of apologizing to patients for unexpected outcomes. While saying “I’m sorry” communicates to the patient the physician’s sympathy and may discourage the patient from filing a malpractice lawsuit, some providers fear that an apology may jeopardize their insurance coverage for a claim based on the incident.

### Cooperation Clause

OMIC’s policy does not preclude insureds from apologizing, and, as discussed in the lead article of this *Digest*, OMIC encourages such open and empathetic communication with the patient. However, OMIC’s policy does require that insureds not admit liability or make any payment, assume any obligation, or incur any expense without OMIC’s prior written consent (Section VIII.9.d. of the policy revised 01/01/2007). If they do, this is a breach of the Cooperation Clause, the outcome of which can be denial of coverage of the claim (Section VIII and Section VIII.9 of the policy).

It is important, therefore, to differentiate between an apology and an admission of liability. In your communication with the patient, you should express compassion, focusing your words on the patient’s outcome and feelings, such as “I am sorry that you...” or “I am sorry for your...” rather than on your actions “I am sorry that I....” If a clear-cut error has occurred, do communicate this, focusing on the facts of the outcome. Do not speculate about what might have occurred or who might be at fault. Much of the time

the cause of an error or unanticipated outcome is not immediately known. And an error that occurred may not be the cause of the particular bad outcome.

While apologizing in this context is expressing regret for the outcome that occurred, admitting liability is saying to the patient that the outcome was your fault and that you are responsible for any damages incurred. By stating this to the patient, it becomes much more difficult, if not impossible, to later defend your care or refuse to compensate the patient if it turns out that the poor outcome was not caused by your negligence. Since OMIC insures you, you are potentially obligating OMIC to pay for damages that may not be warranted or should not be attributed to you. That is why OMIC requires that you confer with your insurance carrier before making any admissions of liability or assuming any obligations or expenses. Complications can occur without you having done anything wrong.

### “I’m Sorry” Laws

As you are probably aware, many states have enacted “I’m Sorry” laws, which permit doctors to apologize to patients without the apology being used against them at trial as evidence of negligence. The laws vary by jurisdiction; they may protect oral statements only, provide a timeframe within which such statements must be made in order to be protected, or provide a broader exemption for all statements of apology or commiseration. Even if your state has an “I’m sorry” statute, you should practice caution when you communicate the facts of the outcome and express your sympathy to the patient. Even when you are careful, patients may hear words of condolence and explanation as admissions of liability. The sooner you talk to OMIC’s risk management specialists, the easier it will be to

discern the proper way to talk to the patient and respond to the unanticipated outcome.

### Beyond “I’m Sorry”

The following is an example of a situation that might fall under the proscription of the cooperation clause. An unanticipated outcome occurs. It was a known complication, but it has never happened to you, and you are upset. The patient, seeing the poor result, is angry. You immediately blame yourself and feel you must have done something wrong. You apologize profusely to the patient. You say that the bad outcome is your fault and you would like to not only refund the patient her money, but pay her \$10,000 for the inconvenience and potential pain and suffering of going through a second surgery. She agrees and you state in writing to the patient that you made a mistake while performing the surgery, which resulted in the patient’s poor outcome, and you enclose \$10,000 as payment of damages. Later, you review a video of the procedure and realize you did nothing outside the standard of care. You belatedly recognize that the outcome was an unfortunate risk of the procedure. Even though you paid the patient \$10,000, you did not have the patient sign a release and she sues you. You follow up with OMIC. OMIC may refuse to defend you or pay any damages, as you have seriously damaged the defense of your claim in violation of the Cooperation Clause.

Such a situation can easily be avoided by promptly communicating with OMIC regarding any maloccurrence. Additionally, following OMIC’s Risk Management Recommendations, as found in “Responding to Unanticipated Outcomes,” will help you to openly, honestly, and empathetically communicate with the patient while minimizing your personal liability.