

 Council on Licensure,
Enforcement and Regulation




2010 Annual Educational Conference - September 23-25

**The Impacts of Apologies in Misconduct and
Disciplinary Matters:
Apology Legislation in Canada**

Presenter:


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Promoting Regulatory Excellence

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Nashville, Tennessee


Presentation Outline:

- What is Apology Legislation?
- What does Apology Legislation do?
- What is the policy rationale?
- Which Canadian jurisdictions have enacted Apology Legislation?
- What are various jurisdictional approaches to Apology Legislation?
- What is not covered by Apology Legislation?
- What are implications of Apology Legislation in the Regulatory Sector?

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What is Apology Legislation?

- extends legal protections to those who apologize in certain contexts
- purpose: saying "I am sorry" does not lead to liability

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What does Apology Legislation Do?

- provides protections for the purpose of proceedings to those who apologize
- may set out exceptions to which the protections of the Act do not apply

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What is the Policy Rationale for Apology Legislation? (Pt. 1)

- To allow people to apologize without having to fear that the apology would be used against them in lawsuits
- To reflect our natural human emotion and tendency
- To help remove the legal barriers to facilitate sincere expression
 - Not to be used to establish liability
 - Not to be used to void coverage under a policy of insurance
- To help restore relations between those who have caused harm and those who are harmed
- ...


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What is the Policy Rationale for Apology Legislation? (Pt. 2)

- To help promote acknowledgement, healing and reconciliation
- To allow people to apologize for a mistake or wrongdoing without fear that the apology would be used in litigation and lawsuits against them
- To curb the reluctance to apologize for errors, accidents and mistakes ^[1]
- These objectives and aims are similar in Canadian jurisdictions with Apology legislation

[1] Ontario, Legislative Assembly, Hansard, No. 71 (7 October 2008) at 3146 and 3147 (Steve Peters).

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8 Canadian Jurisdictions have Enacted Apology Legislation:		
<ul style="list-style-type: none"> • British Columbia - 2006 • Saskatchewan - 2007 • Alberta - 2008 • Manitoba - 2008 • Nova Scotia - 2009 • Newfoundland and Labrador - 2009 • Ontario - 2009 • Prince Edward Island - 2010 		

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5 Canadian Jurisdictions have <u>not</u> Enacted Apology Legislation:		
<ul style="list-style-type: none"> • Quebec • Yukon <small>(Although introduced in 2007, Bill 103 did not receive second reading)</small> • New Brunswick • Nunavut • Northwest Territories 		

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Free-Standing Legislation or Incorporated into an Existing Act?		
<ul style="list-style-type: none"> • British Columbia: <i>Apology Act</i>, S.B.C. 2006, c.19 • Saskatchewan: <i>The Evidence Act</i>, S.S. 2006, c.E-11.2, as am. by S.S. 2007, c. 24 • Alberta: <i>Alberta Evidence Act</i>, R.S.A. 2000, c. A-18, as am. by S.A. 2008 c.11 and S.A. 2009, c.48 • Manitoba: <i>Apology Act</i>, C.C.S.M., c.A98 • Nova Scotia: <i>Apology Act</i>, S.N.S. 2008, c.34 • Newfoundland and Labrador: <i>Apology Act</i>, S.N.L. 2009, c.A-10.1 • Ontario: <i>Apology Act</i>, S.O. 2009, c.3 • Prince Edward Island: <i>Health Services Act</i>, R.S.P.E.I. 1988, c.H-1.6 as am. by S.P.E.I. 2009, c.7 		

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	Jurisdiction	Free-Standing Legislation	Incorporated Into an Existing Act
1	British Columbia	<i>Apology Act</i> , S.B.C. 2006, c.19	
2	Saskatchewan		<i>The Evidence Act</i> , S.S. 2006, c.E-11.2, as am. by S.S. 2007, c.24
3	Alberta		<i>Alberta Evidence Act</i> , R.S.A. 2000, c. A-18, as am. by S.A. 2008, c.11 and S.A. 2009, c.48
4	Manitoba	<i>Apology Act</i> , C.C.S.M., c.A98	
5	Nova Scotia	<i>Apology Act</i> , S.N.S. 2008, c.34	
6	Newfoundland and Labrador	<i>Apology Act</i> , S.N.L. 2009, c.A-10.1	
7	Ontario	<i>Apology Act</i> , S.O. 2009, c.3	
8	Prince Edward Island		<i>Health Services Act</i> , R.S.P.E.I. 1988, c.H-1.6 as am. by S.P.E.I. 2009, c.7

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<h2>Jurisdictional Comparison, Pt. 1</h2> <h3><u>Ontario</u></h3> <ul style="list-style-type: none"> Scope: Ontario <i>Apology Act</i> intended to apply to: <p><i>...(Courts, tribunals, arbitrators and other decision-making bodies. It would apply to legal proceedings under provincial law, such as civil lawsuits, administrative proceedings and professional discipline matters. It would not apply to criminal proceedings, which are federal matters, and it would not apply to prosecutions under the Provincial Offences Act. The Apology Act would not affect a victim's right to sue or their right to compensation for harm done. It would not allow a wrongdoer to escape the consequences of the incident.)</i>^[2]</p> <p>^[2] Ontario, Legislative Assembly, <i>Hansard</i>, No. 71 (7 October 2008) at 3147 (Steve Peters).</p>			

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<h2>Jurisdictional Comparison, Pt. 2</h2> <p>...Ontario</p> <ul style="list-style-type: none"> "<i>apology</i>" means an expression of sympathy or regret, a statement that a person is sorry or any other words or actions indicating contrition or commiseration, whether or not the words or actions admit fault or liability or imply an admission of fault or liability in connection with the matter to which the words or actions relate ^[3] similar in those Canadian jurisdictions that have enacted Apology Legislation <p>^[3] <i>Apology Act</i>, S.O. 2009, c.3.</p>			



HOW AMERICAN STATES COMPARE:

- American states are described as adopting legislation which takes one of two forms
 - an expression of sympathy or regret is not admissible as evidence in litigation but does not extend protection to an apology that includes an admission of liability or fault
 - protecting "apologies that contain admissions of fault or liability"
 - medical care



Jurisdictional Comparison, Pt. 3 ...Ontario

Protections:

Section 2(1): an apology made by an individual, or on behalf of another person in connection with any matter, does not constitute an admission of fault or liability, ... and should not be taken into account in a determination of fault or liability


Section 2(3):
Despite any other Act or law, evidence of an apology made by or on behalf of a person in connection with any matter is not admissible in any civil proceeding, administrative proceeding or arbitration as evidence of the fault or liability of any person in connection with that matter



Jurisdictional Comparison, Pt. 4

...Ontario

- Insurance or Indemnity Coverage:
 - Section 2(1): an apology made by an individual, or on behalf of another person in connection with any matter, does not void or affect insurance or indemnity coverage
 - Other Canadian jurisdictions have a similar approach with respect to insurance or indemnity coverage


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Jurisdictional Comparison, Pt. 5

...Ontario

Exceptions:

- Section 2(2): protections not extended to *Provincial Offences Act* proceedings
- Section 2(4): protections do not apply to the proceeding or arbitration if a person makes an apology while testifying at a civil proceeding (including while testifying at an out of court examination in the context of the civil proceeding), at an administrative proceeding or at an arbitration


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Jurisdictional Comparison, Pt. 6

...Ontario

Exceptions:

- Section 3, Criminal or Provincial Offence Proceeding or Conviction: The Act does not affect the admissibility of any evidence in a criminal proceeding (including a prosecution for perjury) or a proceeding under the *Provincial Offences Act*.

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Jurisdictional Comparison, Pt. 8

- What is not covered by Apology Legislation?

Jurisdiction	Exceptions:
Most Jurisdictions	<ul style="list-style-type: none"> • Provincial Offences (except Prince Edward Island) • Criminal matters • May be used to assess damages



Jurisdictional Comparison, Pt. 9

- What is not covered by Apology Legislation?

Jurisdiction	Exceptions:
Ontario	<ul style="list-style-type: none"> • If a person makes an apology while testifying at a civil proceeding, administrative proceeding or arbitration • An apology may constitute an acknowledgement of liability or may be admitted in evidence for the purposes of section 13 of the <i>Limitations Act</i>



Jurisdictional Comparison, Pt. 10

- What is not covered by Apology Legislation?


Jurisdiction	Exceptions:
Prince Edward Island	<ul style="list-style-type: none"> • Apology Legislation incorporated into <i>Health Services Act</i> • protection is limited to Health Services • Note: "Legal proceeding" includes an action or proceeding for the imposition of punishment by fine, penalty or imprisonment for violation of a provincial enactment




Jurisdictional Comparison, Pt. 11

- Relationship between Apology Legislation and *Limitations Act*

Jurisdiction	Exceptions:
<ul style="list-style-type: none"> • British Columbia • Alberta • Saskatchewan • Newfoundland and Labrador • Nova Scotia 	<ul style="list-style-type: none"> • An apology does not constitute a confirmation of a cause of action in relation to that matter for the purposes of the <i>Limitations Act</i>
<ul style="list-style-type: none"> • Ontario 	<ul style="list-style-type: none"> • Section 4: The Act does not affect whether an apology constitutes an acknowledgement of liability or prevents an apology from being admitted in evidence for the purposes of section 13 of the <i>Limitations Act</i>

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<h3>Implications of Apology Legislation in the Regulatory Sector?</h3>		
<ul style="list-style-type: none"> - Is Apology Legislation applicable to Administrative Tribunals? - Will there be fewer complaints made? - Will there be fewer cases referred to Discipline Committees? 		

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<h3>Conclusion</h3>		
<ul style="list-style-type: none"> • Legislative approach adopted by various Canadian jurisdictions that have enacted Apology Legislation • Canadian case law • Legislation effective in promoting settlement through non-litigious methods? • Too early to tell? • Common denominator among Canadian jurisdictions: <ul style="list-style-type: none"> - definition of "apology" - protections afforded - types of exceptions 		

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<h3>Thank You</h3>		
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**The Impacts of
 Apologies in
 Misconduct
 and Disciplinary
 Actions**

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Fact Pattern #1: Boundary Violation


- Doctor A had sex with a patient
- Doctor B borrowed money from a patient
- Doctor C brings friend to hospital where he doesn't have privileges and interferes with care


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29 States Have Apology Laws


- Colorado Revised Statute §13-25-135
- Oregon Rev. Stat. § 677.082
- Massachusetts *ALM GL* ch.233, § 23D
- Texas Civil Prac and Rem Code §18.061
- California Evidence Code § 1160
- Florida Stat §90.4026
- Washington Rev Code Wash §5.66.010
- Tennessee Evid Rule §409.1
- Ohio ORC Ann §2317.43
- Georgia Title 24 Code GA Annotated 24-3-37.1
- Wyoming Wyo. Stat. §1-1-130
- Oklahoma 63 OKL. St. § 1-1708.1H
- Maryland MD Court & Judicial Proceedings Code Ann. §10-920
- Delaware HB 412


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<h2 style="margin: 0;">29 States Have Apology Laws</h2> <ul style="list-style-type: none"> • North Carolina General Stat. §8C-1, Rule 413 • Hawaii HRS §Sec.626-1 • Maine MRSA §2908 • South Dakota H.R. 1148 8th Leg. • West Virginia HB 3174 • Illinois Public Act 094-0677 Sec. 8-1901 • Arizona A.R.S. §12-2605 • Louisiana R.S. §3715.5 • Missouri HB 393 • New Hampshire RSA § 507-E:4 • Connecticut Public Act No. 05-275 Sec.9 • Virginia Code of Virginia § 8.01-52.1 • Vermont S 198 Sec. 1. 12 V.S.A. §1912 • Montana H.R. 24 59th Leg. • South Carolina Ch.1, Title19 Code of Laws 1976, 19-1-190 		

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<p style="text-align: center;">Colorado Apology Law: §13-25-135, C.R.S.</p> <p>“In any civil action brought by an alleged victim of an unanticipated outcome of medical care, or in any arbitration proceeding related to such civil action, <i>any and all statements, affirmations, gestures, or conduct expressing apology, fault, sympathy, commiseration, condolence, compassion, or a general sense of benevolence</i> which are made by a healthcare provider or an employee of a healthcare provider . . .”</p>		

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<p style="text-align: center;">Colorado Apology Law: §13-25-135, C.R.S.</p> <p>“. . . to the alleged victim, a relative of the alleged victim, or a representative of the alleged victim, and which relate to the discomfort, pain, suffering, injury, or death of the alleged victim as the result of the unanticipated outcome of medical care shall be <i>inadmissible as evidence of an admission of liability or as evidence of an admission against interest.</i>”</p>		

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<p>Colorado Apology Law: §13-25-135, C.R.S.</p> <p><u>Unanticipated outcome</u>: the outcome of a medical treatment or procedure that differs from the expected result</p> <p><u>Health care provider</u>: any person (or clinic, health dispensary, or health facility) licensed or certified by the state to deliver health care</p>		

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<p>Colorado Apology Law: §13-25-135, C.R.S.</p> <ul style="list-style-type: none"> • Like Ontario, permits admission of fault or responsibility without accepting liability 		

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<p>Massachusetts Apology Law: MGLA 233 § 23D</p> <p>"Statements, writings, or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering, or death of a person involved in an accident and made to such person or to the family of such person <i>shall be inadmissible as evidence of an admission of liability in a civil action.</i>"</p>		



California Evidence Code § 1160

"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 involved in an accident and made to that person or to the family of that person shall be inadmissible as evidence of an admission of liability in a civil action. *A statement of fault, however, which is part of, or in addition to, any of the above shall not be inadmissible* pursuant to this section."




North Carolina: § 8C-1, Rule 413

"Statements by a health care provider apologizing for an adverse outcome in medical treatment, offers to undertake corrective or remedial treatment or actions, and gratuitous acts to assist affected persons *shall not be admissible to prove negligence or culpable conduct* by the health care provider in an action brought under Article 1B of Chapter 90 of the General Statutes."




Oregon Apology Law: 677.082

"For the purposes of any civil action against a person licensed by the Oregon Medical Board, *any expression of regret or apology* made by or on behalf of the person, including an expression of regret or apology that is made in writing, orally or by conduct, *does not constitute an admission of liability for any purpose.*"

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Oregon Apology Law: 677.082

"A person who is licensed by the Oregon Medical Board . . . *may not be examined by deposition or otherwise in any civil or administrative proceeding, including any arbitration or mediation proceeding, with respect to an expression of regret or apology* made by or on behalf of the person, including expressions of regret or apology that are made in writing, orally or by conduct."

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Medical Malpractice vs. Regulation

Medical Malpractice	Regulation
Restitution	Public protection
Retrospective	Prospective
Narrow or single patient focus	Broader inquiry into practice
Causation + Standard of practice	Standard of practice
Injury required	No harm required

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Impact of Apology

- Event never reaches the regulator
 - Settlement before patient files malpractice suit
 - Patient not likely to file complaint with regulator

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Impact of Apology

- Does it mitigate?
 - Does it demonstrate to the regulator that licensee has an understanding of the violation?
 - Does it reassure the regulator that the conduct will not recur?
 - Does it demonstrate that the licensee wants to improve her practice?
 - Does it protect the public?

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Spectrum of Discipline


- Revocation
- Suspension
- Monitoring
- Required Education
- Public Admonishment
- Fines
- Confidential Agreements
- Dismissal

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Fact Pattern #2: Addiction

- Doctor A performs surgery while intoxicated
- Doctor B gets a DUI conviction and is ordered to addiction treatment
- Doctor C refers himself to a peer health provider for treatment at the request of his practice partners

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<p>Fact Pattern #3: Substandard Care</p> <ul style="list-style-type: none"> • Doctor A performs surgery on left side of patient's body, when injury is on the right side • Doctor B fails to recognize a medical emergency and treat accordingly • Doctor C prescribes a narcotic with multiple refills, and does not follow up with patient 		

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<p>Legislation for Apology in Regulatory Arena</p> <ul style="list-style-type: none"> • Policy rationales: <ul style="list-style-type: none"> - Encourages candor and cooperation in evaluation of care or conduct - Allows Boards to timely address practice issues - Facilitates investigation 		

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<p>Contact me at:</p> <p>Charmaine Cheung Rose Colorado Attorney General 1525 Sherman Street, 7th floor Denver, CO 80212 Email: charmaine.cheungrose@state.co.us Direct: 303-866-5268</p> <div style="text-align: center;">  </div>		
