

**Hawaii's Apology Act
(Hawaii Rules of Evidence Rule 409.5)**

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I. Introduction

In recent years, numerous states have adopted rules of evidence that offer protection to apologies made by healthcare providers for adverse medical events. Hawaii recently enacted its own apology act in 2007. Such safe harbors have been said to encourage parties to apologize and, consequently, to promote the settlement of civil cases. However, tensions between the legal system and the desire to apologize have resulted in creative litigation strategies, generating scholarly debates in the area of “apology immunity.”¹ This paper explores the recently enacted Hawaii Apology Act, how it interacts with the Hawaii Rules of Evidence relating to settlement offers and offers to pay medical expenses, and its future impact on medical malpractice litigation strategies in Hawaii. Other alternatives will also be considered as possible solutions to strengthen Hawaii’s Apology Act.

II. About Hawaii’s Apology Act

A. Legislative History

Prior to enacting Hawaii’s Apology Act, Hawaii’s healthcare community attempted to pass a completely immune apology act for healthcare providers in 2006, but the proposed legislation was rejected and broadened into its current form as HRE Rule 409.5.²

¹ See, e.g., Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009 (1999); Steven Keeva, *Does Law Mean Never Having to Say You’re Sorry?* A.B.A. J., Dec. 1999; Aviva Orenstein, *Apology Excepted: Incorporating a Feminist Analysis into Evidence Policy Where You Would Least Expect It*, 28 SW. U. L. REV. 221 (1999); Daniel Shuman, *The Role of Apology in Tort Law*, 83 Judicature 180 (2000); Deborah L. Levi, *The Role of Apology in Mediation*, 72 N.Y.U. L. REV. 1165 (1997).

² The proposed Senate Bill 3279 read in part,

Rule Apologies; medical care. (a) In any civil action that is brought against a health care provider, as defined in section 671-1, or in any arbitration proceeding that relates to the civil action, any statement, affirmation, gesture, or conduct expressing apology, responsibility, liability, sympathy, commiseration, condolence, compassion, or a general sense of benevolence that:

Understandably, the legislators wanted to extend the scope of protections beyond health care providers to avoid creating a “special rule.”³

In 2007, Hawaii adopted Hawaii Rules of Evidence (“HRE”) Rule 409.5 to preclude admissions of “sympathy and condolence” in tort claims. HRE Rule 409.5 states:

Admissibility of expressions of sympathy and condolence. Evidence of statements or gestures that express sympathy, commiseration, or condolence concerning the consequences of an event in which the declarant was a participant is not admissible to prove liability for any claim growing out of the event. This rule does not require the exclusion of an apology or other statement that acknowledges or implies fault even though contained in, or part of, any statement or gesture excludable under this rule.

Commonly known as Hawaii’s “Apology Act” or “I’m Sorry Act,” the purpose of the measure was “to make benevolent gestures inadmissible as evidence of an admission of liability in medical malpractice claims.”⁴ However, it was the intent of the legislature that HRE Rule 409.5 would be applicable to “all tortfeasors”⁵ and “allow *individuals and entities* to express sympathy and condolence without the expression being used against the individual or entity to establish civil liability, even if the individual or entity is not a health care provider.”⁶

Hawaii’s Apology Act is among at least thirty-four states that protect expressions of

(1) Was made by a health care provider to the patient, a relative of the patient, the patient's survivors, or a health care decision maker for the patient; and
(2) Relates to the discomfort, pain, suffering, injury, or death of the patient as the result of the unanticipated outcome of medical care is inadmissible as evidence of an admission of liability or as evidence of an admission against interest.

S.B. 3279, 23rd Leg. (Haw. 2006).

³ S.B. 813 SD1 SSCR 977, 24th Leg. (Haw. 2006).

⁴ H.B. 1253 SD1 SSCR 1131, 24th Leg. (Haw. 2007).

⁵ S.B. 813 SD1 SSCR 977, 23rd Leg. (Haw. 2006).

⁶ H.B. 1253 SD1 SSCR 1131, 24th Leg. (Haw. 2007) (emphasis added).

sympathy as inadmissible evidence.⁷ There are two general categories that the so-called “I’m Sorry” laws fall into: “partial” apologies and “full” apologies. Partial apologies only protect expressions of sympathy and benevolence whereas full apologies acknowledge responsibility.⁸ Majority of states have adopted partial apology laws. For example, Texas’ law protects a physician’s statement of regret from admissibility as evidence, but does not protect statements of negligence.⁹ Vermont only protects oral apologies and not written apologies.¹⁰ Colorado remains the only state to protect full admissions of fault by health care providers from admissibility as evidence.¹¹ The unsuccessful legislation advocated by Hawaii’s healthcare providers was modeled after Colorado’s law. As currently enacted, however, Hawaii’s Apology Act is similar to California, Florida, Texas, and Washington, which clearly establish that statements acknowledging fault remain admissible.¹²

B. Impact of Evidentiary Rules

Hawaii’s Apology Act falls under the scope of Hawaii Rules of Evidence relating to settlement offers (HRE Rule 408) and offers to pay for medical expenses (HRE Rule 409). Accordingly, the Apology Act must be analyzed in conjunction with these two rules of evidence.

HRE Rule 408 states:

⁷ Christopher J. Robinette, *The Synergy of Early Offers and Medical Explanations/Apologies*, 103 NW. U. L. REV. COLLOQUY 514, 518 (2009).

⁸ Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460, 468-69 (2003).

⁹ TEX. CIV. PRAC. & REM. CODE ANN. § 18.061 (Vernon 2004).

¹⁰ 12 VT. STAT. ANN. § 1912 (2006).

¹¹ COLO. REV. STAT. § 13-25-135 (2003).

¹² Robbennolt, *supra* note 8, at 468-69.

Compromise, offers to compromise, and mediation proceedings. Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, or (3) mediation or attempts to mediate a claim which was disputed, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations or mediation proceedings is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations or mediation proceedings. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

This rule was developed to “encourage the resolution of problems through negotiation and settlement without the fear of having statements made during the negotiation process haunt a future legal proceeding.”¹³ Thus, an offer to settle is inadmissible only when used to “prove liability for or invalidity of the claim or its amount.”¹⁴

HRE Rule 409 states:

Payment of medical and similar expenses. Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

Under HRE Rule 409, “factual statements” made in conjunction with a promise or an offer to pay medical expenses, are admissible.¹⁵ The difference between HRE Rule 408 and HRE Rule 409 is that Rule 409 does not require a disputed claim and therefore, it is unnecessary to protect factual statements the way similar statements require protection during settlement negotiations.¹⁶

Hawaii’s Apology Act is a hybrid of HRE Rules 408 and 409 where statements or gestures that express sympathy and condolence are not admissible to prove liability for a

¹³ *Han v. Yang*, 84 Haw. 162, 171, 931 P.2d 604, 613 (Haw. Ct. App. 1997) (internal citations omitted).

¹⁴ *Best Place v. Penn Am. Ins. Co.*, 82 Haw. 120, 137, 920 P.2d 334, 351 (Haw. 1996).

¹⁵ Hawaii Rules of Evidence Rule 409 Commentary.

¹⁶ *Id.*

disputed claim. However, an apology or a statement that “implies fault” is admissible to establish negligence.¹⁷

In addition, the legislature “entrusted to the sound discretion of the trial court” to determine what constitutes an “expression of sympathy or an acknowledgement of fault” pursuant to HRE Rule 104(a).¹⁸ Some guidance is provided in making such determinations, including “the declarant's language, the declarant's physical and emotional condition, and the context and circumstances in which the utterance was made.”¹⁹ While Hawaii’s Apology Act remains untested for now because of its recent enactment, there are foreseeable interpretation issues worthy of highlighting.

II. Statutory Interpretation Issues

To date, there have been no legal challenges to Hawaii’s Apology Act. Consequently, there are no case law to determine when protected expressions of “sympathy, commiseration, or condolence” convert into admissible apologies or implications of fault. Other jurisdictions have achieved inconsistent findings. For example, in *Greenwood*, the physician apologized to his patient for wrongly diagnosing a tumor when the patient was actually pregnant.²⁰ The doctor had accidentally aborted a fetus. The patient’s husband, who was present with the patient at that time, recalled the physician told him that his wife was approximately three and a half months pregnant and his misdiagnosis was “a terrible thing I have done, I wasn't satisfied with the lab report, she did have signs of being pregnant. I should have had tests run again, I should have made

¹⁷ HAW. REV. STAT. § 626-1-409.5 (West, Westlaw through 2009 SESS.).

¹⁸ Hawaii Rules of Evidence Rule 409.5 Commentary. HRE Rule 104(a) addresses preliminary questions of admissibility.

¹⁹ Hawaii Rules of Evidence Rule 409.5 Commentary.

²⁰ *Greenwood v. Harris*, 362 P.2d 85 (Okla. 1963).

some other tests . . . I am sorry.” The court declared the statement enough to establish a *prima facie* case for malpractice.²¹ Similarly, in *Hill*, during an oral surgical procedure, when the drill hit plaintiff’s jaw or gum area, the plaintiff recalled that the physician “became distraught, cried, and stated: ‘Oh, don't worry about it. I will take care of you. I have malpractice insurance . . . I did something freaky to you.’”²² The court found that the physician’s statement held as evidence for an extrajudicial admission establishing both the standard of care and its breach.

On the other hand, other courts have found that apologies were insufficient evidence to establish a standard of care or breach of duty. In *Phinney*, the court concluded that a physician who allegedly admitted that he performed an “inadequate resection” and apologized, was not enough for the plaintiff to meet its burden of proof.²³ Another court found that a physician’s statement that “I’m sorry, I accidentally cut the nerve to your vocal cord,” was not enough to establish failure of due care.²⁴

With these varied court holdings, should the time ever come when Hawaii’s trial courts will need to interpret the Apology Act, there will be interesting challenges in interpreting the language of HRE Rule 409.5; especially in light of general settlement offers and offers to pay medical bills. From the perspective of defense counsel and defendant physician, however, the dearth of legal precedent provides opportunities for creative lawyering.

III. Litigation Strategies: “Safe-Apologies”

The lack of clarity as to what constitutes “sympathy” may deter physicians from

²¹ *Id.* at 88.

²² *Hill v. McCartney*, 590 N.W.2d 52, 54 (Iowa Ct. App. 1998).

²³ *Phinney v. Vinson*, 605 A.2d 849 (Vt. 1992).

²⁴ *Jeffries v. Murdock*, 74 Or. App. 38, 42 (Or. Ct. App. 1985).

apologizing to patients for fear of liability. In fact, the primary reason why physicians abstain from issuing apologies is fear of an impending lawsuit.²⁵ From a moral perspective, “even if an apology is the morally right thing to do, attorneys often counsel their clients not to apologize because a misunderstanding about liability can disrupt insurance negotiations and affect the amount of money the offender may have to pay.”²⁶

Consequently, because HRE Rule 409.5 specifically protects expressions of sympathy and does not protect statements that admit fault, so-called “safe apology” statements will likely result such as “I am sorry that you have been injured,” or “I am sorry that you are hurt,” or “my condolences for your injuries.”²⁷ These statements will likely pass evidentiary muster under Rule 409.5, but are “devoid of moral content.”²⁸ Such ineffectual statements may be offensive to some patients and could lead to *more* litigation. In the end, the injured patient still remains “in the dark” about what happened.²⁹ How can Hawaii’s Apology Act be strengthened such that medical errors and injuries will encourage healthcare professionals to apologize and/or to explain to the injured patient why the injury occurred? Two recommendations are proposed and are discussed in detail below.

IV. Suggestions to Improve Hawaii’s Apology Act

In general, research on the legal liability of disclosure and apologies have resulted in

²⁵ Donna L. Pavlick, *Apology and Mediation: The Horse and Carriage of the Twenty-First Century*, 18 OHIO ST. J. ON DISP. RESOL. 829, 853 (2003).

²⁶ *Id.* at 848.

²⁷ Robbennolt, *supra* note 8, at 462, 471.

²⁸ *Id.* at 462.

²⁹ Research has indicated that patients file suit for medical malpractice for the following reasons: “(1) to get information and understand their injury and the circumstances surrounding it; (2) to prevent future injuries; and (3) to determine accountability.” Robinette, *supra* note 7, at 517.

positive findings.³⁰ Studies have indicated that apologies are advantageous in reducing medical error.³¹ However, it is unclear whether implementing apology laws will lessen the medical malpractice crisis. A medical error and subsequent communications between the physician and the patient is an extremely fact sensitive situation. There will also inevitably be patients who will litigate despite an apology. Nonetheless, there are possible solutions focusing on alternatives to the tort system that are advocated by legal scholars and support Hawaii's Apology Act.

A. Establishing Early Offers to Settle With Disclosure

Early offers to settle with disclosure ("Early Offers") is an alternative process that encourages full disclosure and apology to injured patients combined with a financial incentive for settlement.³² It avoids discovery and evidentiary issues as the disclosure would be part of the settlement and therefore protected by HRE Rule 408. The purpose of early offers is to provide prompt payment of the plaintiff's net economic losses and reasonable attorney fees.

³⁰ See, e.g., Charles Vincent & Magi Young, *Why Do People Sue Doctors? A Study of Patients and Relatives Taking Legal Action*, 343 *Lancet* 1609 (1994); Peter H. Rehm & Denise R. Beatty, *Legal Consequences of Apologizing*, 1996 *J. DISP. RESOL.* 115 (1996); Ashley A. Davenport, *Note, Forgive and Forget: Recognition of Error and Use of Apology as Preemptive Steps to ADR or Litigation in Medical Malpractice Cases*, 6 *PEPP. DISP. RESOL. L.J.* 81 (2006); William Winslade & E. Bernadette McKinney, *To Tell or Not To Tell: Disclosing Medical Error*, 34 *J.L. MED. & ETHICS* 813 (2006); Robin E. Ebert, *Attorneys, Tell Your Clients to Say They're Sorry: Apologies in the Health Care Industry*, 5 *IND. HEALTH L. REV.* 337 (2008).

³¹ Todres states that patients do not only "sue for money" and cites a study published in *Lancet* indicating that: [A]s many as 37% of medical malpractice plaintiffs reported that they would not have filed their lawsuits if their doctors had sincerely apologized instead of stone-walling An apology facilitates patients' emotional healing. Access to information helps patients regain a sense of control and empowerment, as well as a voice in the process."

Jonathan Todres, *Toward Healing and Restoration for All: Refraining Medical Malpractice Reform*, 39 *CONN. L. REV.* 667, 686 (2006).

³² Jeffrey O'Connell & Evan Stephenson, *Binding Statutory Early Offers By Defendants, Not Plaintiffs, In Personal Injury Suits*, 54 *DEPAUL L. REV.* 233 (2005).

1. How Early Offers Work

After plaintiff files a claim, the defendant (usually medical malpractice liability insurers) has a fixed time period to make an early offer to settle (180 days is suggested).³³ Plaintiffs may choose to either accept the offer which becomes binding and removes the claim from the tort system or the plaintiff may reject the offer in which the claim will continue in current tort system whereby the plaintiff can seek both economic and non-economic damages.³⁴ However, should the plaintiff litigate in court, he or she must prove that the defendant acted with gross negligence or intentional misconduct beyond a reasonable doubt.³⁵

2. About the “Early Offer” and “Disclosure”

Early offers constitute the minimum amount that defendants must offer to plaintiffs by statute.³⁶ The amount includes the plaintiff’s net economic loss as it accrues (similar to worker’s compensation or disability insurance). Legal scholars recommend establishing a minimum payment schedule similar to worker’s compensation based on type of medical injury or severity of medical injury.³⁷ Net economic loss includes medical and rehabilitation expenses beyond what is compensated by plaintiff’s own insurance. Reasonable attorney’s fees are also included as determined by statute (10 percent is a commonly mentioned figure in legal literature). However, there is no payment for non-economic damages (*i.e.*, pain and suffering). In addition,

³³ *Id.* at 235.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ Joni Hersch, Jeffrey O’Connell, et. al., *Evaluation of Early Offer Reform of Medical Malpractice Claims: Final Report, Office of Disability, Aging and Long-Term Care Policy*, June 5, 2006. The U.S. Department of Health and Human Services conducted research to assess the performance of the early offer proposal using medical malpractice closed claim data from Texas and Florida. The study analyzed insurers’ initial and final reserves, actual settlement awards, and claimant’s economic loss and calculated insurer savings based at each stage by injury type.

the defendant may decide not to make an early offer. If so, the claim will go through the current system, and the plaintiff can seek both economic and non-economic damages.

The disclosure process includes providing the physician with the opportunity to explain to the plaintiff (in his or her opinion): (1) why the injury occurred and (2) what additional steps, if any, are necessary to prevent similar injuries from occurring in the future.³⁸ The physician is also given the opportunity to apologize. However, there is a catch: the disclosure will only occur if the plaintiff agrees to the early offer as part of settlement and the plaintiff has received compensation. As mentioned, the disclosure and apology would be inadmissible under the hearsay exclusion of HRE Rule 408 as statements of fact made during the settlement negotiation process.

3. Benefits of Early Offers

A major benefit of Early Offers is that it provides a choice for plaintiffs to settle early with an immediate and binding guarantee of payment.³⁹ Although plaintiffs forego the opportunity for a chance at compensation for pain and suffering, it reduces the uncertainty in a wide range of outcomes for plaintiffs and brings peace of mind. There are certainly no guarantees that a plaintiff will even win in court. In an Early Offer, plaintiffs hold the option to reject the offer and possibly seek noneconomic damages. With such a powerful bargaining position held by plaintiffs, defendants will be less inclined to suggest a “low ball” payment.

The process is also financially economical for both parties. It reduces prolonged litigation and its associated costs. Such savings on legal expenses may reduce malpractice insurance premiums and could increase the amount offered to plaintiffs. Finally, there is a

³⁸ O’Connell & Stephenson, *supra* note 32, at 235-36.

³⁹ *Id.*

financial safety valve for a plaintiff’s attorney, whereby attorneys can petition the court if the fee is too low.⁴⁰

It is plausible that an Early Offer system could co-exist along with Hawaii’s Apology Act and its current litigation system. As discussed further below, the Patient Protection and Affordable Health Care Act provides an opportunity for states to experiment with various models such as Early Offers, to seek alternatives to the existing tort litigation system.

B. Funding for State Demonstration Programs Offered Through the Patient Protection and Affordable Health Care Act

The Patient Protection and Affordable Health Care Act (“PPAHCA”), establishes federal funding for state demonstration projects to encourage states “to develop and test alternative models to the existing civil litigation system.” Congress has set aside \$50 million for a five year period to implement statewide demonstration projects starting in fiscal year 2011. Section 399V-4 of the PPAHCA sets forth the provision as follows:⁴¹

(c) Conditions for Demonstration Grants-

- (1) REQUIREMENTS- Each State desiring a grant under subsection (a) shall develop an alternative to current tort litigation that--
 - (A) allows for the resolution of disputes over injuries allegedly caused by health care providers or health care organizations; and
 - (B) promotes a reduction of health care errors by encouraging the collection and analysis of patient safety data related to disputes resolved under subparagraph (A) by organizations that engage in efforts to improve patient safety and the quality of health care.

- (2) ALTERNATIVE TO CURRENT TORT LITIGATION- Each State desiring a grant under subsection (a) shall demonstrate how the proposed alternative described in paragraph (1)(A)--

⁴⁰ *Id.* at 236.

⁴¹ The Patient Protection and Affordable Health Care Act of March 23, 2010, Pub. L. No. 111-148.

- (A) makes the medical liability system more reliable by increasing the availability of prompt and fair resolution of disputes;
- (B) encourages the efficient resolution of disputes;
- (C) encourages the disclosure of health care errors.

Clearly, there are national efforts underway to resolve the medical malpractice crisis. Hawaii should take advantage of this unique opportunity. The Early Offer model presents one example for Hawaii to consider. A proposal could include initiating a pilot study modeled after the Texas and Florida closed claims data study.⁴² Medical malpractice insurers in Hawaii are already mandated by law to report paid claims data to the Insurance Commissioner.⁴³ The data can be used to develop a schedule of minimum payments by severity of injury. All of the essential pieces are available to develop a proposal.

⁴² Joni Hersch, Jeffrey O'Connell, et. al., *Evaluation of Early Offer Reform of Medical Malpractice Claims: Final Report, Office of Disability, Aging and Long-Term Care Policy*, June 5, 2006.

⁴³ HAW. REV. STAT. § 671-5 (West, Westlaw through 2009 SESS.), sets forth the claims reporting requirement for professional liability insurance for health care providers:

Reporting and reviewing medical tort claims. (a) Every self-insured health care provider, and every insurer providing professional liability insurance for a health care provider, shall report to the insurance commissioner the following information about any medical tort claim, known to the self-insured health care provider or insurer, that has been settled, arbitrated, or adjudicated to final judgment within ten working days following such disposition:

- (1) The name and last known business and residential addresses of each plaintiff and claimant, whether or not each recovered anything;
- (2) The name and last known business and residential addresses of each health care provider who was claimed or alleged to have committed a medical tort, whether or not each was a named defendant and whether or not any recovery was had against each;
- (3) The name of the court in which any medical tort action, or any part thereof, was filed and the docket number;
- (4) A brief description or summary of the facts upon which each claim was based, including the date of occurrence;
- (5) The name and last known business and residential addresses of each attorney for any party to the settlement, arbitration, or adjudication, and identification of the party represented by each attorney;
- (6) Funds expended for defense and plaintiff costs;
- (7) The date and amount of settlement, arbitration award, or judgment in any matter subject to this subsection; and
- (8) Actual dollar amount of award received by the injured party.

V. Conclusion

Hawaii's Apology Act is a positive step towards reducing medical errors, but the more fundamental issues of accountability and future prevention of similar injuries still need to be addressed. The Act will no doubt place health care providers in a precarious position of making a sincere expression of sympathy and condolence that will remain confidential and inadmissible as evidence as an admission of liability in medical malpractice claims. Without clear delineation as to what constitutes sympathy versus an acknowledgment of fault, it is likely that attorneys will continue to advise their client to remain silent or conjure up creative "safe apologies" that are protected under HRE Rule 409.5. This is unfortunate for the injured plaintiff who is justified in wanting to understand what happened. However, there are other alternatives such as Early Offer Settlements that seeks to award injured plaintiffs earlier at a fair amount while encouraging full disclosure and apology by providers as part of settlement negotiations. Such a solution provides a more balanced approach to the misaligned medical malpractice system. Nationally, Congress is also interested in resolving the medical malpractice crises by providing federal funding for states to develop demonstration projects. Hawaii should take advantage of the opportunity to explore models such as Early Offers.