THE BENEVOLENT GESTURE
MEDICAL PROFESSIONAL LIABILITY ACT
(THE "APOLOGY STATUTE")
SB 379

I. An Overview

A. The “Apology Statute” allows health care providers to make benevolent gestures prior to the start of medical malpractice lawsuits, mediations, arbitrations or administrative actions and not have those statements or gestures used against them as long as such actions are not statements of negligence or fault.

B. Benevolent Gesture: any action, conduct, statement or gesture that conveys a sense of apology, condolence, explanation, compassion or commiseration emanating from human impulses.

C. Covered Providers:

1. Primary health care centers
2. Personal care homes licensed by the Department of Public Welfare
3. A person, corporation, university or educational institution licensed or approved by the Commonwealth to provide health care or professional medical services, such as a:
   a. Physician
   b. Certified Nurse Midwife
   c. Podiatrist
   d. Hospital
   e. Nursing Home
   f. Birth Center
4. An officer, employee or agent of any of the above acting in the course and scope of employment.
II. Legislative History

A. Sponsor: Senator Pat Vance (R—Cumberland/York)

B. The bill took less than one year to pass unanimously in both the Senate (50-0) and House of Representatives (202-0).

1. Governor Corbett signed the bill into law on October 25, 2013.

III. Proponents

A. The Act strikes a reasonable compromise: it allows health care professionals to be benevolent, but does not deprive patients of their right to initiate suits.

B. The Act breaks down a fear barrier physicians feel when contemplating whether to apologize or express compassion following a bad medical outcome.

C. The Act will foster better doctor-patient relationships and thereby reduce the likelihood of lawsuits, which may be driven by anger after an unanticipated result.

D. The Act will lower overall health care costs by reducing suits.

IV. Critics

A. The Act does not adequately specify what constitutes a “benevolent gesture.” Its ambiguity will result in suits.

B. The Act is unlikely to impact malpractice cases because plaintiffs’ attorneys do not often introduce evidence of an apology as an admission of liability.

V. Application in Other Jurisdictions

A. Thirty-six other states, the District of Columbia and the U.S. Territory of Guam have apology statutes.

B. Seventeen states admit expressions of fault and exclude expressions of sympathy.

C. Eight states exclude both expressions of fault and expressions of sympathy.
VI. **Recommendations**

A. There is very little precedent interpreting apology statutes, possibly because, despite their existence, health care professionals are reluctant to express sympathy for fear of liability.

B. Should your insured wish to express compassion, he or she should do so in a way that clearly excludes negligence or fault. "Safe statements" include:

1. "I'm sorry for your loss."
2. "You have my sympathies."
3. "I feel for you."
4. "My heart goes out to you."
APPENDIX I:
Case Law in Other Jurisdictions

The plaintiff/patient filed a medical negligence action against the defendant/doctor following an emergency colostomy. The trial court returned a verdict in favor of the doctor. On appeal, the patient alleged the trial court erred in refusing to admit that: (1) his wife's observations that the doctor appeared "white as his jacket" and "quite upset" following surgery; and (2) the doctor's statement to the patient's wife, "This was my fault." The Court of Appeals held that the trial court properly excluded the observations and statement pursuant to Georgia's apology statute, which holds that statements expressing mistake or error are inadmissible as evidence.

The plaintiff's husband and daughter brought a wrongful death action on behalf of the deceased wife/mother against the defendants/doctor and practice group. At trial, the plaintiffs stated that the doctor told them he had nicked the deceased's artery and took full responsibility for her death. The jury did not hear any testimony that the doctor told the plaintiffs he was sorry. The Court of Appeals decided whether Ohio's apology statute prohibited statements admitting liability or fault. The court determined that the General Assembly did not intend to include statements of fault within the statute's ambit of protection. Rather, an "apology" meant only a statement of condolence or sympathy without including any expression of fault or liability. The testimony the court admitted at trial did not include any statement of apology, sympathy, commiseration, condolence, compassion or general sense of benevolence. As such, the doctor's statement was properly introduced into evidence.

The plaintiff/patient brought a medical malpractice action against the defendant/doctor, alleging the doctor rendered negligent medical treatment during gallbladder surgery. Following surgery, the patient returned to the hospital due to complications and became upset and emotional. The doctor attempted to calm her and said, "I take full responsibility for this. Everything will be okay." The trial court determined that the doctor's statement was inadmissible under Ohio's apology statute, and the jury returned a defense verdict. The Court of Appeals reversed, holding that the apology statute did not apply retroactively to exclude the doctor's statement, which was made prior to the effective date. The Supreme Court of Ohio held that the statement was protected under the apology statute because the plaintiff did not bring an action until after the statute took effect; as such, the suit was reversed and remanded for reinstatement of the jury verdict. The Supreme Court noted, "[Doctor] was faced with a distressed patient who was upset and made a statement that was designed to comfort his patient. This is precisely the type of evidence that [the apology statute] was designed to exclude."

The plaintiffs, the patient and his wife, brought a medical negligence suit against the defendants, the hospital and doctors, alleging failure to timely diagnose a Coccid infection. The trial court returned a verdict in favor of the defendants. On appeal, the plaintiffs alleged that the trial court abused its discretion by excluding alleged statements made by the defendant hospital's chief operations officer and risk manager. The employees allegedly said, "I am so sorry we failed you," "We let you down," "[Doctor] got the whole thing off on the wrong track and it snowballed," and alluded that the situation was an example of how things can go "when people don't do their jobs." The circuit courts excluded the statements because they went to the issue of negligence, which was prohibited by South Dakota's apology statute. The Supreme Court of South Dakota held that the plaintiffs waived their opportunity to object to the exclusion of the statements because they did not do so at the lower level. Furthermore, the statements were contained in a set of notes written by the plaintiff/wife. Although the notes were provided to the court, there was no context to understand them. Neither of the employees could recall making the statements.