

## **Apologetics in Senior Care Should we ever say..... Sorry?**

*By J David Thurber, J.D. Counsel to Alliance Insurance Group*

When a negative event occurs with a resident on our campus or in our community, because we care, we often are led to apologize. There are times we want to do so simply out of compassion, and at other times because our team may have contributed to the event. We recognize those rare cases where we have failed in our standard of care and desire to show remorse and offer an apology. But should you? **Many operators are fearful of how their apology will be construed** in a subsequent law suit, as well as, at times, their lawyers are advising against anything that might be construed as an admission of guilt or liability. We believe it wise for counsel to take a more thoughtful and evaluative approach to this question of whether to say..... “*we are sorry*”.

If an apology is not offered up initially, the lack of a genuine apology fuels families who may perceive our inaction as a callous indifference to the injury of their family member or their loss, eventually leading to the very lawsuit we feared. This failure to say we are sorry, or to offer a perfunctory apology, can also be played out by plaintiff’s counsel in front of a jury to further emphasize their argument of our callous indifference. It is a bit of a catch 22 for operators. We feel strongly that any apology in isolation is insufficient, however, **you must consider the apology in the context of your entire response to a resident injury or death**. Do you have consistency with your responses to other resident injuries and deaths in your community? We discuss this in more detail below.

There are always situations and ways to show remorse and compassion **which may include an apology for the resident’s injury or death**. In fact, Alliance has several clients whose culture encourages an apology to their residents and families regardless of what has happened. Their overall response within their organization is consistent with the apology. Parenthetically, and while there is no scientific correlation, it is true that these client’s litigation rates are also low.

So, what does a heartfelt apology look like? **An apology that is effective is consistent with your culture and makes a difference in the relationship with the family**. A poor apology can cause more harm than good, so it is important to be consistent and thoughtful in how you approach this opportunity in your relationship with the resident and family. Approaching it solely because you think it will save money on a settlement will also be evident and diminish the sincerity of your approach. Poor examples or pitfalls include:

- **Offering a vague and incomplete apology is more harmful than doing nothing**. Such an apology might sound like: “I apologize for whatever I did”.
- **Using the passive voice**: “Mistakes were made, something happened, along with other complications...”.
- **Making the offer conditional**: “**IF** we did anything wrong”.
- **Questioning whether the victim was damaged**: “To the degree that you were hurt we are sorry”.

On the other hand, Psychologists identify several main components of successful apologies, such as:

- admission of responsibility
- expression of remorse
- promise of forbearance
- and offer to repair

Research shows that when done sincerely, each component contributes to the apology’s effectiveness.\* Taking the apology from saying we are sorry for the loss to actually offering some sort of recompense does require thoughtful consideration with counsel and or the adjuster if one is involved.

So, how do we incorporate the above components into an apology and what should exactly be said and by whom? First and foremost, be sure to **understand your facts completely and carefully, yet as quickly as you can**. Do we have

Eugene  
941 Oak Street  
Eugene, Oregon 97401

Portland  
One Centerpointe Drive, Suite 575  
Lake Oswego, Oregon 97035

Boise  
1079 S. Ancona Drive  
Eagle, Idaho 83616

Phoenix  
4727 East Bell Road  
Phoenix, Arizona. 85032

an act or omission for which we need to take ownership under the most obvious of facts? You do not want to be unclear, ambiguous or evasive because you do not know what happened. You will be asked questions and you do not want to be caught flat footed. Be completely informed as to what happened, having carefully considered what you want to say. Carefully review if your apology is consistent with other actions and behaviors on your part in the resident's and families experience within your community.

**Consider if senior management should be involved in giving the apology.** One Alliance client owner is typically involved in the apologies on behalf of his company. Others are made by the person closest to the family with the Administrator or ED present. We are not all equally gifted with the capacity to express heartfelt apologies. Carefully consider:

- **Do I believe what I am about to say?** If you do not, it will show.
- **Use timely & genuine empathy & compassion** in your communication: "I am truly sorry for your injuries or the discomfort you have suffered or are suffering".
- **Listen thoughtfully**, respect and acknowledge the resident's or family's perspective. **Do not be defensive or respond in anger** to the anger of the family or resident.
- **Empathize**, do not interrupt, take it in, acknowledge their hurt or anger.
- **Offer to provide a simple explanation.** State what you will do or have already done going forward: ie... any change in practice or procedure, a ramped up or specific training, maybe the termination an offending employee, and other simple actions that would demonstrate the authenticity of your apology. For example, in one case the offer to place the name of a long-term resident on a reading room in the community was graciously offered and received. In another case, specific outside training on a topic was initiated and will be done every quarter for all new hires.
- And Finally - **Take the time to consistently follow up** with the resident and family.

What else might advance the authenticity of your approach? **Going to the hospital timely to follow up** on the event and injuries. **Calling the family** and possibly **go to see the family on their turf**. Do you offer to help in any a-typical way? For example, one client offered to pay some incidental expenses for family members who had to travel to the location while another responded to a request and paid for expenses for the grandchildren to visit an amusement park for a day. Others have also credited a resident with rent directly or offered to pay other incidental medical bills. Remember, with any of these ideas, engaging with your counsel and adjuster in advance is always wise.

Paying some amount of money in the process of the apologetic dialogue is a regular question we receive. Considering this form of recompense in some cases is wise. It must be done with counsel and adjuster input. The issues of **getting a release** when doing this also generally comes up and, if acted upon, **generally diminishes any effect of an apology and related actions**. So, depending on the amount of the expenses or proposed payment of money directly, which may or may not be nominal, getting a release may or may not be critical.

In closing, it is wise to note that **the law in many states (thirty-six to date) support (and thus protect) apologies in medical liability cases**, which include senior care communities. When we say protect, we mean that the law prohibits the use of your words in any litigation by a plaintiff as an admission of liability. These laws are generally "full protection" laws which protect not only the apology but also any direct admissions of guilt. Most others are "partial protection" laws which protect just the apology itself, not an actual admission of fault. Knowing the respective states statutory protections for an apology will help guide your approach in what you say.

*\* Steven J. Scher & John M. Darley, How Effective Are the Things People Say to Apologize? Effects of the Realization of the Apology Speech Act, 26 J. PSYCHOLINGUISTICS 127- 132 (1997)*

*Note: The law in most all jurisdictions protects an expression of apology or liability made in the context of a Mediation. Mediation may be the first formal step in trying to resolve a potential claim and is actually the forum in which most of our professional liability claims get settled. The use of apologetics in this context, where appropriate, should always be a strong consideration. Some of the examples above were actually made in the context of a mediation.*