Legal Bite Question of the Issue
How to Apologize to a Patient
By Frank Recker, DDS, JD

Q: An extensive treatment plan was completed on one of my more difficult patients. Along the way, we encountered just about everything that could go wrong. I was confident that the treatment was all performed properly, but I apologized to the patient several times for each difficulty we encountered. The patient is now hinting that I should pay her for what she “went through,” because she obviously interpreted my apologies as admitting some kind of wrongdoing. Should I never be courteous and extend an apology of any kind to a patient for some discomfort or any treatment difficulty they encounter?

A: Dentists and other health care practitioners are often confronted with a situation where the treatment was rendered appropriately but the patient is unhappy with the results. Another scenario is when an unforeseen event occurs, such as a temporary paresthesia or difficult postoperative healing period, and every caring health care provider feels “empathy” for the patient. Often times, I am asked whether an apology should be noted in the records, or just not made at all.

It is clear that when patients feel that the practitioner relates to what they are going through, the patient is happier. Studies have shown that patients are far more reluctant to institute litigation if they believe empathy or compassion is felt by the health care provider. And public policy, as expressed in many state statutes, encourages expressions of honest compassion and open communication with patients and families following unanticipated outcomes. To that end, about 36 state legislatures, plus the District of Columbia, have enacted “apology statutes,” which allow physicians and dentists to speak openly with patients without fear of retribution in the legal system.

The Ohio apology statute is one example of the wording and objectives of such a law:

“In any civil action brought by an alleged victim of an unanticipated outcome of medical care….any and all statements, affirmations, gestures, or conduct expressing an apology, sympathy, commiseration, condolence, compassion or a
general sense of benevolence that are made by a health care provider or an employee of a health care provider to the alleged victim, a relative of the alleged victim, and that relate to the discomfort, pain, suffering, injury or death of the alleged victim as a result of the unanticipated outcome….are inadmissible as evidence of an admission of liability or as evidence of an admission against interest."

Clearly the purpose of such “apology” statutes is to encourage expressions of compassion without exposing the practitioner to legal jeopardy. However, such laws do not shield statements or expressions that admit liability or fault. For example, one case held that because the physician said “I take full responsibility for the outcome and it was my fault” was admissible. Another example was when a practitioner said he was the “captain of the ship” and assumed responsibility was deemed to be an admission of guilt and was admissible in court in a subsequent malpractice suit.

The bottom line is that you can be compassionate, and express an apology for what the patient is encountering or what difficulties were experienced, but without making statements that constitute “admissions” or guilt of malpractice. When I first entered the practice of dentistry many years ago, a very old local dental practitioner had just died. Upon seeing many of his former patients, I was amazed at the substandard dentistry he had rendered. But in virtually every instance, the patients praised his skills and his likeability. In short, if they love you they are very reluctant to take any adverse action against you! That is the objective of “apology” laws.