Disclosure

What's the Risk?

Complications and iatrogenic injuries are an inevitable part of the practice of medicine. The practitioner's genuine concern and acknowledgment of the patient's pain may influence how much anger the patient/family members feel about the situation. This, in turn, may influence whether a claim or suit is filed.

Disclosure of an error to the patient does not necessarily avoid litigation. Not knowing how to express empathy (or apology when appropriate), an inadequate framework for disclosure, and/or lack of preparation may lead to certain behaviors that can complicate the disclosure process. These behaviors include:

- Waiting for all the facts prior to disclosing anything.
- Denying.
- Lying.
- Blaming.
- Speculating.
- Confessing.
- Conversing casually about an adverse event with colleagues.
- Offering compensation without adequate preparation.
- Offering compensation without adequate representation.
- Disclosing without adequate preparation.
- Disclosing without adequate representation.
- Covering-up.
- Altering medical records.

Moreover, fear of involvement in medical professional liability litigation can contribute to poor practitioner communication; some may say too much, others may say too little, and yet others may say nothing at all.

Lack of informed consent may also complicate the disclosure process. The patient may have an unanticipated outcome that is a known complication of a procedure. For example, a patient undergoing a colonoscopy may experience a colon perforation. If the patient lacks awareness of known complications prior to a procedure, the patient may believe an error was made. Advising the patient that this is a known complication after the fact simply invites a claim that the patient was not properly informed.

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When Is This Risk an Issue?

Disclosure of unanticipated adverse outcomes and medical errors to patients and family members can be among the most stressful events in a practitioner's professional life. Disclosure is endorsed by many professional and regulatory organizations, including the American Medical Association, the Agency for Healthcare Research and Quality, The Joint Commission, and the National Quality Forum. Furthermore, the consideration and/or passage of disclosure and apology laws have gained significant ground in state legislatures as well. Claims Litigation and Management reports that 38 states have enacted apology or sorry laws. These laws typically "restrict the admissibility of statements of benevolence, sympathy, commiseration, condolence, or compassion made by a health care provider to a patient or patient's representative after an unanticipated outcome of medical care or treatment."[1] In addition, several states mandate adverse event reporting.[2] Ideally, reporting such events triggers a disclosure discussion with the patient/family members.

Effective disclosure discussions rely on empathy, informed consent, adequate communication, avoidance of certain behaviors, and an apology when appropriate. In addition, resolution programs tied to disclosure may decrease claims and the time it takes to resolve a claim, and overall costs. Below is a brief review of how each topic applies to the disclosure process.

Empathy and "I'm Sorry"

It is important to understand that expressing empathy is acceptable, but expressing fault or responsibility is inappropriate in almost all situations. "I'm sorry I did this to you" is a statement of fault or responsibility. You should not apologize for having caused the event, unless your responsibility is absolutely clear.

Saying "I'm sorry this happened to you" is an expression of empathy. Empathy is always appropriate when a patient experiences an unanticipated outcome. It is important to know that there are ways to express empathy without using the words "I'm sorry." Phrases like "This is terribly sad," "We feel awful about this," or "We feel terrible about what you are going through" express empathy in ways that are distinct from apology and have less chance of being misunderstood. Expressing empathy is not only appropriate, it may also help mend a relationship that has been strained by an adverse outcome, calm the anger of some patients and/or family members, and, in many instances, avoid medical professional liability litigation.

Role of Informed Consent in the Disclosure Process

Although an outcome may be negative and/or unanticipated, it may not have resulted from an error. Hence, it is imperative that practitioners have comprehensive informed consent discussions with patients to address potential risks, complications, and adverse outcomes. This enables patients to make informed decisions and avoid surprise should one of the risks or adverse outcomes actually occur. For more information on informed consent, see ***Informed Consent: Process***.

Disclosure

Practitioners who want to avoid a claim following an adverse outcome are well-advised to cover this ground ahead of time during the informed consent discussion. Practitioners should:

- Promise no more than they can certainly deliver.
- Make no guarantees.
- Acknowledge their own limits.
- Refer patients to another practitioner when the required professional skills are beyond their own level of training or competence.
- Incorporate as many risk management systems into their practice as possible, including comprehensive procedure-specific, treatment-specific, or medication-specific informed consent.

Patients who experience an unanticipated outcome of care, even when an informed decision is made, want their practitioner or someone from the organization to acknowledge the outcome or event. When a medical error occurs, patients not only want this acknowledgment, they also want to know why the error occurred, how the effect of the error will be minimized, and the steps the practitioner (and organization) will take to prevent recurrence. Such disclosure strengthens the relationship and builds trust between patients and providers; provides a healing opportunity for caregivers, patients, and families; and improves patient care by allowing system errors to be identified and addressed with corrective actions.

Communication

Communication following a mistake can have significant risk management and human impact. The reactions of patients and their families to incidents are influenced by the incident itself and the manner in which the incident is handled. Inadequate or insensitive management may cause further emotional trauma, while open acknowledgement of the injury, sensitivity, good communication, and skillful management of corrective actions may reduce emotional trauma.[4] Waiting for all facts to become known may result in a loss of credibility for the practitioner. An investigation into the event may reveal that the "why" and "who" of an event are different from what was originally thought. As more facts become known, they may be disclosed to the patient/family members as part of an ongoing dialogue. It is also important to realize that whatever is said to the patient/family members in the initial disclosure will become "truth" for them. Recognize that it is better to say "I do not know at this time" than to speculate about the cause of an event.

Behaviors That May Complicate the Disclosure Process or Litigation

Witnessing Errors

When a witness recounts a practitioner's error or oversight to a patient or family member, it may not be considered disclosure, but rather tattling at best and slander at worst. Accordingly, the witness should speak with the appropriate supervisor or manager rather than directly with the patient/family members.

Casual Discussion
A casual discussion with a colleague about what happened may result in involving that person as a witness in a later claim lawsuit.

Cover-up
Lies and cover-ups invariably have a negative impact upon the practitioner, especially in the context of litigation.

Blame and Defensiveness
Disclosure is not about blaming or shaming. When two practitioners enter into the "blame game," both lose credibility. Blaming someone else is an almost certain way of implicating yourself. Likewise, defensiveness is an emotional response that often belies guilt and inspires anger.

Speculation
Early speculation and even educated guesses may lead to unnecessary accusations that will be difficult to withdraw at a later time.

Confession
Blurting out a confession may be as dangerous as withholding the truth. Except in those few cases in which one's responsibility for an error that led to an adverse outcome is obvious, guilt should not be acknowledged. The problem is often more complex than it initially seems.

Nondisclosure
There may be rare instances when nondisclosure may be considered, but the practitioner who contemplates taking this course may want to first ask whether they would be willing to defend that decision in public. Additionally, practitioners choosing not to disclose should be doing so for the patient's well-being, not their own.

Documentation
Entries that are blacked out or whited-out, erased, or otherwise obliterated are likely ensuring the loss of a medical professional liability case that may have otherwise been defensible.

How Can I Reduce Risk?

From a risk management perspective, disclosure is advisable for all medical professionals, no matter the site of occurrence of the adverse outcome. The recommendations that follow address the topic of disclosure for healthcare practitioners.

Develop Disclosure Framework

Be familiar with reasons for disclosure	• Recognize the key reasons for disclosure are to facilitate the development of a framework. These reasons include:
	  ○ Patients have a right to know and to be involved in their care.
	  ○ Patients want to know the truth after an adverse outcome and may seek the help of an attorney if they suspect their healthcare practitioner is not being open with them.
	  ○ Patients value honesty and are adept at sensing lies and cover-up.
	• Recognize that healthcare facilities accredited by The Joint Commission must disclose unanticipated outcomes to comply with its standards.
	• Recognize that some states mandate adverse event reporting. Be aware of your state's laws and regulations.

Create and implement disclosure framework	• Develop framework for discussing unanticipated outcomes, premised on strong communication both before and after treatment or procedures. See ***Disclosure Policy – Sample***.
Conduct investigation	• Conduct an appropriate investigation so the facts are understood.
Identify events to be disclosed	• Identify specific events to be disclosed: ○ Adverse events, unanticipated outcomes, and occurrences affecting patients.
Seek assistance	• Notify your medical professional liability carrier and, when time permits, the hospital's risk manager to seek assistance (e.g., legal counsel, clinic manager) prior to disclosure, especially if you are unsure how to communicate the event. Understand that in some cases, an institution may require a hospital representative to attend any disclosure meeting.
Plan carefully	• Recognize that while disclosure should NOT appear rehearsed, it should be planned.

Know What to Disclose

Disclose events surrounding a serious outcome	• Disclose all events resulting in patient injury or death.
Consider disclosure of minor events	• Recognize that most patients favor disclosure of facts surrounding even minor events.
Stick to known facts	• Share the facts that are known at the time of disclosure with the patient/family members. Refrain from speculating about why an event happened or who was responsible for it, as an investigation may reveal that the "why" and "who" of the event are different from what was originally thought. Provide a caveat that as more information becomes available, further discussion will take place.
Disclose responsibility when responsibility is clear	• Be upfront and honest about what happened in cases in which sole responsibility is clear; for example, a surgeon who amputates the wrong limb. Do NOT blame another healthcare professional for failing to mark the correct leg or to make sure the X-ray was correctly placed in the view box in the operating room.
Offer treatment options	• Inform the patient of the next steps in the plan of care to reverse or minimize injury, as applicable. This may include additional office visits or diagnostic testing, performance of another procedure, or referral to another practitioner. Promise only what you can or intend to implement.

Know When to Disclose

Disclose as soon as possible	• As a general rule, initiate the disclosure process as soon as possible after an unanticipated event or discovery of such an event. Recognize that some facilities have disclosure protocols. Follow the facility's protocols when engaging in the disclosure process.
Disclose when patient is medically stable	• Disclose to a mentally competent patient as soon as the patient is capable of hearing and understanding the information. Consider disclosing to a family member before disclosing to the patient if the patient remains heavily sedated or unresponsive for an extended period after the unanticipated event.

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Know When to Disclose	
Do NOT wait for all facts to become known	• Do not wait for all facts to be discovered prior to disclosing, as this may diminish credibility. Disclose known facts at the earliest possible time and communicate additional facts as soon as they become known.

Know Who Should Disclose	
Have involved practitioner disclose	• Whenever feasible, ensure that the involved practitioner discloses to the patient/family members. Consider having the practitioner disclose a system error that is discovered long after the fact (for example, a misfiled positive biopsy report), as the practitioner will usually have a relationship with the patient.
Recognize when a peer or colleague may need to disclose	• If you see a peer or colleague commit an error that causes harm to a patient, confront your colleague and suggest disclosure to the patient and/or family members. Report the event through the proper channels if the colleague denies the incident or refuses to disclose it.
Do NOT force emotionally distraught practitioner into a disclosure discussion	• Refrain from forcing an emotionally distraught, fearful, or reluctant practitioner to engage in the disclosure process. Explain to the involved practitioner that their absence will be addressed during the disclosure discussion.
Consider a designee	• Consider using a designee for disclosure if the practitioner is too emotionally involved to discuss the matter calmly and rationally or if it is impractical or unreasonable for the practitioner to do so. Recognize that a hospital risk manager may be able to substitute – or to find a substitute – for the involved practitioner.
Consider group disclosure	• Consider having additional people (for example, a social worker, chaplain, patient advocate, or nurse) participate when a practitioner is fearful of entering into the disclosure discussion alone. Recognize that too many participants may overwhelm the patient/family members. For example, it may be overwhelming to have four participants from the facility present for a disclosure discussion with a patient and a spouse. In general, limit the number of

Know Who Should Disclose	
	facility participants to the number of persons to whom disclosure is being made. In the example of a disclosure discussion with a patient and spouse, limit the number of facility participants to two.
Seek advice from a trained risk manager	• Consider seeking advice from the facility's risk manager regarding any plans to disclose to patients or family members. Recognize that trained risk managers can provide coaching on the initial disclosure discussion with the patient.

Know How to Disclose	
Train	• Consider utilizing a training program such as the Agency for Healthcare Research and Quality (AHRQ) Communication and Optimal Resolution (CANDOR) to train practitioners on how to respond to an unexpected event.
Plan	• Plan what will be said to avoid saying something that may be regretted later.
Express empathy	• Express empathy with patients and/or family members and sympathy for their pain and suffering. Deal with human emotions before presenting the objective facts. Recognize the emotions that accompany the loss; for example, injury or death. Recognize that "I'm so sad to have to tell you this…" may be an effective first step in communicating empathy to patients/family members. • Recognize that expressing empathy is more than simply saying a few words.
Express regret	• Express regret for what happened and for the suffering of the patient and/or family members. Recognize the difference between expressing sorrow for the pain and suffering of the patient/family members and expressing regret over directly contributing to the pain and suffering.
Reserve apologies	• Reserve apologies for those instances in which responsibility for the problem or outcome creating the need for the apology is certain.
Explain in lay terms	• Explain the facts that are known in lay terms.

Know How to Disclose	
Avoid certain words	• Avoid words such as “error,” “mistake,” “fault,” and “negligence.”
Be prepared for anger	• Be prepared for anger. Realize patients may express anger because they feel helpless in the situation. Try to avoid becoming defensive or responding to the anger; allow patients to express their frustration. If the situation becomes unsafe, end the discussion and excuse yourself from the room.
Remain available	• Remain available to patients and/or family members to handle questions or concerns. Recognize that many questions arise only after the initial pain and confusion have subsided. Be available to patients/family members as they sort through the process.
Follow up	• Be sure to follow up when follow-up is promised. Refrain from revealing details of the ongoing investigation or any planned disciplinary actions. Assure patients/family members that the issue is being addressed at the highest possible levels and that appropriate actions either have been or will be taken.

Document Appropriately	
Document event	• Document the details of an adverse outcome. Ensure that the documentation is factual, objective, and completed contemporaneously. Do NOT document a self-serving explanation of what happened. Do NOT state opinions, perceptions, or defenses. Include such information as when the adverse outcome was discovered, what symptoms the patient was showing, and what actions were taken. Include the date, time, and signature at the time of the entry.
Avoid including extraneous information	• Avoid writing any information unrelated to the care of the patient in the medical record. Do NOT document in the medical record that an incident report was filed or that the legal office or superiors were notified.
Do NOT alter documentation	• Do NOT alter any prior documentation or insert backdated information.
Document disclosure	• Objectively document the facts and substance of any conversations or meetings with the patient/family

Document Appropriately	
	members. Include the names of those present, the date and time of conversation or meeting, what was said (specific details need not be noted), and the reaction of the patient/family members.

Avoid Certain Behaviors That Complicate Disclosure or Litigation	
Don't wait	• Don't wait for patients/family members to initiate the disclosure process. Recognize that waiting to be asked puts you in a defensive position.
Don't lie or cover up	• Don't lie or cover up. Patients/family members want honesty and are more willing to forgive an error than a lie. Recognize that lies and/or cover-up attempts not detected by patients/family members may be discovered by a plaintiff attorney in the course of a subsequent lawsuit.
Don't blame	• Don't blame someone else or share blame with another, as serious adverse events are rarely due to the sole action or inaction of one person. Don't criticize the care or response of another provider in an attempt to exonerate yourself. Recognize that blaming someone else is an almost certain way of implicating yourself.
Don't be defensive	• Don't be defensive. Try to meet anger with professionalism and objectivity.
Don't speculate	• Don't speculate, guess, or offer an unsubstantiated opinion. Recognize that speculation may lead to false accusations that will be difficult to withdraw or undo at a later time.
Don't confess	• Don't confess. Avoid apologizing for having caused the outcome, unless responsibility is unmistakably clear.
Don't speak down to the patient	• Don't speak down to the patient or communicate at a level the patient cannot understand.
Don't disclose in the presence of plaintiff attorney	• Don't disclose in the presence of a plaintiff attorney unless your defense attorney is also present. Postpone the disclosure meeting if the patient and/or family members bring an attorney and your defense attorney is not present.
Don't offer compensation	• Don't offer compensation without first involving your MPL insurance carrier. Recognize that this typically

Avoid Certain Behaviors That Complicate Disclosure or Litigation	
	includes consulting the claims department and/or assigned defense counsel.
Don't disclose disciplinary action	• Don't disclose disciplinary action taken against an involved professional. Assure patients/family members that the issue is being addressed.
Don't discuss the event with colleagues	• Don't discuss the event with colleagues. Recognize that casual conversations with other physicians may come out in subsequent litigation. Restrict discussions about an adverse outcome that may result in litigation to a legally protected peer review meeting, your own defense attorney, or a representative from your MPL insurance carrier.
Use caution with peer review meetings	• Be aware that some states do not afford peer review protection to discussions that occur in a medical practice that is not independently licensed as a clinic. Recognize that the event may be safely discussed in hospital peer review meetings that are protected from discovery.
Don't discuss with subsequent treating practitioner	• Don't discuss details or opinions of the event with subsequent treating practitioners, as a subsequent treating practitioner may become an expert witness for the plaintiff if the incident develops into a lawsuit. Recognize that as an expert witness, the subsequent treating practitioner may be asked to provide the involved practitioner's interpretation of the event. Share only the information that is required for the patient's ongoing care.
Don't alter the medical record	• Don't alter the medical record. Attempts to alter the medical record after the fact result only in making a defensible case indefensible.
Use Caution With Nondisclosure	
Consider nondisclosure	• Consider that choosing not to disclose may be an option in some cases, as knowing the information can sometimes put a patient at risk of physical or emotional harm. Use clinical judgment regarding nondisclosure.
Document reasons	• Document the reasons why it was decided to withhold information. Consider having a mental

Use Caution With Nondisclosure	
	health provider conduct an assessment, as appropriate.
Use caution	• Do NOT use nondisclosure as an option when the primary reason for choosing it is to protect yourself.

Establish Policy for Communicating With Media	
Develop a media policy	• Develop a policy on communicating with the media that addresses the following: o Educating staff members on the policy. o Appointing a spokesperson for the office practice – Ensure that staff refer requests for information to the spokesperson. o Practicing what will be said and obtaining insurance company and legal input. o Communicating carefully – Saying a little is better than saying nothing. Recognize that if your office doesn't tell the story, an angry patient/family member may do so. o Telling the truth, based on what is known at the moment – Do NOT speculate, do NOT blame other practitioners, and do NOT blame the patient. o NOT providing any information "off the record" – If you don't want it said on the 6 o'clock news, don't say it. o NOT guessing or speculating – If you don't know the answer to a question, say so and indicate that the investigation is ongoing. o NOT offering excuses – It is OK to acknowledge that an apology has been made. o Focusing on what is being done – Make sure you emphasize what is being done to "make things right" and to prevent a reoccurrence.

Disclosure

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