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Lifespan
Risk Services, Inc.

167 Point Street, Suite 170
Providence, RI 02903

T: (401) 444-8273
F: (401) 444-8963

Insights

INTO RISK MANAGEMENT

@RISK: DISCLOSURE & APOLOGY:

CAN A DOCTOR'S SILENCE FUEL A LAWSUIT?

By William Jestings, Esq.

This article is an enduring activity approved for *AMA PRA 1 Credit(s)*™ and category 1 credit in Risk Management Study.

Demonstrating compassion and expressing remorse is something most patients expect of their providers. Yet due to concern about the impact on potential future medical malpractice litigation, such sentiments are rarely expressed.

Does a doctor's silence trigger a patient's anger? Authors and researchers who support apology after a medical error or bad outcome occurs, argue that medical malpractice litigation is fueled by the patient's anger and desire to bring the truth to light, rather than by greed or desire for compensation. Their hope is to change the thinking that statements of sympathy can only serve to hurt a healthcare professional in the litigation that is bound to follow, to an understanding that an apology may prevent a lawsuit in the first place.

It needs to be noted that physicians and healthcare providers have an obligation to communicate errors and adverse outcomes to patients, pursuant to the American Medical Association's Code of Ethics which provides that "[i]t is a fundamental ethical requirement that a physician should at all times deal honestly and openly with patients." Moreover, The Joint Commission (TJC) requires that hospitals disclose unanticipated outcomes of treatment to patients or their families. Neither requires that a physician admit fault or responsibility when explaining an unexpected outcome to a patient or a patient's family.

Rhode Island does not actually have an apology statute, and often the question arises, "What is the potential impact of an apology by a healthcare provider on the defensibility of a law suit?" This is a difficult situation for any provider to find themselves in, since at the time of the event, they will likely be asked to provide information to the patient or the patient's family as to what happened, why it happened and what will be done to correct the error.

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COMMUNICATING WITH PATIENTS AND FAMIILIES

Healthcare workers in Rhode Island should be cognizant that any admission of fault or liability is admissible in evidence at a medical malpractice trial to support a claim of liability. Distinct from an expression of sympathy, an admission of error can be used to establish breach of a standard of care. This may result in causation and damages arising as the only questions for a jury to consider.

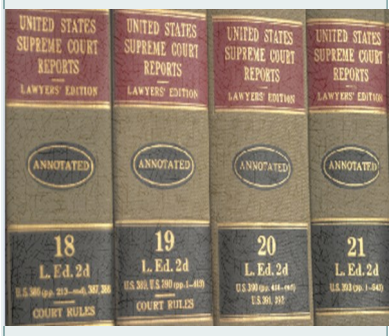
However, expressions of sympathy, condolences and concern about the patient's care are appropriate and generally will not impact the defensibility of a case before a jury. A failure to make an effort to express sympathy can create an impression on the jury and on the patient, that the healthcare provider is more concerned about liability than properly caring for the patient.

Accordingly, making an effort to communicate with the patient or the patient's family as soon after the event as you can, will reinforce to the patient and family that you genuinely care about the patient, the event, and the impact of the event on the patient's care.

Accordingly, providers need to express empathy without admitting fault.

Rhode Island does not currently have a medical apology statute.

Of the 4 apology bills introduced in the Rhode Island Legislature between 2011 and 2014, none passed.



RHODE ISLAND'S APOLOGY LEGISLATION HISTORY

Rhode Island does not have a statute protecting physician apologies from being introduced into evidence at a medical malpractice trial.

Bills have repeatedly been introduced in the Rhode Island Legislature between 2011 and 2014, but none have passed, with almost all being held by committee for "further study."

Early in the process, the Rhode Island Legislature declared "open communication between patients and healthcare providers is essential to ensuring optimal healthcare outcomes; fear of lawsuits can impede such open communication between health care providers and patients; and, protecting statements by health care providers that express sympathy, condolence, fault, or a general sense of benevolence to a patient after an unanticipated healthcare outcome fosters open communication between the health care provider and the patient." Two notable provisions in the 2011 proposed bill were: 1. Statements can be made to family or a representative of the patient; and, 2. Statements of responsibility were protected.

Unfortunately the bill never passed and was tabled for further study.

In 2012 a similar bill was introduced expanding the scope of the person or entity making the apology to include employees of the healthcare provider. More importantly, the bill *removed the protection for statements of responsibility by specifically excluding the admission of liability or fault from the protection afforded by the statute*. That bill did not pass.

In 2013, the proposed bill was a streamlined version of the one in 2012; however, there was one notable change: *removal of the protection for offers made by a healthcare provider to a patient, or to the family or representative of such patient, to undertake corrective or remedial treatment, or gratuitous acts to assist the patient in connection with or relating to the patient's condition or the outcome of such patient's medical care and treatment.* Again the bill was sent to committee for further study.

The most recent attempt in 2014 ended up being sent to committee for further study as well. That proposed bill expanded the class of individuals to whom the apology could be made to include friends of the patient, or friends of the patient's family, but was otherwise identical to the 2013 proposed legislation.

RI LAWS OFFERING SOME DEGREE OF PROTECTION:

Rhode Island Rule of Evidence 409 states that any evidence of furnishing, offering or promising to pay medical, hospital, or similar expenses as a result of an injury is not admissible to prove liability for the injury.

Rhode Island General Laws §9-19-35 states that the failure of a health care provider to bill a patient for services rendered shall not be construed as an admission of liability and shall not be admissible in evidence as to liability.

To earn CME credit for reading the apology disclosure information on pages 1—3, please go to:

https://www.surveymonkey.com/r/9F3YPQQ

Current Apology Laws: Know the Language In the Jurisdiction Where You Practice

- 36 states, the District of Columbia and Guam have adopted rules or restrictions on the use of apologies or other sympathetic gestures in medical malpractice cases.
- The protections afforded differ in ways that are often subtle, but which may have dramatic implications for practical applications.
- Most protect written statements, oral statements, and conduct (generally defined as "statements, affirmations, gestures, and conduct").
- 21 of the 36 states define who can convey an apology: healthcare providers and employees and/or agents of a healthcare provider acting on the provider's behalf.
- The remaining states with apology laws indicate that apologies are inadmissible if they fall within the remaining provisions of the statute, regardless of who apologizes.
- The majority of states have provisions defining to whom an apology may be given, generally limiting it to the victim of an accident or adverse medical event, the victim's family, the victim's representative, or some combination thereof.
- There is a wide range of sentiments protected by apology laws, such as statements expressing "sympathy, compassion, commiseration, and condolence."
- 5 state laws protect expressions of mistake, error, and fault; therefore, sympathetic statements and gestures need to be distinguished from those considered to be admissions of fault.
- Laws in the majority of the remaining 31 states explicitly define acknowledging fault or liability as admissible statements.
- Only 3 states have apology laws that protect explanations of the circumstances which led to an adverse medical event or injury.
- A majority of the apology laws restrict the context in which an apology qualifies for protection, requiring that the apology relate to pain, suffering, injury, or death of an individual as a result of an unanticipated outcome of medical care.
- Certain laws are more general and provide protection regardless of whether the apology relates to injury or death of an individual as a result of an accident, medical or otherwise.

The bottom line: ***be knowledgeable about the specifics of apology laws that apply to the jurisdiction where you practice.***

FOR ADDITIONAL INFORMATION:

American Medical Association. AMA Code of Medical Ethics, Opinion 8.12 – Patient information. http://www.ama-assn.org//ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion812.page.

Baltimore Sun, Moderating malpractice costs, February 8, 2010.

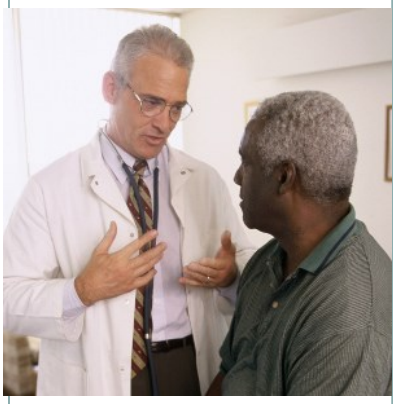
Alina Tugend, An Attempt to Revive the Lost Art of Apology, New York Times, January 29, 2010

Jennifer K. Robbennolt, Attorneys, Apologies, and Settlement Negotiation, 13 Harv. Negot. L. Rev. 349 (2008)

Johnathan R. Cohen, Advising Clients to Apologize, 72 S. Cal. L. Rev 1009 (1999)

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 Res. 127 (1997)

Nicholas Tavuchis, Mea Culpa: A Sociology of Apology and Reconciliation (1991)



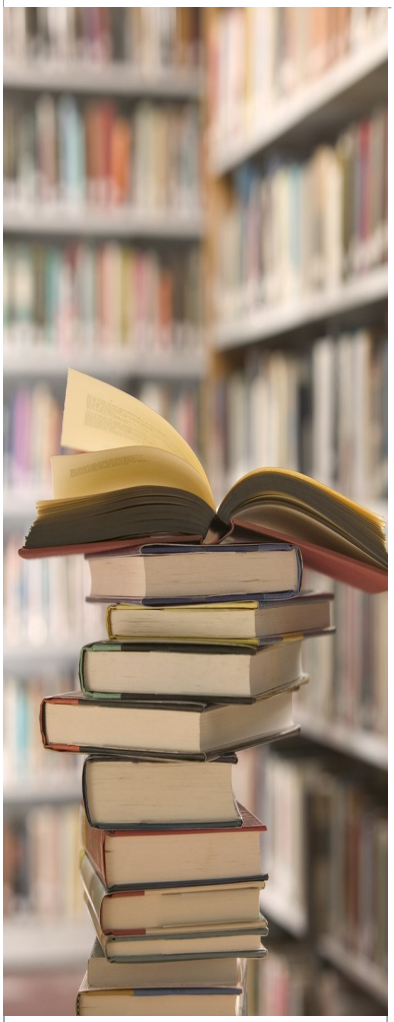
WHAT TO SAY IN THE FACE OF AN ADVERSE, UNANTICIPATED OUTCOME:

Guidance for Providers and Healthcare Workers

Looking for a script to guide you on the best way to interact with patients and families in a situation where there is an adverse, unanticipated outcome? You'll have to search hard, because there's no one-size-fits-all script that universally applies; however, one thing that is true in every circumstance is that no definitive statement should be made until a sufficient review of what occurred has taken place.

* As a suggested initial response to patients or family members, include an explanation of the unexpected outcome *without an admission of fault,* as well as what is being done for the patient along with a description of future care as applicable.
* Make a statement similar to: "I'm sorry that this happened. I've notified the Attending/Unit Director/Administrator and they are trying to understand why this occurred. Right now my priority is making sure the patient is taken care of, but I want to keep you in the loop as well. Who would you like me to provide updates to?"
* This will demonstrate concern and a determination to make sure the patient will receive appropriate future care.

The needs of the patient must be your focus.



* Next, contact Risk Management and your supervisor, or the unit director.
* Decide who is responsible for managing the ongoing care of the patient.
* In situations where a facility such as a hospital or outpatient surgical center is involved, an investigation will likely be initiated. Information gathered in any investigation will be confidential and some may be protected from discovery, such as a Peer Review proceeding or an investigation by the healthcare provider's insurer. The investigation may include record review and interviews of those who participated in the care to obtain their perspective.
* Regardless of the investigation, the needs of the patient must be the focus. It is extremely important to stay involved in the patient's care, with a focus on the current condition of the patient and his or her prognosis. Communicate frequently with the patient and family regarding care.
* After discussion with administration and your malpractice provider, an apology or expression of grief toward the patient or family may be considered. A more difficult consideration is whether and how there will be an acknowledgement of responsibility since this may impact the ultimate defensibility of a case. It is not advisable to make that decision in isolation and without advice.

The APOLLO Physician Peer Support Program

The immobilizing feeling of stress after being named as a defendant in a lawsuit is, for physicians, often compounded by fear of stigmatization and a sense of isolation.

Physician reports include symptoms of stress, anxiety and depression, work dissatisfaction, occupational discomfort and lowered levels of psychological and physical well-being.

Physicians often choose to navigate through the litigation process alone and unsupported, a choice that can have a devastating effect on their ability to focus and care for patients, their families, or themselves.

In an effort to decrease the likelihood of medical error by helping the defendant physician to effectively manage litigation stress, Lifespan Risk Services developed the APOLLO Program to offer physicians an opportunity to confidentially reach out to a panel of specially trained physician peers for support throughout the litigation process.

Participation in the APOLLO Program is entirely voluntary, and absolutely confidential.

A panel of ten trusted physicians who had experienced the litigation process were selected and endorsed by their Department Chairs to participate in the APOLLO Program. The peer supporters received training in stress identification and reduction, crisis management and legal limitations related to communicating with program participants. Training was developed and facilitated by a psychologist, risk management staff and attorneys.

Participation in the APOLLO Program was initially offered only to defendant physicians upon initiation of a malpractice suit and at key points in the litigation process, however, now all providers experiencing stress related to a patient safety event may use the program, whether litigation is imminent, or not.

For more information about the APOLLO Program, please contact Suzanne Duni Briggs, Director, Loss Prevention @ 444-2018 or visit our website: www.lifespan.org/centers-and-services/lifespan-risk-services.

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Compassionate, confidential support for Physicians, by Physicians

Lifespan Risk Services *presents*:

@Risk: Live Lecture Series

PY 2016 @ Risk Live Lecture Series

Presented by Lifespan Risk Services, Inc. - Loss Prevention

Rhode Island Hospital - George Auditorium

Diagnostic Error	Health Care Technology	Transitions of Care	Disclosure/ Apology
09/08/2016 7 - 8am	06/09/2016 7 - 8am	TBD	04/28/2016 12 - 1pm
TBD	09/27/2016 5 - 6pm	09/15/2016 12 - 1pm	05/12/2016 12 - 1pm

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RISK MANAGEMENT CORNER

Responding to a Patient Safety Event

Managing a patient safety event can feel overwhelming, and handling the situation effectively truly is more of an art than a science. Communicating with the patient, family and care team is possibly the single most important factor in ensuring a patient safety event is managed properly. Our risk management experts have provided the following valuable advice:

- Ensure there is a full clinical assessment documented in the record. Document the facts only. Be objective.
- **Do not** document that you contacted Risk Management.
- **Do not** document that you completed a Safetynet report.
- **Do** document that you spoke with the patient/family and allowed opportunity to ask questions.

Risk Management is available to help plan a response and assist with documentation.
(after hours pager, 350-5274)

- Secure equipment, devices, medication that might be involved in the patient safety event.
- Be proactive. Do not wait for the family to ask what happened. Do not comment on care you were not directly involved with.
- Do not point fingers at others. Be factual and empathetic.
- Do not tell the patient/family you know how they feel – you don't and they resent it.

Studies show that the most important factor in people's decisions to file lawsuits is not negligence, but *ineffective communication between patients and providers…*

Upon learning of a medical error, patients/families feel a myriad of emotions: *Why me?* Feels unfair; *I wasn't told this could happen*. Feel deceived; *Now what's going to happen to me?* Feel scared; I *hurt*. Feel angry and depressed; *I demand an explanation*. Feel violated and not in control; *Is this going to cost me money?* Feels unjust. *I'm so angry!*

- Remain compassionate and in control. "I've notified (the person who can take action) and they are going to look into why this happened".
- Determine if the event warrants notification to the administrator on call.
- Ensure a Safetynet report is completed. Communication regarding the event is placed in the report to protect the information from discovery in a malpractice lawsuit.
- Ask the family if there is anything you can do for them….service recovery. "My concern is that you are okay, is there anything I can do for you right now?"
- If time allows, check back on them at the end of the shift. If not, handoff to the appropriate representative of the Hospital for continued communication with the family. Include in the handoff the family expectations for further communication and action.
- Check on your co-workers. How are they doing? Express empathy for what they have gone through.

Insights is published by Lifespan's Department of Risk Management Loss Prevention division.
Submissions and ideas are welcome and may be submitted to the department or faxed to **401-444-8963.**