

## When and Why You Should Apologize To Patients

As many of us can attest, it's hard to say you're sorry. The process is vastly more complicated for healthcare professionals who make life-and-death decisions in a world where multimillion-dollar lawsuits are common. Despite the obvious risks, the movement toward full disclosure—and finding a way to enable clinicians to empathize with patients and apologize for unfortunate outcomes—is gaining momentum. Apologizing for clinical errors even has been shown to reduce medical malpractice lawsuits.<sup>1</sup>

In 1999, the Institute of Medicine released *To Err is Human*, a report showing that between 44,000 and 98,000 deaths result from medical mistakes each year in the U.S. The report forced the medical community to redouble its efforts to promote patient safety and reduce errors. It also launched a movement to dismantle what has historically been a deny-and-defend culture. The movement owes much of its momentum to at least three sources, said Sylvia Brown, RN, JD, vice president of risk management for Premier Insurance Management Services: the ethics of healthcare providers, numerous studies supporting the effectiveness of disclosure in reducing exposure to massive court awards, and pressure from regulatory agencies.

At least 17 states have implemented “apology legislation.”<sup>2</sup> Under most of these laws, a provider's apologetic expression of sympathy (“I'm sorry you had to go through this”) cannot be used against him or her in court. In a handful of states, the apology is inadmissible in court even when it includes an admission of fault (“I'm sorry I gave you the wrong medicine”).

### A middle ground

The Sorry Works! Coalition, a national group of patients, practitioners, hospital

administrators, insurers and others, is working to find “a middle ground solution to the medical malpractice crisis.”<sup>1</sup> The group advocates sincerely apologizing for a clinical error, along with offering prompt and fair compensation.

In 1987, the Veterans Affairs (VA) Medical Center in Lexington, KY, implemented a full-disclosure/apology program. Any patient harmed by a medical error is immediately informed of what happened and is offered an apology by facility officials. If



the risk management team determines that the hospital or a staff member is at fault, the VA offers a fair settlement. Within 10 years, the hospital slashed annual claims payments from some \$1.5 million to about \$180,000. Other hospitals have implemented similar disclosure policies.

Despite these initiatives, apologizing remains controversial, said Geri Amori, PhD, director of the Risk Management Patient Safety Institute in Lansing, MI. An apology must be sincere and the offender should try to make amends. In healthcare, where cause-and-effect are not always clear, that can be challenging.

Other issues: When is an apology due? What if a mistake did not result in harm? In addition, apologizing forces a clinician to confront his or her fears: of being sued,

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embarrassed, uncomfortable or perceived as unprofessional.

### Fundamental guidelines

Experts agree on a few basic guidelines for apologizing. First, clinicians must be familiar with their organization's approach to disclosure, said Brown. Practitioners who find themselves in situations with unanticipated outcomes should immediately file honest, objective incident reports and contact the facility's risk manager, said Melanie Balestra, PNP, JD, past president of the American College of Nurse Practitioners. Clinicians should avoid making off-hand remarks, guessing about the cause of the problem, or assigning blame.

Apologizing can deepen your relationship with the patient and family, safeguard the patient, and actually reduce the likelihood of a lawsuit. The key lies in knowing how to be ethical and honest, while steering clear of legal risk.

### REFERENCES

1. [www.sorryworks.net](http://www.sorryworks.net) (Sept. 30, 2005).
2. Amori G. The Risk Management and Patient Safety Institute. Personal communication.

*Some healthcare providers and their attorneys do not promote apologizing to patients for clinical errors. For this reason, HPSO can neither support nor reject the argument for apologizing presented here. We are making this information available so our readers are aware of this new trend and can better make their own decisions with the help of their risk manager and/or attorney.*

# Did you know...

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immediately if you receive a letter from any state or federal administrative agency, or a licensing or regulatory authority, because your license or certification is protected by the policy offered through HPSO?

A significant risk that many healthcare professionals could face is the suspension or withdrawal of their license or certification. Without your license or certification, you lose your ability to work, which can be devastating. If you are summoned to appear before a licensing or disciplinary board regarding your professional activities or conduct arising out of a covered medical or non-medical incident, your policy will provide you with a means to secure experienced legal representation and reimbursement of out-of-pocket expenses. Employers rarely provide license protection; however, your policy will provide up to \$10,000 per proceeding, for your legal defense coverage. Just be sure to contact us right away!

## ... that you should also call HPSO

immediately if you are deposed?

In almost all cases, there will be court proceedings prior to the actual malpractice trial. A deposition, which can be part of "the discovery phase," is a court sanctioned hearing in which all parties participate in a formal question and answer session to find out information relevant to the lawsuit. Whether you have been called to testify at a deposition or are named in a covered lawsuit as a defendant, CNA, the underwriter of the HPSO program, will ensure that you are prepared for the discovery phase of the suit by assigning a claim consultant and an attorney, when necessary, to represent you at the deposition.

It is important to be properly prepared even if you are deposed for a suit against your employer or a co-worker. Without proper guidance, you run the risk of incriminating yourself and being named in a lawsuit as well.

## LESSONS FROM COURT

### Patient refuses to go to hospital

The plaintiff called 9-1-1, after her husband complained of severe headaches for two hours. Upon arrival, EMS personnel examined the husband, finding only a moderately elevated blood pressure. The plaintiff and her husband signed a document indicating that he refused transportation to a hospital. Nearly a day later, the husband suffered a seizure-like episode. He was diagnosed with a ruptured cerebral aneurysm and died the following day.

The plaintiff sued, claiming that the EMS personnel discouraged the decedent from going to the hospital. The defendants denied the claim, contending that the decedent wanted to stay home. A defense verdict was returned.

Staff. (2004). *Medical Malpractice Verdicts, Settlements & Experts*, 20 (12), 15.

### Advice from the expert:

*This case illustrates the importance of documenting any information provided to patients that will enable them to make informed deci-*

*sions about their care. Following your state laws and your employer's policies, ensure that patients are aware of the risks and benefits of refusing the recommended care, as well as the alternatives and consequences of no treatment. Respect your patient's decision to refuse care, and tell him what to do if the condition persists or worsens—such as call 9-1-1, call his physician, or go to the nearest emergency room.*

*To protect yourself from liability, document all information you provide, as well as the patient's decision. If the patient is competent and refuses treatment, have him sign a form indicating that he understands what the recommended care is and that he is refusing your advice. Be aware that if a patient seems incompetent to make decisions about his care, you could be held liable if you allow him to refuse care and a bad outcome follows. In an emergency, though, treating an incompetent patient against his will is unlikely to result in liability unless you act negligently.*

Gayle H. Sullivan, RN, JD  
Fairfield, CT

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## Moving into management: Responsibilities and risks

Moving into management is a great way to advance your career, but it's not without risk. If you decide to take the next step in your career, make sure you understand what new responsibilities this will entail. Review the job description and required qualifications for the management position. Determine whether your skills can support these new duties.

Also, make sure your training and education reflect the needs of the job. In-service training may be required, or you may choose to take managerial training courses on your own to fill in your back-



ground. Remember, performing tasks that are beyond your scope of practice or your job responsibilities can pose a liability risk.

If you will be supervising others, become familiar with the competencies and assigned duties of each member of your staff. To help protect everyone from liability, review their job descriptions and what procedures their licenses allow them to perform. Consider making necessary changes to protect you, the staff and the facility from a potential lawsuit.

Both you and your staff also should be familiar with the chain of command and where you fit into it. If problems occur or questions arise, you and those you supervise should know where to turn.

Finally, know your facility's policies and procedures and be aware that violating them can have consequences. Become familiar with employment and practice laws in your state, as well as your employer's policies. If you will have hiring and firing authority, for example, you'll have to under-

stand how to properly maintain employee files and what you can and cannot say when interviewing potential staff or terminating a subordinate.

## If you're asked to be an expert witness

The role of an expert witness is important: He or she helps jurors determine if a defendant maintained the standard of care or acted in the same way a reasonable and prudent healthcare professional with a similar background in similar circumstances would have acted. But before you agree to testify as an expert witness in a malpractice case, make sure you understand what is expected of you.

If you decide that you may want to offer your services, ask yourself these questions: Am I qualified? Do I feel comfortable with the attorney handling the case? Am I sure I have no conflicts of interest—such as having worked previously with the defendant—that would make me a less-than-ideal witness? Am I well versed in my specialty's standards of care?

If you answered “yes” to these questions, you may be well suited to be an expert witness. You will be asked to review copies of medical records and other documents relevant to the case, and provide an opinion about if and how a standard of care was met, as well as other related matters. If your opinion supports the attorney's position, you most likely will be asked to testify as an expert witness in court.

If you do serve as an expert witness, practice your testimony with the attorney before getting on the witness stand. Avoid looking too rehearsed, which could jeopardize your credibility. Answer questions objectively, honestly and succinctly. Do not volunteer information or provide testimony outside your area of expertise. Speak firmly and, whenever possible, try to use language that laypeople in the courtroom will understand and explain any medical terms. Above all, make sure your professional liability insurance includes a consulting services endorsement, which provides protection if your testimony results in a claim being brought against you. If you need to add this endorsement to your policy, call 1-800-982-9491.

## STUDENT ALERT!

### Keep Your Professional Liability Coverage Active After You Graduate

One of the most frequently asked questions HPSO receives is: Why do I need my own professional liability insurance if my employer already covers me?

You may already understand that your own policy offers coverage that will protect you against allegations of malpractice while you are working on your degree or certification, but you also want to make certain that you have sufficient protection in the event you are named in a lawsuit or need legal defense to respond to a complaint against you with the licensing board or ethics committee, even after you graduate.

While your employer may provide coverage for you, it may not cover you in all cases. You need to be clear about how your employer's coverage protects you. Often, an employer's policy is designed to protect its interests first. If you have your own policy, you will have the benefit of your own representation that is focused on your interests in the event of a lawsuit.

Some healthcare professionals avoid purchasing or continuing their own policy because they may have been told, “having your own insurance will make you a more likely target for a lawsuit.” This couldn't be further from the truth. A person can sue you anytime, for any reason. If a patient or client perceives he or she has been injured and perceives that this injury is the result of your providing, or failing to provide, adequate professional services, that patient could sue. This doesn't mean that you have been negligent. It means that the patient or client perceives negligence. Also, no one can know whether you have your own policy, unless you tell someone. In fact, if you are involved in a lawsuit, this information typically won't be uncovered until the “discovery phase.” At that point, you will already have been named in the suit.

By continuing your coverage as a professional, you can feel comfortable knowing that if something happens on or off the job, 24/7, you can rely on your own policy to protect you against allegations of professional malpractice.

# Meeting the Needs of the

## Barriers, compliance and more.

“Education is an essential aspect of caregiving for all elderly patients, but make sure you tailor the message to meet individual needs.”

**T**hroughout most of the 20th century, elderly Americans were the fastest growing segment of the population. As you care for these sometimes frail and medically needy individuals, you must pay special attention to their needs—and your own liability risks. Many of the youngest elderly (age 65 - 75) are healthy and hearty, not fully retired, and enjoying a busy and active “early” old age, though they may have chronic illnesses such as arthritis and diabetes.

Those in the intermediate group (75 - 85) are more likely to have several chronic illnesses and may need to depend on others for at least some of their care. Individuals in the eldest group (over 85) are more often frail and in poor health, and may no longer be able to live independently.

Despite their differences, most elderly patients have a common need for assistance in one or more of the following areas: accessing care, comprehending patient education materials, complying with complex medical regimens, receiving appropriate screening, following good health practices, and steering clear of the potential perils of polypharmacy.

### Common barriers to care

Limited finances are a significant barrier to care for many elderly patients. According to a 1995 Medicare benefits survey, elderly Americans spent 19% of their income on out-of-pocket healthcare expenses. Additional barriers may include lack of transportation, especially since some elderly no longer drive or have access to public transportation. Many elderly patients don't know how to tap into the healthcare system or negotiate the complicated process of applying for benefits like the new Medicare Part D (Rx) program. Elderly patients facing such difficulties may skip appointments, cut back on medications, or go without expensive devices not covered by insurance, such as hearing aids or eyeglasses. Healthcare providers can play a crucial role in helping patients access the services they need.

### Patient education is a must

Education is an essential aspect of caregiving for all elderly

patients, but make sure you tailor the message to meet individual needs. Counselors assisting younger, generally healthy clients, for example, may need to offer information on planning for and



adjusting to retirement or staying vigorous by adhering to appropriate diet and exercise routines.<sup>1</sup> Getting health messages across to someone older than 75 often presents special difficulties because this population generally knows less about staying healthy than younger, Internet-savvy individuals. In addition, language barriers, poor eyesight or hearing, and cognitive impairments may diminish understanding.

Surmount such limitations by asking the patient's caregiver to attend appointments so she can reinforce your message at home. Use foreign-language interpreters as needed, speak slowly, avoid professional jargon, and provide large-type educational materials. Be sensitive to cultural and generational differences.

### Fostering compliance

Elderly patients often need to follow complex medical regimens in managing chronic conditions or are

# Elderly—and Avoiding Risk

engaged in long recovery programs—from a stroke or broken hip—making compliance a significant concern.

A variety of tactics can ease these difficulties. Telephone reminders cut down on missed appointments, for instance; so does enlisting the cooperation of a family mem-



ber or friend. PTs, for example, working with patients who aren't following exercise regimens might devise solutions that better meet their preferences: encouraging exercising during commercial breaks in TV programs, for example, or varying routines. Similarly, the healthcare team can collaborate to help patients manage complicated medication regimens, with pharmacists following drug utilization review or disease management protocols, tracking compliance with asthma or diabetes regimens and informing the prescriber.<sup>2</sup>

## Screening—protection for you and your patient

Screening for conditions that are prevalent among the elderly is crucial to protect your patient from harm and to protect you from liability. Check vital signs before, midway and after a therapy session in frail patients and in those with heart disease or chronic obstructive pulmonary disease. Therapists who treat patients at home should check for hazards like throw rugs, wobbly banis-

ters or slippery surfaces.

Because elderly patients typically take multiple medications, conduct a thorough drug review, with an eye toward adverse drug interactions and serious adverse effects. Find out, too, if your patient has had the immunizations recommended for the elderly, such as a yearly flu shot and the pneumococcal vaccine; if not, direct him to a primary care practitioner or ensure that the vaccines are given before the patient leaves the facility.

Counselors—indeed, all providers—“should be alert for signs of depression and suicidal ideation in elderly clients, the age group with the highest rate of completed suicide in the population,” said Marie Bracki, public policy chair for the Association for Adult Development and Aging, a division of the American Counseling Association. The PROSPECT (Prevention of Suicide in Primary Care Elderly: Collaborative Trial) study, she noted, found that suicide rates were substantially lower in primary care practices that used nurses, social workers or master's-prepared psychologists to screen for and treat depression.

Every practitioner should screen for and report elder abuse, as well. In fact, most providers in almost every state have a mandate to do so. The standard for reporting is simply a reasonable suspicion that the individual has been abused; it is not necessary to be able to prove that the abuse occurred. The vast majority of states grant immunity from liability to clinicians who act on such a belief. But in a questionable situation, it may be wise to consult an attorney.

When screening for abuse, be on the lookout for physical signs, such as untreated pressure sores, urine burns and bruises or broken bones not likely to have been caused by falls. Counselors are especially likely to detect signs of emotional or financial abuse or neglect, which has the same reporting requirements as physical abuse.

## Be alert to legal pitfalls

To work successfully with elderly patients, many of whom are lonely and emotionally needy, it is crucial to develop warm relationships. But this presents a danger—the temptation to become involved with the individual in ways that cross professional boundaries. This so-called dual relationship opens the door to accusations of harming or exploiting the patient, raising the prospect of a lawsuit or discipline by your state licensing board or professional organization. According to Paul Nelson, executive director of the American Counseling Association Insurance Trust, dual relationships are the number one issue in risk management. “There is a thin line between helpfulness and involvement in a personal relationship....too many practitioners give in to temptations or good intentions and find they have crossed over that thin line,” he said.

As a healthcare professional, you understand that every elderly patient has unique needs. In trying to meet those needs, keeping patients safe must be your top priority, but avoiding legal risk should remain a concern as well.

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2. Monane M, Cataldi LA. Safe Prescribing: Interdisciplinary Solutions. *Geriatric Times* 2000. [www.geriatrictimes.com/g000632.html](http://www.geriatrictimes.com/g000632.html). (Oct. 1, 2005).

To read about polypharmacy in the elderly, see the Web Flash in the newsletter section of [www.hpso.com](http://www.hpso.com)



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## Occurrence and claims-made: What are the differences?

In the world of professional liability insurance, there are two types of policies, occurrence and claims-made. It's important to understand the difference between the two coverages.

An occurrence policy, like the one currently offered by Healthcare Providers Service Organization (HPSO), covers you for any incident that occurs during the policy term, regardless of when the claim is filed. As long as the incident occurred during the term that the policy was active, regardless of when you were named in a lawsuit, you are covered.

A claims-made policy also provides coverage for an incident that occurs during an active policy period, but only if the claim is also filed during that active policy period. In other words, if you are named in a lawsuit, the lawsuit must be filed during the policy period when the incident occurred or the policy will not protect you.

What's key with a claims-made policy is that you run the risk of not being covered for a claim discovered after the policy has expired. Therefore, if you decide to terminate a claims-made policy, you will need to purchase tail coverage to continue to protect yourself. This will extend the time that a claim can be reported, but the incident still needs to occur while the policy was active, or you won't be covered.

Also, a claims-made policy can typically cost less than an occurrence policy for the first three to six years (the premium can increase up to 30% a year). It may seem that there is a big difference in price; however, by purchasing a claims-made policy and tail coverage, you can end up spending as much as or possibly a little more than by purchasing an occurrence policy.

The bottom line is, learn the details of your coverage so you are not caught unawares. You may be shocked how policies differ from one another.

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## Coping with Short-Staffing

Staffing shortages are becoming more common in all clinical specialties, making it increasingly likely that you'll be asked to take on more patients or clients than usual, or to assume the duties of an absent coworker. Either situation can hinder your ability to care for patients or clients properly, increasing your risk of a malpractice lawsuit. The key to protecting yourself is to know what to do when you feel overwhelmed.

Determining the best action to take depends on the circumstances. If the short-staffing results in mandatory overtime, evaluate whether you feel able to provide safe patient or client care. If not, you can refuse the assignment. Notify your supervisor and draft a memo documenting the specific reasons. Keep a copy of the memo for your records.

During a department shortage, you may also be reassigned without warning and/or given duties you do not normally perform. If, for example, you are an occupational

therapist assistant and are asked to support an OT you don't typically work with, you may want to prepare yourself for the assignment by questioning the OT about any special patient needs. Don't hesitate to ask for help, or even direct supervision, if you are asked to perform a task with which you have limited experience.

Whatever the circumstances, your primary concern must be patient or client safety. If you feel you cannot provide adequate care, notify your supervisor at once. If nothing is done to remedy the situation, document the specific problems in an internal memo—not in the medical record. Include the date and time, number of staff and patients or clients on the unit, the circumstances surrounding each patient involved,



whom you notified and any action that was taken. Keep a copy of the memo for your records.

If short-staffing is a chronic problem at your facility and you are considering finding a better-

staffed position, be sure to follow your facility's procedures for resigning. No matter how frustrated you feel, never leave in the middle of a shift, which could result in a charge of patient abandonment.

It can be exasperating when you're faced with a staff shortage. Sometimes it's necessary to elevate the issue so management takes notice. Taking action can be intimidating, but keeping quiet belies your position as a patient advocate and can leave you open to a malpractice charge.

# Firing a Subordinate Without Risking a Lawsuit

Firing a subordinate, though it may be difficult and unpleasant, sometimes is necessary. The trick is to avoid making the dismissal unnecessarily disagreeable, and to steer clear of potential lawsuits.

First, ascertain whether the individual is employed on an at-will basis, meaning that the employee can be terminated for any reason, with or without cause. You should speak with someone in risk management or human resources to ensure that the dismissal does not violate a contractual agreement or federal, state or local laws, including statutes that protect against discrimination based on age, race or gender.

Make sure you have complete and accurate documentation on the employee and a record of your facili-

ty's disciplinary policies and performance standards. The employee's file should include any performance evaluations, along with records of progressive discipline, including verbal and written warnings or eyewitness accounts of misconduct or unsatisfactory performance. If you're sued for wrongful dismissal, the documentation could be used as evidence in your defense.

When you inform the employee of the termination, have another member of the staff present, if possible. But avoid giving the impression that you are ganging up on him or her by, for example, having just one person speak. Be direct yet courteous. Clearly and firmly explain the reasons for the dismissal. Present the employee with a

written agreement for a severance package and information about COBRA coverage, if applicable. The employee should be informed of her rights if she signs the agreement.

Determine how long it will take to finish or hand off the terminated employee's current patient load. Then arrange for a quick and graceful exit. If circumstances permit, allowing the employee to wait until her shift is completed to turn patient records over to someone else instead of requiring an immediate departure could make the separation more amicable. Just be sure patient safety is preserved.

Finally, document the discussion and the termination process with the employee. Be sure to keep all details surrounding the dismissal confidential.

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## Q&As

### Addressing your concerns about Professional Liability

Q

As an occupational therapist on a busy unit, I don't always have time to adequately educate patients before they are discharged. What legal risks do I face if I fail to provide enough patient education?—P.C., Oregon

A

You could face charges of negligence. Patient education is part of the standard of care, and it's not something you should skimp on.

Patient education will seem less time consuming if you incorporate it into every interaction so that it becomes routine. Ask the patient to repeat what you tell him or to demonstrate a new technique or task so you're sure he understands your instructions. At future sessions, test how well the patient has retained the information.

Use preprinted patient instruction sheets to save time. Review the material with your patient and have him sign it to indicate his understanding. Make a copy of the signed document to place in his medical record. Don't forget to record any other education you provide.

Q

I am already insured by HPSO, but I have a friend who is currently a student. What are the general guidelines for being eligible for coverage under your professional liability insurance program? —C.D., California

A

HPSO provides coverage to more than 70 allied healthcare professions. An individual interested in purchasing an individual professional liability insurance policy must hold a valid license or certification, or be accredited by the regulatory agency responsible for maintaining the standards of the profession in the state in which he or she practices. But because students perform professional services to patients while doing post-graduate work, HPSO also provides coverage for students for \$29\* that will continue as that student advances in her career. Once that student graduates, a discount off the regular full-time rate is applied to the first year of the new professional's individual employed (or self-employed) policy.

\*Annual rate for student Nurse Practitioner is \$250.