

Prevention Is The Best Way To Avoid Liability

You'd think avoiding a malpractice lawsuit would be simple—avoid injuring patients. But reviews of claims histories show that many patients who charge their practitioner with malpractice do so because they weren't happy with their care or their expectations weren't met. This is good news, since there's a lot you can do to keep patients satisfied with the care they receive from you, your employees and your practice.

According to the American Physical Therapy Association (APTA), practitioners must tell patients about any "substantial risks" of an exam or recommended intervention. You and your staff should be prepared to offer reasonable alternatives to the recommended treatment in the event the patient asks.¹ This may include referrals to other healthcare providers.

Let's look at some other approaches you and your staff can take to help reduce the risk of malpractice in your practice. You may even consider establishing protocols based on these guidelines.

Good communication is key

Good communication is crucial to quality patient care. Studies have found that the better informed patients are, the more satisfied they'll be. And the more comfortable they feel with you, the more they'll trust you with their care. "Try to make friends with your patients, because no one wants to sue a friend," said Siri Koshes, PT, ATC, from Sarasota, FL. Make sure patients know that you understand their problems.

Listening is one of the best ways to show you care. Ask patients how their physical problems affect daily living at home, at work and in other aspects of their lives. Find out how important they consider specific abilities by asking them to rate activities on a five-point scale.² Don't forget to talk with patients about what they hope to gain

through therapy. If the end result is not what is expected, you may have a dissatisfied patient.

After conducting an interview and a physical exam, devise a plan for therapy and explain exactly what it involves. Be sure each patient truly comprehends what you're saying. "Problems



tend to arise when a patient doesn't understand the basis for his care," said D. Kathleen Lewis, PT, JD, Associate Professor at Wichita State University in Kansas. Patients who know the reason for their treatment plan will be more likely to be compliant and less likely to pursue a malpractice claim later on.

Don't ignore complaints

Occasionally, even your best efforts fail to keep all patients happy, but an unhappy patient is likely to complain informally before filing a legal complaint or pursuing a lawsuit. You can often avoid a suit if you take all complaints seriously and acknowledge them quickly. "Addressing a complaint within 24 to 48 hours significantly reduces the chance that a lawsuit will follow," Lewis advised.

If there seems to be little threat of litigation, review all the facts before you respond in more detail. With an objective picture of the situation, you can determine if the complaint is valid and what action to take. When you respond, remain objective, focus on the facts and address only the issue at hand.

"If a patient seems displeased with any aspect of his care, we always ask how we can make it better," explained Koshes. "Don't take any blame, but let the patient know

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that you're listening to his concerns." Often, a sensitively worded explanation can turn things around. If the patient has simply been inconvenienced, Koshes suggests you apologize and ask how else you can be of service.

For complaints that mention a lawsuit or seem serious enough to be headed that way, it's important to notify your malpractice insurance carrier and attorney right away. Make it clear to your staff that they must report this form of grievance to you right away, so you can handle the incident accordingly. Above all, always let your attorney guide the investigation.²

Document, document

Good documentation is often your best resource for showing that patients received good care. Always include patients' status before, during and after treatment. Note how receptive they were to patient education and your response to any voiced concerns. Always record patients' perceptions of their progress and how it relates to treatment goals. "For instance, if your patient talked to you about being happy with the improvement in his condition, include that conversation in his record," Lewis said. Keeping a detailed account will help ensure quality patient care and help you if you're named in a lawsuit.

Remember, a happy patient rarely sues. Make certain that your staff provides each patient with consideration through open, two-way communication. Advise them to show patients that your practice is working for their best interests. This can help ensure patient satisfaction and help keep you and your practice out of legal trouble.

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2. Schunk, C. R. 2004. "Responding to patient complaints." [www.apta.org/Ptmagazine/Current_Issue?id\[1\]=47306#52918](http://www.apta.org/Ptmagazine/Current_Issue?id[1]=47306#52918) (Sept. 15, 2004)

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 important life 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 practitioners to empathize with patients and apologize for unfortunate outcomes—is gaining momentum. Apologizing for errors even has been shown to reduce medical malpractice lawsuits.¹

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.”² 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.”¹ 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, 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.

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.

REFERENCES

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

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Difficult Patients:

When and How To Dismiss Them

Your patient just won't follow the agreed-upon treatment plan. She skips appointments, doesn't abide by your instructions, then she complains because she's not getting better. Should you tell her good-bye? Only if you've run out of other options.

Dismissing patients could injure them and put you and your practice at legal risk especially if they feel you have abandoned them. A patient who feels abandoned may become angry, which can lead to disciplinary complaints and lawsuits.

Before you do anything, evaluate the situation objectively. Is the patient really noncompliant or is something else—like a personality conflict—the true culprit? How many other personal obligations is the patient juggling? Does he or she simply have no time for therapy?

Perhaps the patient won't cooperate because she doesn't know why the therapy is necessary or she misunderstood your directions. Prior to treatment, it is up to you and your employees to clearly explain the reasons for each treatment. Make it part of your practice's policy to have patients repeat instructions back so you can evaluate their understanding of them. Also, make sure no physical or cognitive limitations prevent patients from following the care plan.

If problems continue, it's time for a heart-to-heart talk. "Sometimes you can win a patient over just by showing a real personal interest and making a slight change that suits her better," said D. Kathleen Lewis, PT, JD, a physical therapist and attorney in Wichita, KS. You may learn something from the discussion that will lead to a different solution. If the patient hasn't bought a necessary piece of equipment, for instance, you may find out she can't afford to buy it. Instead of dismissing the patient, consider referring her to a social worker, or try to suggest a substitute for the costly equipment. If insufficient time is the issue, you may be able to suggest a way for the patient to juggle her schedule. If an employee has any difficulty doing this, make sure they know that they should come to you for help.

When you have no choice

If you or your staff can't win over a difficult patient, dismissal may be the best option. But be sure you handle it the right way by taking steps to transfer the patient's care to another provider. If a physician referred the patient to you, update that practitioner on the outcome. Above all, make sure your employees keep you informed or even bring you into the situation for resolution.

Consider these steps to limit you and your practice's potential legal risk when ending a relationship with a patient:

- Inform the patient properly. Tell him in person (if you haven't already) and in writing that he must find a new practitioner, and why. Stick to objective statements and facts that would support your action if you were sued.

- Offer to help the patient choose someone else. Give him a reasonable amount of time—about two weeks—to schedule an appointment with another practitioner. "You might also want to give him a list of practitioners in his area," said Jonathan M. Cooperman, PT, DPT, MS, JD, president of the Ohio Physical Therapy Association. Or, suggest that he call his managed care plan for a list of candidates.
- Continue to see the patient during the transition period. Monitor all progress as you would any other patient's.
- Contact the patient's primary care practitioner (PCP), if necessary. You might do this if the two-week period has ended, the patient has an unstable condition, and he hasn't found another practitioner, said Lewis. While the patient is in your office, you could offer to call his PCP and make an appointment for him to see the practitioner, she suggested. "This way, the patient is more likely to follow through."

Keep a complete record

To protect yourself and your practice, you must objectively document everything that happens throughout the patient-practitioner relationship. Note the patient's condition before, during and after each treatment. Include all comments about the patient's progress, as well as your own observations. Record any missed visits and appointments she failed to schedule. Note any directions that were ignored.

If you told the patient that she still needed further care, explain what could happen if your medical advice isn't followed. But avoid using the word "noncompliant," said Cooperman, which presumes that the patient is wrong. Dismissing a patient should be your last resort. If you can't avoid it, do it by the book to protect your patient, yourself and your practice.

PT CLAIMS STUDY

Physical therapists play a significant role in optimizing wellness, but if a patient is injured, you can become vulnerable to professional liability claims. For that reason, HPSO worked closely with our underwriter, CNA, to make a claim study available for our PT customers. This study examines key physical therapy liabilities and presents practical risk management strategies that can be incorporated into your clinical practice.

Copies of the claim data study results are now available from CNA at www.hpso.com/ptclaimstudy or by calling CNA directly at 1-888-600-4776.

Dealing with an Angry Patient

In the highly charged atmosphere of a healthcare practice, anything from a delayed response to a request for help to news of a poor prognosis can trigger an outburst from a patient. No matter what is making the patient angry, it's best to recognize and respond to signs of distress before the anger escalates. Training your employees to do so can help maintain everyone's safety.

Look for clues of agitation. Evaluate the mood of a patient who is unfamiliar to you by approaching slowly and cautiously rather than rushing up to the bedside or exam table. Stay more than an arm's length away until you are sure an explosion isn't imminent. Be aware of signs of an impending outburst, such as incessant complaining, pounding a fist or pacing rapidly. A history of physical violence or verbal threats should also raise a red flag.

Encourage communication. Don't ignore a patient who is upset. Instead, take time to listen without passing judgment. If the patient complains about unmet expectations or needs, express empathy, validate his or her feelings and offer to help find a solution. Do not contradict the patient's perception, make excuses for or try to explain the perceived lapse or place blame.

Stay calm. Avoid being confrontational or defensive with a patient who is upset. Use non-threatening body language: Face the patient at an angle rather than head on, and do not point a finger or fold your arms. At the same time, protect yourself by staying at least two feet away and never turn your back on a patient who's visibly upset.



Get help. Even if you have done everything you can, managing an agitated patient on your own may not be possible. If a patient's agitation or frustration seems to be escalating to a frightening level, page security, summon nearby co-workers or activate your facility's emergency call button. Don't delay or second guess yourself. Having another person present is always beneficial, especially in a case like this.

Protect others. Warn your colleagues about agitated patients so they can take appropriate precautions. Document aggressive behavior precisely. For example, note that "patient slammed fist on the table" rather than "patient was furious."

You can improve everyone's ability to manage angry patients by getting additional training for you and your staff. Seek out inservice training and techniques for resolving conflicts or restraining patients to avoid injury when necessary. You should also establish

written policies and procedures on dealing with an angry patient for your employee handbook. This should include when it's necessary to summon the police and a list of emergency numbers.

Cultural barriers must not compromise patient care

A patient who has a different cultural background or speaks a language different from your own can present a real challenge to a healthcare provider. Such differences can complicate patient care and create significant legal risk for you, your staff and your practice. The Joint Commission on Accreditation of Healthcare Organizations (JCAHO) and the American Hospital Association (AHA) require that practices meet patients' communication needs as a condition of accreditation. And as a healthcare business owner, you, too, have a legal responsibility to make sure that non-English speaking patients receive proper care.

Ideally, your practice will have professional translators on staff. When a translator is not available, consider using telephone translation lines. Language Line Services (www.language.com) and Language Service Associates (www.lsaweb.com), among others, offer 24-hour access to interpreters of more than 100 languages. It may be tempting to use a family member as an interpreter, but this should be a last resort because it could compromise patients' confidentiality. Both state and federal laws dictate when a hospital or office practice must supply an interpreter (including sign language) at its own expense. Be sure you know and understand how those laws apply to your practice.

With an interpreter at your side, speak directly to the patient. Talk slowly and pause frequently, using simple words and avoiding slang. These techniques will help the translator to repeat your words exactly as you've said them. Always note the name of the translator in the patient's chart. This directive should be included in your policies and procedures manual so your employees follow the same guidelines.

You may also have to overcome cultural differences by learning about the social customs and health beliefs of the patients you and your employees treat. Their feelings about eye contact, touching and the proper ways to show respect may not be the same as yours. For example, while a lack of eye contact is viewed as embarrassment or passivity in Western society, it is a sign of deference in many Asian cultures. Maintaining eye contact is considered ill-mannered and disrespectful. So if your facility treats many Asian patients, you need to be aware of this difference.

To reduce any chances of miscommunication, learn all you can about the cultural variety in the community in which you establish your practice. It will show sensitivity to cultural preferences, and it will promote safe patient care within your practice. Ultimately, that translates into good risk management.

NSO, HPSO and CNA have combined efforts to bring you this risk management information. Some of the content of this newsletter is provided by CNA. The information, examples and suggestions presented in this material have been developed from sources believed to be reliable, but they should not be construed as legal or other professional advice. CNA accepts no responsibility for the accuracy or completeness of this material and recommends the consultation with competent legal counsel and/or other professional advisors before applying this material in any particular factual situations. This material is for illustrative purposes and is not intended to constitute a contract. Please remember that only the relevant insurance policy can provide the actual terms, coverages, amounts, conditions and exclusions for an insured. All products and services may not be available in all states. CNA is a service mark registered with the United States Patent and Trademark Office. Copyright © 2007 CNA. All rights reserved.

