

# RISK MANAGER

*Medical Assurance Company of Mississippi*



## THE NUTS AND BOLTS OF MEDICAL ERROR DISCLOSURE:

### A STEP-BY-STEP CHECKLIST

By Kathy Stone, BSN, RN, Assistant Director of Risk Management

Traditionally, physicians have avoided dealing with and disclosing a medical error to patients. Whether it was the fear of a lawsuit or the discomfort of the process, sometimes it was easier to ignore and hope the medical error was never revealed. In recent years, attitudes about disclosure of a serious error have changed and, with the right process, communicating that error is necessary and appreciated by the patients.

Following is a breakdown of the steps – from start to finish – that should be taken when a medical error has occurred.

#### Disclosure – Step-by-Step

- Carefully review the incident to determine exactly what happened.
- Determine how to prevent this type of error in the future.
- Call the MACM Risk Management Department to gain support and assistance with the management of the situation.
- Call the MACM Claims Department to report the incident.
- Recognize your own feelings related to the error and prepare yourself for this difficult discussion.
- Review exactly what you will say to the patient/family and how you will say it. You may even want to practice with a trusted colleague.
- Include the following in your discussion plan:
  - Nature of the error, how it occurred, and consequences – real and potential
  - Apologize and take responsibility. For example: “I’m so sorry that this has happened. I wish I could change how I managed this situation.” Avoid statements such as “I’m sorry I did this to you.” There is a very fine line here; but, the idea is to take responsibility without throwing yourself under the bus.
  - Explain how any consequences will be managed or remedied.
  - Describe how future errors will be prevented.
- The disclosure of the error should occur as quickly as possible for the involved physician – even if the root cause is not yet known.
- The cause of the error, however, should not be discussed until it has been clearly determined. This may be known immediately, or it may take days to arrive at the root cause.
- Ask a trusted colleague to accompany you during the disclosure discussion.
- Consider to whom do you want to reveal the medical error — certainly the patient and his closest family

member(s) or friend(s). But, there should not be a crowd in the room during this sensitive discussion.

- Approach the patient with empathy, not defensiveness.
- Do not joust, *i.e.* don't blame someone else.
- Discuss any follow-up care that will be necessary and determine if the patient is willing to continue to see you or prefers a referral to another physician.
- Consider whether to waive your charges/fees related to this incident and to the management of any future resulting consequences related to the medical error.
- Notify the appropriate staff in your clinic that this patient is to receive prompt attention for any future calls or requests.

### **Documentation of a Medical Error and Disclosure**

The documentation of the error should be accurate, detailed, and objective — without speculation as to the cause or the inclusion of emotionally charged statements.

The disclosure of the medical error should also be documented in a similar fashion. Be sure to include the following elements:

- Who was present – patient, family members/friends, other healthcare providers, etc.
- Specific details as to how you explained the nature of the error, how it occurred (if known at that time), and the real and potential consequences. Do not make a blanket statement, especially regarding the consequences. Be very specific.
- Relate your expression of empathy and concern for the patient.

- Describe, in detail, the plan of care going forward including whether the patient has asked for a referral or plans to continue to see you for follow-up care and the management of any resulting consequences of the medical error.
- Document that you informed the patient if you have decided to waive all charges and fees related to your care in this incident, including complications that may arise later due to the medical error.
- In all documentation, be objective in your description, *i.e.* simply state the facts.

If you have questions or concerns at any point during this difficult process, please call MACM. Support of and guidance to our physicians following the occurrence of a medical error is one of the cornerstones of our existence. So, please allow us to assist you in this process. It does not reflect poorly on you; rather, it signals to us that you are invested in your patients and have a desire to provide the best care possible, even when it is not the easiest choice.



# COMING CLEAN

By Stephanie Edgar, JD - Legal Counsel

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It's been said that "I'm sorry" are two of the hardest words to say. None of us looks forward to admitting a mistake because it exposes our vulnerabilities. In short, finding ourselves in situations which require apologies is a blunt reminder that we aren't, in fact, perfect. For healthcare providers, that vulnerability can result in self-imposed feelings of inadequacy or in a patient's outright accusations of negligence. It's no wonder then that what can be a difficult task in even your everyday life with the people you care for the most is compounded in situations where there is a legitimate fear of legal liability heaped on all of the typical emotions tied to admitting a mistake.

Many states have laws, commonly referred to as "I'm sorry statutes", which prevent the admissibility of a healthcare provider's apology to a patient. So, if a healthcare provider apologizes to a patient, and the patient later sues the provider for the admitted mistake, the fact that the provider apologized is never presented to the jury. The thought behind such laws is that open, honest dialogue will be fostered if there is no looming fear of penalty.

Mississippi has no such law. However, the lack of this protection doesn't mean that you can't or shouldn't apologize in circumstances where you're in the wrong. It simply means that you must carefully consider how you plan to admit to a mistake and what specifically you will say to the patient because in this circumstance, everything you say can and will be used against you. The goal here is to apologize in such a way that conveys genuine compassion and shows that you accept

responsibility for your actions. This will likely strengthen your relationship with the patient, and an added benefit is that if a jury later hears about this encounter, they will picture themselves in a similar situation and wish that their doctor would behave the way you did.

Making the actual apology is probably the most uncomfortable component of admitting a mistake, but it's only one piece of the puzzle. The remaining piece is how to document what occurred. First, details of what led to the mistake must be accurately charted. In doing so, it's important to be as objective as possible. If you find yourself including emotional elements, it may be best to take a break and resume charting at another time. Once you've documented what led to the mistake, make sure to also chart the fact that you've discussed what occurred with the patient and/or family member. While it's not necessary to take down every literal word that was exchanged, it is vital to include the overall substance of the conversation.

For many, the knee-jerk reaction when a mistake occurs is to blame someone else, but we strongly discourage jousting with other providers both in the medical record and in direct conversations with the patient. Plainly put, no one wins when fingers start pointing. In the event of a lawsuit, you will automatically be pitted against other providers who may even be joining you at the defense table. Rather than presenting a united front against the person suing you, you'll be fighting a battle on multiple fronts thereby making the plaintiff's lawyer's job very easy. At the end of the trial, when the jurors are exhausted

and ready to leave the courtroom drama behind, it's more likely that rather than sorting through all of the blame, they will simply make a Solomonian decision and allocate fault to everyone—including you.

C.S. Lewis once said, "You can't go back and change the beginning, but you can start where you are and change the ending." While I'm certain that professional liability claims weren't what Lewis was referring to, the moral is equally applicable. Mistakes are inevitable, ugly and difficult, but as another famous Englishman, Winston Churchill, put it, "Difficulties mastered are opportunities won."

When you find yourself in this situation, please contact the MACM Risk Management Department for help. I can assure you that your call won't be the first we've had on this topic, and it certainly won't be the last.



# HOUSTON'S HANDOFFS

By Gerry Ann Houston, MD - Medical Director

## The Take Away

If you have made a medical error and are not sure what to say to the patient, please call one of MACM's risk managers who can tell you what to disclose and how best to do it. You additionally need to talk to one of MACM's claims representatives and submit an incident report. Hopefully by admitting your error and offering an apology, no action will be taken by the patient or family. But MACM needs to be notified of the event at the time it occurs.

Mistakes happen, even with good physicians doing the right thing. Continue to do what you know is correct; acknowledge the error and offer an apology. And, just as illustrated in the case presented, your honesty and openness with the patient will go a long way toward avoiding a claim.

## Case Report

*A 29-year-old police officer was found to have a large left upper lobe mass with mediastinal lymphadenopathy. FOB and percutaneous biopsy were performed, and both were "nondiagnostic". VATS with biopsy followed with pathology reported as "severe acute and chronic pneumonia with areas of necrosis and extensive organization". He was referred to an infectious disease specialist who treated him for the next eight months with antibiotics and antifungals with no response.*

*The patient was referred back to the thoracic surgeon who did a left upper lobe excision with pathology now confirming nodular sclerosing Hodgkin's lymphoma. The pathologist reviewed the previously biopsied lung tissue sample and concluded that despite a somewhat unusual appearance and presentation, Hodgkin's lymphoma was present in the tissue biopsied eight months earlier.*

*After noting that the original pathology report was not correct, the pathologist met with the patient and his family members, admitted that the prior report was incorrect, and apologized for his mistake. Both the pathologist and the thoracic surgeon notified MACM of the event and submitted incident reports.*

*Two years later the patient's family filed a lawsuit naming multiple physicians and institutions negligent in the diagnosis and treatment of his Hodgkin's disease. None of the physicians or institutions were ever served, and the lawsuit was dismissed.*

From early childhood, we were taught to admit our mistakes and apologize, and we as parents have tried to teach our children the same. But as physicians, we find it very hard to admit that we made a medical error and to offer a sincere apology. I still remember feeling very anxious and inadequate when I had to call a patient's attorney husband to tell him that his wife had received the wrong chemotherapy drug. Though she got an appropriate dose of the incorrect drug, the side effect profile was different, and now she would quickly lose all her hair, which so far had not been a problem even after several cycles of chemotherapy. He knew his wife was not going to be "happy", but he accepted the disclosure and my apology, and she (with no hair) continued to come to the clinic for treatments.

Physicians who commit a medical error experience distress, guilt, and a sense of dread when they think about having to disclose the error. They are reluctant to disclose a medical error for fear of damage to the very important physician-patient relationship. Even if no harm is done to the patient, why does the event need to be told to the patient? Some feel that disclosure may cause the patient to be more anxious or angry and may result in a loss of trust in the physician. And the conversation is made worse as physicians who disclose a misadventure often do not know what to say or how to say it. The conversation then becomes very uncomfortable for all parties.

But what seems to worry physicians the most is the thought that by disclosing an error, the potential for a malpractice claim

is significantly increased. Every physician wants to avoid a claim, and many will elect not to reveal a mistake to prevent the filing of a lawsuit. The patient deserves to know that a mistake was made; in fact, the Joint Commission now requires the disclosure of unanticipated outcomes of care. On the positive side, there are studies indicating that the filing of claims is reduced when physicians apologize and disclose errors. The situation is always better when physicians are felt not to be hiding something from their patients or families.

Patients want to be told and should be told about errors, even if the harm is relatively minor. The physician who is involved should

- Acknowledge the error and explain what it is, how it occurred, and what its consequences are,
- Apologize for the error and take responsibility,
- Explain how any ill effects from the error will be managed or remedied, and
- Describe how future errors will be prevented.

When talking to the patient and/or the family, physicians should not try to blame someone or something else for the mistake. If the patient or family seems to be uncomfortable with the physician continuing care, an offer should be made to find another physician to assume immediate care.

If you have made a medical error and are not sure what to say to the patient, please call one of MACM's risk managers who can tell you what to disclose and how best to do it. You additionally need to talk to one of MACM's claims representatives and submit an incident report. Hopefully by admitting your error and offering an apology, no action will be taken by the patient or family. But MACM needs to be notified of the event at the time it occurs.

Mistakes happen, even with good physicians doing the right thing. Continue to do what you know is correct; acknowledge the error and offer an apology. And, just as illustrated in the case presented, your honesty and openness with the patient will go a long way toward avoiding a claim.



## **TABATHA PENINGER, BSN, RN** JOINS THE RISK MANAGEMENT DEPARTMENT

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Our Risk Management Department welcomed a new team member in August when Tabatha Peninger, BSN, RN, came on board as a Risk Management Consultant. Tabatha began her nursing career at Greenwood Leflore Hospital garnering knowledge in the areas of general medical-surgical nursing, as well as geri-psych. Her clinical experience also includes home-health nursing with Sta-Home, where she served as Mentor responsible for training newly hired nurses.

Prior to coming to MACM, Tabatha worked as a clinical liaison for a long-term acute care hospital where she worked with hospitals, nursing homes, home health agencies, and physician clinics throughout Mississippi. She is a graduate of the University of Mississippi Medical Center.