

## Disclosure of Medical Error

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### Perspective

Disclosure of medical error is inextricably linked to today's patient safety efforts. Health care experts advocate that greater disclosure is necessary to achieve complete transparency and ameliorate barriers to error reporting.(1,2) Of course, the ethical obligations triggered by the occurrence of a medical error are not to be overlooked. Principles of fiduciary duty, patient autonomy, and equity all strongly support the ethical and moral mandate for physicians to disclose harmful errors to patients.(3) These principles weigh in favor of disclosure even if it is contrary to the physician's interests (e.g., malpractice risk or reputation). As a result, the issue of disclosure garners tremendous attention in today's medical literature.

The interest, however, is more than academic. Recent presidential candidates have touted using disclosure as part of a centerpiece of patient safety reform.(4) Numerous hospitals and insurers have adopted disclosure policies (of note, some also bundle disclosure with offers of compensation to patients and families).(1,5,6) Moreover, in at least seven states, disclosure is legally mandated depending on the nature of the error and resultant harm.(1) It is important to realize that these laws are different than the "I'm sorry" laws that many states have passed; the latter simply protect expressions of remorse (and generally not expressions of fault) from being introduced as evidence of negligence in a lawsuit, while the former mandate notification to patients and families.

Amid the growing push for greater disclosure, two issues remain central to any discussion of the topic: what happens to malpractice risk and how disclosure is best conducted. We'll briefly touch on each in turn.

In an era often characterized as filled with excessive malpractice suits and premiums, physicians (and insurers) often worry that disclosure will worsen the situation.(7-9) The logic is straightforward: If more patients are notified of errors, more will ask for compensation or file lawsuits. In many regards, this has been a time-revered risk management belief. However, many proponents of disclosure now contend that this logic might not be correct. They cite evidence that supports the notion that what patients want most is a sincere and honest apology and that failing to provide one may actually lead to more and larger requests for compensation.(6,10) Others argue that, while disclosure might well increase the rate of malpractice

suits, more lawsuits could actually lead to greater efforts to improve safety.(11)

The empirical answer to this liability debate still largely eludes us.(12) Data on disclosure's effect on malpractice liability remain relatively sparse, although some observational data demonstrate that a disclosure policy may lower the total number of lawsuits, lawyer fees, or compensation expenses.(4,13) However, these data also suggest that there may be more events that receive compensation (although each event may receive a relatively smaller dollar payout). Of note, this information comes from large health systems or malpractice insurers that often coupled disclosure with an offer of patient compensation. Thus, these data do not necessarily speak to what will happen to liability if a physician's disclosure is unaccompanied by an offer of compensation.

Some researchers have modeled the likely effect of disclosure and concluded that the number of lawsuits and total compensation payouts will increase.(14) Nevertheless, because of the limitations of our current observational data and models, the liability question remains unanswered. Fortunately, some ongoing evaluations of programs currently in place will hopefully demonstrate the feasibility and liability cost impact of a full disclosure with compensation offer model.

Even without a satisfying answer to the malpractice liability question, the ethical and legal mandates, combined with the push for great transparency, have created an environment that is likely to bring more disclosure of errors to patients. Naturally, physicians continue to ask how disclosure is best conducted. Surveys tell us that patients want to hear about errors in their care, but these surveys do not necessarily tell us how best to conduct the communication.(10) After all, saying, "I'm sorry. We made a small mistake in your care, but don't worry, you'll be fine in 6 months," is likely to have a different effect on a patient than, "I'm very sorry that we made this mistake. We are going to do what it takes to make you better and make sure the same thing does not happen again." This example highlights that there are good and bad ways to disclose. Yet there is no formulaic approach to disclosure because errors and harm so often result from a complex web of events and affect a wide range of personalities. Nevertheless, many general recommendations have been elucidated; they tend to be based on survey data, observation, and common sense.(1,2,5,6,15,16)

First, the apology and disclosure should be explicit and conducted with sincerity and honesty. Delivering a message that is too carefully crafted may suggest a cover up to the patient and undermine the disclosure and relations.

Second, as soon as an error is identified (or even suspected), the provider should have a conversation with the patient. Providers should ensure that patients understand that an investigation will be undertaken and that some facts may change. This is critical because patients should not feel that they are being told shifting stories.

Providers should also understand and communicate that while the disclosure of the event may occur in one conversation, there will be an entire process that follows to determine what actually happened. As new details emerge, they should be communicated to patients. In fact, programs that tie offers of compensation to disclosure often promote an initial conversation that focuses on empathy, honesty, and transparency. Only later, after the facts are clearer, is the issue of compensation discussed. Whether or not

compensation will be offered, there should be many follow up opportunities to address the entire situation.

Even if conducted under optimal circumstances, it is important to recognize that not all patients will immediately, if ever, forgive the physician or the health care system for the mistake.<sup>(17)</sup> Moreover, physicians and other providers can also be tough on themselves when evaluating their own actions. The period following an error can be emotionally trying for patients and providers alike. The desire to avoid these strong and trying responses should not be underestimated and is thought to be another barrier to disclosure. To deal with these challenges, all available resources, including social workers, chaplains, support groups, and counselors, should be sought. The goal is to improve delivery of disclosure and better address the emotional impact of harmful error to foster disclosure efforts.

In sum, we are in a time in which greater transparency, legal initiatives and mandates, and ethical obligations will bring greater disclosure of medical error in health care. We still do not know with certainty what happens to malpractice liability in the setting of error disclosure. However, there are some early indications that disclosure coupled with offers of compensation may lower total liability costs. The challenges to greater disclosure extend beyond liability and include determining how best to disclose and how to cope with the emotional effects of error. Fortunately, efforts to address these issues are underway, and some resources are available.

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[Back to Top](#)

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