# Disclosure and Apology: CRICO's Perspective

In July 2001, the Joint Commission on the Accreditation of Healthcare Organizations (JCAHO) issued its disclosure standard (RI. 1.2.2). Essentially, this standard required all healthcare institutions to have in place a process whereby any "unanticipated outcomes" are promptly disclosed to patients and families. In 2002, after a period of some confusion, JCAHO issued a new "interpretation of the intent" of its disclosure standard which narrowed its application to scenarios where the unanticipated outcomes "relate to sentinel events considered reviewable by the Joint Commission" or those which may have an impact on "future decisions" by the patient (or patient's family) regarding the patient's course of medical treatment. It should be noted, however, that the Joint Commission made no mention of any requirement to *apologize* to the patient.

Yet, the need to couple the disclosure with an apology has gained momentum over the past few years. The reasoning behind this is that, in the absence of an apology, the disclosure has a minimal positive effect. In fact, because an apology is often equated with the showing of empathy, a communication that lacks this basic "human touch" may actually make a situation much worse.

But confusion abounds on this complicated subject. Unfortunately, there is no simple answer as a variety of interested parties take positions that reflect their particular perspectives. The following is a snapshot of some of those viewpoints:

*Health Policy Experts, Legislators, and Regulators:*

From a public policy perspective, there is often a perception that medical errors can be identified quickly and simply. In some camps, there is also a belief that someone ought to apologize for any unexpected outcome. Both of these positions miss two important points: first, it is often almost impossible to immediately determine if a patient's poor outcome was the result of negligence. In fact, CRICO has defended numerous claims where the standard of care was in fact met, even though initially, it appeared as though a physician was negligent. Second, the concept of encouraging physicians to apologize when they have done nothing wrong may unnecessarily expose them to personal liability. Because of the Massachusetts charitable cap, this is probably more the case here than in any other state.

*Hospital Administrators:*

Because of the JCAHO standard, most hospitals have developed policies on disclosure and apology. Under the belief that an apology will prevent a lawsuit, some of these policies are fairly progressive. Many of these institutions have widely communicated these policies and have mandated that disclosure and apology should consistently occur.

While CRICO supports the underlying principles for doing this, two cautionary points should be kept in mind: first, there is no evidence that an apology will actually prevent a lawsuit. No objective research on this issue has yet been completed and there are a

variety of differing opinions on the subject. Anecdotally, there appear to be certain categories of lawsuits that could have been avoided as a result of a prompt disclosure and a heartfelt apology (e.g., cases where there was not a severe outcome and where the suit was triggered because a patient or family was angered by how they were treated). But it is also quite possible that there are some cases – e.g., high-severity injury scenarios – which may not be impacted at all. In fact, some argue that an apology may actually result in *more* of those types of cases being asserted.

*Physicians:*

Many physicians are at times over-willing to accept blame for an unexpected poor clinical outcome. However, this is a rush to self-judgment that should be actively discouraged. For example, doctors may have no control over a variety of factors that contributed to what ultimately happened: poorly trained hospital staff, flawed business processes, even patient non-compliance.

It's absolutely appropriate for a doctor to empathize with a patient's negative outcome. In the Commonwealth of Massachusetts, an apology certainly can be given and, if done correctly, will not be used as an admission of liability. But there needs to be a fine balance between expressing regret at the difficulty the patient is experiencing and *taking responsibility for something the physician did not do.*

*Defense Counsel:*

Understandably, defense attorneys have typically advised doctors against using any language that might somehow infer they were to blame for what happened. In the wake of the JCAHO disclosure mandate, most defense counsel have modified their position. They recognize that healthcare providers need to honestly answer the patient's questions or concerns, with special attention to the patient's ongoing treatment. They also recognize that this level of responsiveness and candor often rings hollow without expressions of apology, empathy, and sympathy.

*CRICO's Position:*

CRICO/RMF supports disclosing and apologizing to patients. This is for two primary reasons: first, in addition to it being the "right thing to do", disclosure and apology is critical to preserving the relationship between physician and patient. It goes without saying that, if the trust between doctor and patient is restored because of open, honest, and empathetic communication, it *may be less likely that a lawsuit will be brought.* To what degree that is true is unknown, but there is general consensus that this is probably correct.

Second, if done appropriately, communications of this nature do not necessarily open the door to increased liability. In Massachusetts, an apology offered in the wake of an adverse event has some protection. Even though Massachusetts is not one of the 12 states

with physician-apology statutes[1], there does exist protection through the "benevolent gesture statute" (Mass. G.L. c.233, Sec. 23D):

> "… Statements, writings or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering or death of a person involved in an accident and made to such person or to the family of such person *shall be inadmissible as evidence of an admission of liability in a civil action.*" [Emphasis added]

While this statute was originally written with automobile accident scenarios as the context, it has generally been also applied to medical errors (the equivalent of "accidents" in the healthcare setting). It should be noted, however, that this statute does not prevent a plaintiff's attorney from introducing an apology into evidence. It simply states that, if it has been introduced, the apology may not be considered evidence of an admission of liability. Also, it should be emphasized that apologies must be limited to expressions of sympathy or empathy. If they go beyond that and begin to infer causation, a judge may choose *not to exclude them* as admissions of liability.

*When an Apology is Clearly Appropriate*

In cases that are clear-cut and where an objectively visible error has occurred, apologies should be made. Some institutions refer to these as "The Wrongs": wrong patient; wrong digit /limb /organ; wrong drug /dose /method of administration; wrong procedure, etc. If a doctor, assisted by the institutional risk manager, can clearly determine that the unanticipated outcome has been caused by one of these "wrongs", an immediate apology should be made. However, it should be emphasized that physicians should not make this determination on their own. They should immediately contact their risk manager, lay out every known fact, and then let the risk manager serve as their expert.

*General Guidelines:*

But the cases where there is obvious error remain rare events. What is more the norm are the scenarios that are "gray" in nature. These are situations where the patient has experienced a poor outcome, where it is suspected that there may have been negligence, but where causation (and the full context) is unclear. In those events, the risk manager should be immediately notified and should assist the physician in maintaining a fine balance as next steps are taken. The key elements to this "fine balance" are:

- First and foremost, **take care of the patient**. Make certain that the patient's current health needs are addressed and preserve (or restore) the trust between doctor and patient.

[1] The 12 states with doctor-apology statutes are: Arizona, Connecticut, Georgia, Illinois, Louisiana, Maine, Missouri, Montana, New Hampshire, South Dakota, Virginia, and West Virginia. Nine additional states are currently considering similar statutes: Colorado, Florida, Maryland, North Carolina, Ohio, Oklahoma, Oregon, Wyoming, and *Massachusetts.*

- Allow the **risk manager to serve as an expert** to the physician. The risk manager will be able to immediately delineate between a clear-cut case (one of "the wrongs") versus a scenario where negligence, causation, and damages are unclear.
- **Disclose as immediately as possible** – unnecessary delays in having this conversation can create anxiety and suspicion on the part of the patient.
- **Do not speculate about causation** – separate fact from opinion and avoid attribution of blame (particularly to other people who are not present).
- **Convey compassion for the patient's pain and suffering** – *this is the apology*. Do not use words such as "I'm sorry we did this to you". Rather, in accordance with the protections of the benevolent gesture statute, say "I am sorry for what you are experiencing", or words to that effect.
- **Take responsibility**. This does not mean take accountability for what caused the patient's injury; instead, take responsibility for follow-up, for managing all steps that need to be taken for helping the patient to become whole.
- Make certain **responsibility is assigned for analysis (and project work)** that will avoid similar scenarios from repeating themselves.
- The risk manager should **preserve evidence** (if equipment is involved) and the physician should **appropriately document** a synopsis of the disclosure discussion in the medical record.
- The risk manager should determine **if the event should be reported to CRICO**. The risk manager should also alert CRICO claims representatives if disclosure and apology have been made.