

Medical Malpractice Reform: Disclosures, Apologies, and Early Offers of Compensation

A tenet of building a culture of safety is disclosing and discussing adverse events to improve systems and avoid future errors. It is also important—indeed required—for providers to disclose and discuss adverse outcomes with patients. However, litigation fears often discourage full disclosure, meaningful apologies, and early offers of compensation, when warranted. This issue of *Health Care News In-Depth* will explore disclosure requirements, the potential value of full disclosure and apology, and ways to encourage providers to undertake comprehensive disclosure programs.

The last decade has seen significant movement toward encouraging and assisting providers to disclose and discuss adverse outcomes with patients and families. Disclosure is not a new concept and is required by professional ethics, accrediting standards, and many states' laws and regulations. But it is unquestionably a hard thing to undertake, given natural feelings of denial and embarrassment, as well as concerns about loss of stature, punishment, and malpractice litigation. Many hospitals have therefore implemented programs to support their staffs, who must undertake disclosures. Over the years, GNYHA has facilitated these efforts by providing communication skills training to members.

Elements of Full Disclosure and Apology

More important—and certainly more difficult—than the act of disclosure is ensuring that it is complete and accompanied by a “full” apology, which has been defined as one that is an “acknowledgment of respon-

sibility ... coupled with an expression of remorse.”¹ In addition, it is also advised that the provider should offer appropriate com-

penation, when warranted. This approach is premised on the view that patients want and deserve certain basic information, respect, and, in some cases, recompense. The preface to Leonard Marcus's 15-year-old book, *Renegotiating Health Care*, outlines a seasoned health care mediator's observations as to what patients want.² Patients first want to know what really happened to them. They want to know the incident will not be repeated. They also want an apology or acknowledgment. Subsequent research has repeatedly reinforced these observations. Thus, while “disclosure” is required and important, the patient wants and deserves much more.

Impact on Claims Volume, Costs?

The question of whether such programs will or do trigger increased claims and costs re-

mains controversial, although recent data suggest that costs might actually decrease when such programs are successfully implemented. First, to examine evidence supporting the idea of increased claims, a 2007 article written by malpractice experts David Studdert, Michelle Mello, Troyen Brennan, Atul Gawande, and Claire Wang concluded that more disclosures would likely lead to increases in litigation volume and costs.³ For the purposes of the study, the authors assumed that, following a disclosure, the average cost per severe injury claim would decrease by 40%, on the basis that patients might be willing to accept reduced pain and suffering compensation for expeditious settlements.

The authors surveyed 78 “medico-legal experts” in 2005 for their predictions of how 100 patients would react to disclosure in the con-

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GNYHA'S COMMUNICATION SKILLS TRAINING

- Promotes improved care outcomes, and ultimately improved patient satisfaction.
- Helps staff develop and improve skills needed to accomplish effective disclosure following an adverse event.
- Prepares core group of skilled staff that can assist others with communicating about adverse events.
- Helps create more supportive environment for physicians and other caregivers following an adverse event.

1. Lazare, Aaron. “Apology In Medical Practice: An Emerging Clinical Skill.” *Journal of the American Medical Association* 296 no. 11 (September 20, 2006): 1401-1404.

2. Marcus, Leonard. *Renegotiating Health Care*. San Francisco: Jossey-Bass Inc., 1995.

3. Studdert, David M., Michelle M. Mello, Atul A. Gawande, Troyen A. Brennan, Y. Claire Wang. “Disclosure Of Medical Injury To Patients: An Improbable Risk Management Strategy.” *Health Affairs* 26 no. 1 (January-February 2007): 215-226.

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text of four different situations. Based on 65 survey responses, the authors concluded that it was highly likely that claims volume would increase if there were more disclosures, and correspondingly that a net increase in costs was more likely than a decrease or change. The authors acknowledged the weaknesses of the study's theoretical nature, as well as the fact that the experts' survey assumed only a "typical disclosure situation in your institution or experience," which might not have assumed full apologies, offers of compensation, or other elements that reduce tendencies to litigate.

UMHS Reports Disclosure Success

Facilities with more comprehensive programs have found that disclosure and apology reduced their cost of claims. In a January 2009 *Journal of Health & Life Sciences Law* article, Richard Boothman, Chief Risk Officer, and others from the University of Michigan Health System (UMHS) outlined UMHS' proactive approach to responding to patient injuries and claims.⁴ It includes acknowledging and apologizing for "true mistakes"

gates swing open." New claims have fallen steadily from a high of 136 in 1999 to a low of 61 in 2006, without adjustment for increases in clinical activity over the same period. In that time (2001 to 2007) UHMS also reduced its average claims processing time from 20.3 months to about 8 months. In addition, its total insurance reserves dropped by two-thirds, and its average litigation costs were cut in half.

Others Satisfied With UMHS Program

Boothman, et al., acknowledged that more than just transparency had been at play, citing decreases in tort filings and efforts to improve patient safety nationally. But they also said physicians and the plaintiff's bar approve of the program. More than 87% of 400 UMHS physicians surveyed said the threat of litigation adversely affected the satisfaction they had in practicing medicine. But 98% of respondents fully approved of the UMHS approach to adverse events, and 55% said the approach was a "significant factor" in their decision to stay at UMHS. Among the 26 respondents to a survey of the plaintiff's

Maryland, Catholic Healthcare West in the Southwest, and COPIC Insurance Company in Colorado.

Need to Protect Disclosures, Apologies

Though UMHS and other systems have reported positive results in their approaches to adverse events, providers' fears of litigation are still an obstacle to comprehensive programs, particularly in states that are perceived to have less friendly litigation climates. To address this, the majority of states have enacted laws protecting apologies, and in many cases disclosures and early offers of compensation as well, from being introduced in court. The formulations vary, but all are aimed at ensuring that providers are more willing to undertake complete disclosures and full apologies without fear that those discussions will be used against them in any subsequent litigation. It is often argued that providers should not be protected from undertaking actions they are required to take or that are simply the right thing to do. But a proactive, full, and meaningful disclosure and apology may be more satisfying to patients and providers, and may be more apt to lead to an early and fair resolution. Among the states in which GNYHA members are located, unfortunately, only Connecticut offers such protections at this time. GNYHA urges the passage of such laws in every state.

Encouraging Comprehensive Programs

Proactively offering a full disclosure and apology following an adverse event, plus compensation, when warranted, may spare providers and patients long and often acrimonious litigation, potentially reduce costs, and certainly support a culture of safety. Given that litigation fears often impede providers from undertaking recommended comprehensive disclosures and full apologies, laws protecting such actions from admission in subsequent arbitration or litigation may be necessary to encourage providers to engage in these recommended activities. ■

For additional information on medical malpractice issues, contact Susan Waltman at GNYHA. To learn more about GNYHA's communications training, contact Lorraine Ryan.

RISK MANAGERS AND PHYSICIANS DIFFER ON DISCLOSURE, APOLOGIES

In an AHRQ-funded survey of risk managers and physicians:

- More risk managers than physicians strongly agreed that generally serious errors should be disclosed to patients.
- Risk managers were more likely than physicians to recommend that the errors specified in the study be disclosed and to provide full details about how the errors would be prevented in the future.
- Physicians were more likely than risk managers to provide a full apology, recognizing the harm caused by the error.

Source: David J. Loren, M.D., et al. "Risk Managers, Physicians, and Disclosure of Harmful Medical Errors." *The Joint Commission Journal on Quality and Patient Safety* 36 no. 3 (March 2010): 101-108.

and providing "a thorough explanation" of all unanticipated outcomes. UMHS is also committed to compensating patients quickly and fairly when "unreasonable" medical care causes injury, defending medically reasonable care vigorously, and reducing patient injuries by learning from patient experiences.

Addressing the Studdert study's conclusions that open and honest disclosure would result in increased litigation, the Boothman article stated that UHMS "has not seen those flood-

bar, 71% stated settlement amounts with UMHS were less than anticipated; 81% said their costs were lower; and 87% agreed the transparency allowed them to make better decisions about claims to pursue. More than half of respondents stated they had declined to pursue which claims they likely would have pursued before the system changed. The article also cited other hospitals and systems that have reported success with similar approaches, including the nationwide Kaiser Permanente network, Johns Hopkins in

4. Boothman, Richard, Amy C. Blackwell, Darrell A. Campbell Jr., Elaine Commiskey and Susan Andres. "A Better Approach to Medical Malpractice Claims? The University of Michigan Experience." *Journal of Health & Life Sciences Law* 2 no. 2 (January 2009): 125-159.