Apology & Disclosure of Medical Error: The Right Way to do the Right Thing

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Key Points

- There are strong moral and ethical arguments in favor of a duty to disclose medical error.
- Multiple studies have shown that patients expect disclosure of errors along with apology, and assurances that errors won’t recur.
- Research indicates that disclosure and apology can have favorable effects on medical malpractice litigation and costs.
- Sincerity, careful planning and skillful execution are essential.
Disclosure of Error: A Brief History

- Momentum built following IOM report.
- Professional societies outlined ethical and moral duties – AMA, ASIM, others.
- Published evidence of positive effects began accumulating.
- Positive effects demonstrated for both patients and providers.
- Yet, resistance remains.
Providers Fears About Disclosure

- Disclosure will create more suffering for the patient.
- Disclosure will damage the relationship with the patient.
- Disclosure will cause embarrassment and professional isolation.
- Disclosure will lead to litigation.
Clear Downside Risks for Failure to Disclose

- Legal
- Financial
- Ethical
- Emotional
The Disclosure/Liability Cycle

Event occurs

Provider’s concludes fears were well-founded

Patient feels angry and betrayed

Patient aware that something has happened, expects explanation

Provider does not disclose fearing increased liability

Patient sues provider
"Boy, have I got a story to tell you!"
Beyond Disclosure to Apology

- Increasing interest in “medical apology laws”:
  - As of 2009, 36 states and the District of Columbia have statutes or rules of evidence that prevent the use of apologies as evidence of fault in medical malpractice cases.
  - 25 of these laws have been enacted since 2005.
  - Stated purpose is to reduce the incidence of claims resulting from unanticipated outcomes.
The South Carolina Apology Law

- The “Unanticipated Medical Outcome Reconciliation Act” was passed in 2006.
- Requires apology to be made in “a designated meeting to discuss the unanticipated outcome.”
Why Apologize?

- Apologies provide important benefits:
  - subtract insult from injury
  - help to restore trust
  - help both provider and patient to recover
  - reduce animosity, antagonistic behavior
  - help speed settlements – but only if they include acceptance of responsibility
What is the Impact of Apology?

- University of Michigan Health Service experience following adoption of disclosure and apology program:
  - Per-case payments decreased by 47%
  - 61% decrease in legal costs
  - Settlement time dropped from 20 months to 6 months

- Ho and Liu study:
  - Increase in settlements and decrease total litigation.
  - Faster disposition of cases.
  - Decreased average payments for the cases with more significant and permanent injuries.
Are Apologies Legally Risky?

- Laws offer protection.
- Insurers cannot deny coverage for a simple apology.
- Juries tend to have a favorable view of defendants who apologize.
- As always, the devil is in the details.
Elements of an Apology

- The 5 Rs approach described by Michael Woods, M.D. in Healing Words, the Power of Apology in Medicine:
  - Recognition;
  - Regret;
  - Responsibility;
  - Remedy; and,
  - Remain engaged.
Recognition

- Is an apology warranted or needed?
- What does the patient/family expect?
- Is there fear, disappointment, anger?
- Be aware of patient/family feelings and your own!
- Apologizing is NOT the same as admitting fault or responsibility!
Regret

● Express empathy:
  ▪ “I am sorry for what you are going through.”
  ▪ “I am sorry this has happened to you.”

● Acknowledge the patient's disappointment, fear, and anger.

● Remember that expressing regret is not the same as admitting guilt or responsibility.
Responsibility

- Own up to what's happened, even if it was unforeseeable.
- Disclose all details that led to the outcome or complication.
- Explain why it happened.
Remedy

- Make it right by explaining what's being done to correct the problem.
- Evaluate and explain how it will affect your patient's health and then begin appropriate therapy.
- Consider who will bear the cost of the error or complication:
  - Are there any costs you can absorb?
  - Consult with risk management!!
Remain Engaged

- Be there for the patient.
- Reassure the patient that you will not abandon him/her.
- Focus on and provide for your patient's continuing care needs after the outcome or complication.
- Follow up, even after you hand off to someone else.
What is a “Safe” Apology?

- Apology must be made in “a designated meeting to discuss the unanticipated outcome.”
  - Not in the surgical waiting room.
  - Not in the supermarket or on the golf course.
  - Not in conjunction with any other activity or discussion.
Things That Are Okay to Say

• “I am sorry this has happened to you.”
• “I am sorry that the cardiac monitor fell on your head.”
• “I am sorry that you developed an infection.”
• “I am sorry that you had so much bleeding.”
Things That Should NEVER Be Said

- “It wasn’t my fault.”
- “It was my fault.”
- “It was Dr. X’s fault.”
- “It was the hospital’s fault.”
- “It was those stupid nurses’ fault. They would have killed you if it wasn’t for me.”
- “I wish I hadn’t done it this way.”
Consider the Timing

- As soon as possible.
- But, must be in a “designated meeting.”
- Take the time to plan and prepare.
- Make sure you have all the facts and information.
- Consult with risk management regarding remedy.
Remember.....

The key is distinguishing between expression of empathy and admission of fault.
But Sincerity is Crucial

Fig. 1.—“And today in Washington a top Administration apologist issued an apology while denying that there was anything to apologize for.” (Mischa Richter © 1990 from The New Yorker Collection. All rights reserved.)
What Would You Do?

You are the surgeon who has just performed a total knee replacement on a patient. You have stopped by the PACU to see how he is doing, and the patient asks you why the dressing is on the right knee instead of the left. How would you answer?
What Would You Do?

You are the attending physician and you have learned that your patient has received the wrong medication, resulting in an anaphylactic reaction. The patient is currently in a coma in the ICU. What would you say to the waiting family members?
What Would You Do?

You are the nurse taking care of a patient and have just finished infusing an IV medication in preparation for surgery. Another nurse comes by and notices that the wrong name is on the infusion. This conversation is had in front of the patient. What would you say to the patient?
What Would You Do?

You are the ED attending and have just evaluated a patient with a history of recent abdominal surgery who is complaining of fever and abdominal pain. An x-ray shows a clear radio-opaque marker in the left abdomen. What would you say to the patient and his family?
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