FULL DISCLOSURE OF MEDICAL ERRORS

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Josie’s Story

QuickTime™ and a decompressor are needed to see this picture.
There is a current and important transformation towards full disclosure in both healthcare and medical insurance.

EVERY healthcare professional has aspirations to be open and honest about the medical errors.

Gap between our aspirations for openness and honesty AND what is really happening in our hospitals and clinics.

Practical wisdom & moral courage to practice full disclosure
I. DEFINITION

Medical Error is a human error in healthcare, rather than the underlying disease, that causes harm to a patient.

In 2000, Institute of Medicine reported that medical errors cause up to 98,000 preventable deaths and 1,000,000 excess injuries each year in U.S. Hospitals.
Tradition: Deny and Defend = Lack of Standards

Moral and ethical obligation to disclose the medical error to the patient who does not have the necessary education or training to discover or prevent that error on her own - fiduciary duty - First Do No Harm

Joint Commission’s requirement: the outcome of patient’s care to be provided to the patient even if the outcome was unanticipated. No guidance as to HOW?
Dear Owner of this car:
I accidentally hit your car and someone saw me. That's why I am pretending to write down my information.

SORRY (really really Sorry)

( :(
II. THE GAP

The aspiration to be open and honest

*versus*

We like the principle not the practice

Have no guidance as to HOW to do it

Questions, challenges and obstacles
II. THE GAP

Narrow definition by Health Care Professionals versus Broad Expectation of Disclosure by Patients

Shame, Fear of Discipline or Litigation - Minimum Disclosure

Only 10% patients found emotional support at Hospital.

There is support for the concept but not the context
THE GAP: LEGITIMATE Qs

- How can we fully disclose medical errors?
- What do we say? Apologize? Explain? Compensate?
- Who says it? Physician / Disclosure Coach / Team?
- When is the best time to disclose?
- What if it results in discipline or litigation?
III. LEGAL ASPECT - Apology

30+ States have “Apology Laws”: Statement of Apology cannot be used in court as evidence of liability.

25 States - only protects expression of regret. But, any admission of fault - not protected.

4 States - Full Protection for apology & admission of fault

8 States - Mandate disclosure of harmful errors to patients. 2 in writing. Burden is on the institution not the practitioner. KP
KENTUCKY - 20 YRS BEHIND
III. LEGAL - Litigation

Full Disclosure CAN trigger litigation - despite Apology
Laws adopted in individual states

FRE 801(d)(2) Hearsay - Exception for Admission by a
Party Opponent: Statement made by a party which is
offered in evidence by the opponent is admissible as
an admission. Agency/Vicarious admission for H if
statement by Physician
FRE 407. When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. [Admissible] when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.
FRE 408. Compromise and Offers to Compromise: (a) Prohibited uses. Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was **disputed** as to validity or amount, or to impeach through a prior inconsistent statement or contradiction: (1) furnishing or **offering** or **promising** to furnish or **accepting** or offering or promising to accept a valuable consideration in compromising or attempting to compromise the claim; and (2) **conduct or statements** made in compromise negotiations regarding the claim, ... Permitted uses... include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.
FRE 409. Payment of Medical and Similar Expenses. Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

But, conduct or statements attached - admissible
The Truth About Litigation

The truth re: litigation: COST = Pain + Breached Trust + Energy and Time + Finding a Lawyer + Funding the Case + Finding an Expert - >$300K - $150K


Very Strong Defense if Full Disclosure + Early Offer of Compensation.
“If your patient had to go lawyer shopping so that she could get answers or fair compensation for her injuries resulting from your error, you have already LOST the battle!” Dr. Kraman, Innovator of the Full Disclosure Program at Lexington Veterans Administration Medical Center
IV. DEVELOPMENTS

I. The Veterans Affairs Medical Center in Lexington - National

1987, lost two big medical malpractice cases totaling >$1.5M - decided to take more proactive approach

WE WILL NO LONGER DELEGATE OUR ETHICAL DUTIES TO THE LEGAL SYSTEM: ID - investigate - voluntarily disclose - Offer compensation

We are caregivers and we will remain caregivers
DEVELOPMENTS

- University of Michigan - Full Disclosure + Early Offer of Compensation
- University of Virginia - Early Response Teams + Full Disclosure + Early Offer of Compensation
- Johns Hopkins - Maryland - Team Full Disclosure + Explanation + Compensation
DEVELOPMENTS

Harvard, Johns Hopkins,
Stanford University,
Children’s Hospitals and Clinics in Minneapolis (2005)
Kaiser Health Care Systems,
Saint Joseph Health System,
Slow Reporting - association with medical errors
DEVELOPMENTS

COPIC - 3R Program = Recognize, Respond, Resolve

Disclosure + Early Compensation + No Fault

Unanticipated Outcome qualifies; No Scrutiny; Up to $30K

Exclusions: Patient Death, Attorney Involvement, Complaint, Written Demand

No Waiver of right to sue - No Nat’l Practitioner Data Bank
DEVELOPMENTS

COPIC Results:  
1. 5 years, 4,000 Incidents Voluntarily Disclosed  
2. Only 500 payments  
3. $5,600 Payment per incident  
4. None of 4,000 proceeded to trial  

Patients did not try to max out the system  

Doctor’s names were not entered into National Pr. Database because it is a no-fault system  

Both providers and patients are very happy with results
V. BENEFITS

Litigation costs have gone from $5M to $1M at University of Michigan. Thomas Gallagher, M.D., University of Washington

The full disclosure policy of VAMC Lexington resulted in unanticipated financial benefits to the medical center. Nancy Lamo, Disclosure of Medical Errors: The Right Thing To Do, But What is the Cost? Lockton (2011).

50% drop in medical malpractice suits after implementation of medical error disclosure program at Children’s Hospitals and Clinics in Minneapolis. Nancy Lamo, Disclosure of Medical Errors: The Right Thing To Do, But What is the Cost? Lockton (2011).
The presence of a hospital disclosure policy for informing patients and families about systems failure or human errors resulting in unanticipated outcomes was associated with lower mortality. Laurie Barclay, Safe Practices in Hospitals Not Linked to Better Outcomes, Medical News (2011); The LeapFrog Data.

BENEFITS

Claim processing times and average litigation costs dropped more than half, and total medical malpractice reserves dropped by more than two thirds. R. Boothman, A. Blackwell, D. Campbell, Jr., E. Commiskey, and S. Anderson, A Better Approach to Medical Malpractice Claims? The University of Michigan Experience, Journal of Health & Life Sciences Law v. 2, no. 2 (January 2009).

Where inappropriate medical care caused patient injury, the provider owes the patient quick and fair compensation. Full disclosure makes this compensation possible without the need to file a lawsuit. R. Boothman, Message on National Patient Safety Foundation Listserv (Nov. 20, 2010), http://listserv.npsf.org/archieves/patientsafety-1.html
BENEFITS

Full Disclosure distinguishes the caregivers who act reasonably and the incidents where there is no patient injury - caregivers will receive a thoughtful and vigorous defense. R. Boothman, Message on National Patient Safety Foundation Listserv (Nov. 20, 2010), http://listserv.npsf.org/archieves/patientsafety-1.html

Full Disclosure provides opportunities for the healthcare professionals and institutions to improve patient safety from the experiences of their patients. Id.
BENEFITS

- Full Disclosure of harmful medical errors help with the human resources aspect of the HealthCare Institutions.
- Improved provider-patient relationships.
- Creates an opportunity for forgiveness and reconciliation.
- Reduce the likelihood of litigation. 

BENEFITS

- Full Disclosure of Medical Errors helps the Customer Service experience of the Patients -

- The Role of Media, Social Media, Blogs, Reviews and Patient Referrals
Put in a system to prevent medical errors; If the error can't be fully prevented, prevent harm to the patient

If the patient is harmed, investigate and disclose ASAP

Hire a disclosure coach or train your providers on disclosure

Provide a fair compensation

Every H & C is different: create your own system
Hi,
My name is Helen, and I accidentally hit your car while trying to park next to you.

I am so sorry! My number is 859.797.4323 and my insurance info State Farm # 954487

Again, I am so sorry!