

# 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

# OUTLINE

I. Definition of Medical Error

II. Gap and the reasons

III. Legal Consequences of Full Disclosure

IV. Current Developments Towards Full Disclosure

V. Benefits of Full Disclosure

VI. Practical Wisdom & Moral Courage

# I. DEFINITION

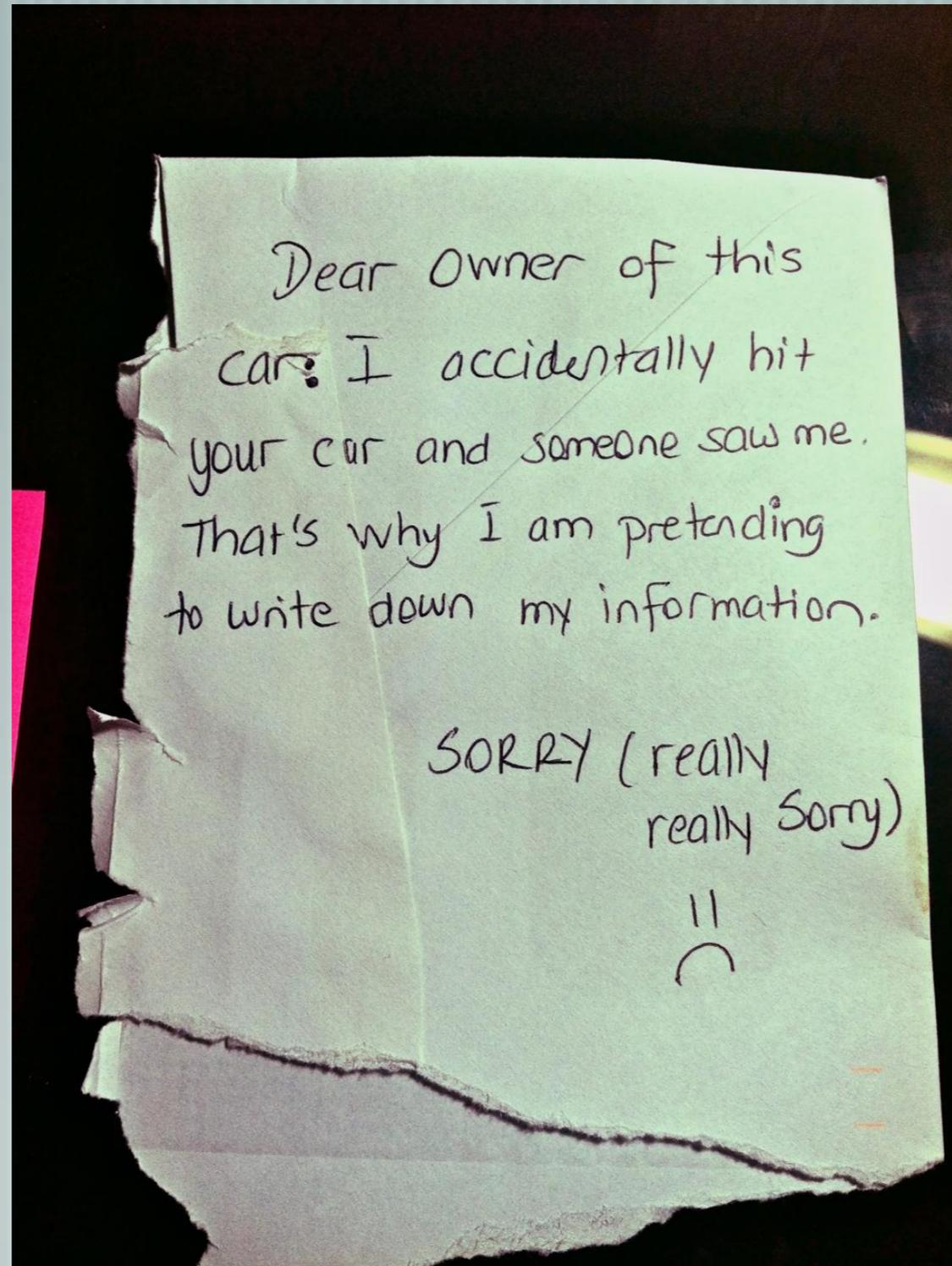
— [ **Medical Error** is a human error in healthcare, rather than the underlying disease, that causes harm to a patient.

— [ 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.

# DISCLOSURE

- [ 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?

# Disclosure?



# 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

# III. LEGAL - Evidence Rules

— [ 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.

# III. LEGAL - Evidence Rules

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.

# III. LEGAL - Evidence Rules

— [ 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

— [ Defendant Friendly Juries - > 90% verdict for D -Guardado, José R. "Professional Liability Insurance Indemnity and Expenses, Claim Adjudication, and Policy Limits, 2000-2009" Policy Research Perspectives No. 2010-2. (Chicago, IL: American Medical Association, November 2010)  
<http://www.ama-assn.org/resources/doc/health-policy/x-ama/prp201002-piaa-data.pdf>.

— [ Very Strong Defense if Full Disclosure + Early Offer of Compensation.

# LITIGATION = P & H LOSES

— [ “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).

# BENEFITS

— [ 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.

— [ Identifying and investigation apparent medical errors helped hospitals better defend malpractice claims. Nancy Lamo, Disclosure of Medical Errors: The Right Thing To Do, But What is the Cost? Lockton (2011).

# 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/archives/patientsafety-1.html>

# BENEFITS

Full Disclosure distinguishes the caregivers who act reasonably and the incidents where there is a 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/archives/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.

Elaine O'Connor, Hillary M. Coates, Iain E. Yardley; Albert W. Wu, Disclosure of Patient Safety Incidents: A Comprehensive Review, International Journal for Quality in Health Care, Oxford University(2010).

# 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

# TO-DO

— [ Put in a system to prevent medical errors; If the error cant 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

# MAKE IT RIGHT

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!