Early Resolution

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Unfair to physicians, healthcare entities and patients alike!!

• Most negligent acts do not result in lawsuits
• Most events that result in a lawsuit do not represent negligence
• 60% of all claims dropped/dismissed for lack of merit ($15k per claim without indemnity payment)
• Damages not negligence is the major driver behind the majority of claims filed
• Fear of runaway verdicts is the major reason many high damage claims are settled
• 57% of the money paid for med-mal premium goes to plaintiff lawyers; 18% goes to defend claims, leaving 25 cents on the dollar to pay those injured.
Reason for the High Volume of Medical Malpractice Suits

• Contingent fee system
  – “The First Amendment allows lawyers to advertise in a manner that is not misleading to members of the general public”

https://www.youtube.com/watch?feature=player_detailpage&v=Lr3BKBVg-HM

  – Availability of “experts” for both the Defense and the Plaintiff
    • Defense: Patron saints of loss causes
    • Plaintiff: Hired guns
• Deterioration of the physician-patient relationship
• High rate of preventable injury
Preventable Errors I Have Known

- **Wrong:** Limb
- **Wrong:** Side of head (neurosurgery)
- **Wrong:** Level spine surgery
- **Wrong:** Patient (cath’ed)
- **Right** Procedure but **wrong** patient
- **Wrong:** Blood type

**Retained:**
- Sponge
- Kelly Clamp
- Needle
- Retractor (14” by 3”)

- **Wrong:** Test results given to patient (AIDS)
- **Wrong:** Solution used to clean site (100% acetic acid vs 5%)
- **Wrong:** Drug dose (those decimal points get us every time!)
- **Wrong:** Administration-route (chemotherapy)
- **Wrong:** Organ(s) transplanted or removed
What Do Patients Who Sue Want?

- **Adverse Event (catastrophic life-changing injury):**
  - An outcome that differs from the anticipated result of a treatment or procedure and results in harm to the patient
  - May or may not be the result of a medical error

- **A desire for an explanation (What and Why):**
  - Data shows a major reason for malpractice lawsuits is that after an adverse event the patient (family) is left with the impression that the doctor “did not talk openly” or “tried to mislead”

- **A desire to prevent “it” from happening again**
- **A desire for someone to accept responsibility or a chance to hold someone accountable**
- **A desire for financial compensation**

Communication Gaffes: a Root Cause of Malpractice Claims
Beth Huntington, BSN, MSN, JD and Nettie Kuhn, RN, BSPA, CPHRM
Why Consider an Error Disclosure, Apology and Early Resolution Claim Management Approach

Because it is the right thing to do!

- Ethical standards established by the AMA and many specialty societies oblige the disclosure of errors
- The Joint Commission requires disclosure to patients of unanticipated outcomes
- More and more states are requiring hospitals and physicians to disclose “known facts” behind adverse events to patients
- Many policymakers believe it is necessary if we are to safeguard the public trust in the medical profession
- More and more healthcare providers want the opportunity to be honest with their patients when harm occurs
- Many healthcare organizations are encouraging a culture of transparency
Is There a Business Case for Early Resolution?

- **Bottom Line** – Still too early to call
- **University of Michigan Health System (UMHS) (Rick Boothman)**
  - Claim frequency dropped by 1/3
  - Frequency of suits dropped by 2/3
  - Indemnity dropped
  - ALAE dropped

- **Conclusion**: The UMHS implemented a program of full disclosure of medical errors with offers of compensation without increasing its total claims and liability costs

- **Limitations**:
  - Malpractice Claims in Michigan generally declined during the latter part of the study period
  - UMHS has a closed staff model covered by a captive
  - UMHS often assumes legal responsibility
Is There a Business Case for Early Resolution? (continued)

- Plaintiff lawyers fight apology statutes as vigorously as they fight tort reform

“I would agree to caps on pain and suffering before I would agree to the inadmissibility of apologies. If healthcare organizations ever learn how to respond to patients who are injured, my doors will close. People come to me not because they are injured, they come to me because they are angry.” - Quote from a prominent plaintiff lawyer - said as I was attempting to get an apology statute passed in DC.
• Defense lawyers are generally against early claim resolution:
  – “It is too early to advise as to defensibility of this claim. We will know much better after discovery is complete.”
  – 12.5% = 6 year total of MedStar’s ratio of legal fees to indemnity paid
  – 6 years total % of cases tried = 2%

• Studies regarding litigant’s motives for bringing suit find many believe an apology is one factor that might have changed the course of the litigation (Hickson, Robbennalt)
Early Claim Resolution Process

Benefits:

- Gets resources to the injured patient when they most need it
- Reduces cost for everyone involved
- Often narrows down the issues and the parties
- Avoids turning a caregiver into a defendant
Percent of Career with Pending Claim

Source: The Doctors Company and RAND
Barriers (Challenges) to Disclosure and Early Resolution Programs

• Institutional culture:
  – Is the organization ready? Is the medical staff ready?
  – Patient factors: Approach will not work with all patients
    • Distrust too strong
    • Language and cultural barriers
    • Is the patient/family competent or literate enough to understand?
    • Do they insist upon or need a lawyer?
Barriers (Challenges) to Disclosure and Early Resolution Programs (continued)

- Physician factors: Fear/concern of how this will affect them
  - Board of Physicians
  - Insurance Coverage
  - NPDB
  - Credentialing issues
  - Fear of litigation

- Other barriers:
  - Medicare and other lien holders
  - Physicians in private practice separately insured
  - Physician insurance carriers
Claims Management

Consistent with the MedStar mission, vision and values, MedStar Risk Management Services handles all patient care related professional liability claims in a fair and equitable manner.

- To that end, we attempt to settle valid claims promptly and for a reasonable amount
- We defend all frivolous or non-meritorious claims vigorously
- We strive at all times to reinforce MedStar’s reputation in the community for fairness, honesty and sound judgment as well as firmness in resisting non-meritorious claims
Response to an Adverse Event
The New Claim Management Paradigm

- Local and Corporate Go Team Activated:
  - Go Team Event – Any unanticipated significant or serious change in a patient’s clinical course regardless of whether the standard of care was met

- Go Team Members:
  - Local Medical and Nursing leadership
  - Risk Management – Local Entity and Corporate
  - Quality/Safety and Nursing – Local Entity and Corporate
  - Claims Management – Corporate
Response to an Adverse Event
The New Claim Management Paradigm (continued)

• Go Team Actions:
  – Hold the bills! The last thing the patient or family needs is to receive bills from the hospital or a physician while they're dealing with a traumatic event.
    • Waive the patient pay portion of the bill
    • Waive bills directly related to the event
    • Waive all bills
  – Ensure that the immediate needs of the patient are met
  – Provide support to the caregivers
  – Engage patient and family immediately

• Disclosure conversation initiated

• Discuss compensation when it is appropriate
Disclosure Types

- Disclosure of an error causing harm and the need for immediate treatment and informed decision-making
- Disclosure of an error causing a static adverse outcome (death, for example)
- Disclosure of an adverse event before it is known whether or not error was to blame
- Disclosure of an error when the patient does not know and might never know
- Disclosure of an error when the patient is unharmed (near miss)
Disclosure Does Not Always Mean Falling on Your Sword!

Disclosure is a process not a conversation

- Disclosure often begins before we know the answer to the question of “how” and “why” the adverse outcome occurred
- The first part of disclosure is simply to acknowledge that something unexpected and adverse has occurred
- The initial phase involves expressions of empathy coupled with ensuring that the immediate needs of the family and the patient are being met
  - Ensure that the patient is clinically stable and safe
  - Offer the patient access to any care that is needed
  - Provide immediate emotional support to the patient, family, and caregivers
- Empathy is appropriate 100% of the time; apology is only appropriate after a thoughtful investigation has demonstrated that it's warranted
The Power of Apology

For the Patient

• Helps to restore the patient’s dignity and self-respect
• Begins to restore trust in the caregivers and hospital
• Shows that you also suffered

For the Caregiver

• Allows expression of the normal empathic concern we have for any harmed patient
• Begins to relieve guilt and shame
• Makes forgiveness possible… but not inevitable

You have the right to remain silent.

Anything you say can and will be used against you in a Court of Law.
Apology Statutes

• A statute intended to encourage a candid and transparent conversation between caregivers and patients and their families after an unanticipated adverse patient outcome.

• There are 4 different statutory approaches taken by the various states and the District of Columbia.

• The major differences between such statutes is the degree to which they protect the conversations from being used in a subsequent law suit as an admission of liability.
Early Intervention

True or False?

Following an adverse outcome, early intervention with candid disclosure and supportive discussion can avoid or change the course of litigation
Fall – CH

Site: MedStar National Rehabilitation Network
Event Date: July 25, 2016

Summary:
C.H. is an 87 year-old male who was admitted to MNRN on 7/16/2016. Upon admission, he was assessed as a “High Fall Risk” and put on a bed alarm. On the morning of 7/25/2016 at approximately 5:15 am, CH got out of bed independently, crossed the room and fell, suffering bilateral subdural hematomas and nasal fractures. The bed alarm never sounded because it was turned OFF. CH was transferred to MedStar Washington Hospital Center intensive care unit.
Response to CH’s Fall and Injury
The New Claim Management Paradigm

• Patient Courtesy Bill Hold Process activated
• Event Review Process initiated immediately
  – Standardized structure for facilitating an event review, understanding true contributing factors and developing an effective and sustainable solution
• Claims Manager assigned to provide appropriate support to the patient and family as needs are identified:
  – Pay out-of-pocket expenses incurred by family
  – Cover travel expenses (airfare) for daughters living out of state
  – Pay for 24/7 private sitter for patient while at MWHC
  – Coordinate transfer back to MNRN – flawless handoff
  – Remain in contact with family until patient’s transition to home and beyond
CH – The Rest of the Story

• The MNRN and MWHC teams, including the MedStar Claim Manager, stayed in contact with CH and his family every day until his discharge, and then remained in contact even after he was at home and stable

• In the beginning, the daughters were angry and hard to engage

• On discharge the patient and his family were appreciative of MedStar’s support and response

• Since discharge, there has been no claim filed, nor is one expected
The Jack Gentry Story. When the Moon is in the Seventh House, and Jupiter Aligns with Mars ...

• All the factors were aligned for success:
  – Liability was certain
  – Ideal patient and family
  – Jack’s brother is a plaintiff’s lawyer who “understood” what we were trying to do
  – The surgeon came out of central casting
  – Providing Jack immediate support for care not covered by his insurance provided him the opportunity for greater recovery
  – MedStar leadership on board and supportive
Failure to Rescue Cardiac Patient Resulting in Death

- Relationship with the patient’s wife and daughter difficult from the beginning
  - Angry, distrustful and demanding
- Good news – they brought their claim to us prior to seeking counsel
- Liability clear, damages diminished due to age and medical condition of the patient
- We established a settlement value after conferring with experienced outside mediator
- Family rejected our offer, we stayed firm, family sought to retain counsel
- Family advised by plaintiffs counsel to take our offer because with contingent fee factored in they would go home, under the best circumstances, with less than we had offered
- Family accepted offer and executed release
60 year-old wife and mother left in persistent vegetative state after thyroidectomy resulted in hematoma that closed her airway and caused anoxic devastation

- Liability clear but shared with a private practice separately-insured surgeon who refused to participate

- Hospital’s President, VPMA and Risk Manager met with the husband and two adult sons soon after the event to apologize and to offer support, including financial support, to provide care for the patient

- Husband listened but never responded despite many attempts to engage him in conversation
60 year-old wife and mother left in persistent vegetative state after thyroidectomy resulted in hematoma that closed her airway and caused anoxic devastation (continued)

• Within two weeks I received a call from a well-known plaintiff lawyer who indicated “I understand that you have conceded liability, so all that is left to determine are damages. Why don’t we make it easy and simply tell me how much insurance coverage you have because I don’t want to harm MedStar, but it is going to cost a fortune to take care of her for the rest of her life”.

• We were in Maryland, a jurisdiction with caps on pain and suffering, but, of course, not on economic damages

• We thought we might be in a case that had to go to a jury admitting liability and trying the case on damages, a scary thought in Baltimore City.
60 year-old wife and mother left in persistent vegetative state after thyroidectomy resulted in hematoma that closed her airway and caused anoxic devastation (continued)

- During the pendency of the litigation, the patient experienced respiratory decline and it was unclear whether she could survive her severe respiratory infection.
- I received a phone call from the same plaintiff lawyer asking if I’d be willing to go to mediation if he dropped his demand to something more reasonable.
- Fearing that his case could any day be worth no more than $1 million, he settled in mediation for the same number that I had reserved the case in the very beginning.
Focus On What You Can Control

- Focus on better outcomes
- Commit to quality
- Actively engage in loss prevention
- Engage in early resolution when possible