Apology and Medical Error Full Disclosure Programs: Is Saying “I'm Sorry” the Answer to Reducing Hospital Legal Costs?

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Throughout the nation, the implementation of apology and medical error disclosure policy programs is on the rise in an effort to reduce hospital legal costs. Such programs aim to lower medical malpractice costs by limiting hospital exposure to large monetary verdicts and judgments (and the cost associated with trial litigation) by creating open communication that encourages “admitting medical errors up front, suggesting a reasonable settlement and offering a genuine apology for the error.”¹

Such open communication may represent a fundamentally different approach to medical errors for many health care providers. Historically, if a patient or next of kin suspects that a medical error has occurred and begins to ask questions, a hospital may treat the patient or family member warily, providing only partial or self-serving answers to their questions.² If a medical mistake has occurred, hospitals and medical community members traditionally remain silent. Both the hospital’s risk management lawyers and liability insurer may even require that the hospital cease all further contact with the patient – in some cases even if there has been no medical error or negligence committed on the part of the hospital.³

As a result of a hospital’s behavior, patients and their families may feel abandoned by the very institution they once entrusted with providing them care. The hospital’s silence may only fuel patients’ suspicions that there has been a hospital “cover-up.” Patients’ reactions may then quickly turn to anger. Contacting an attorney may be the only venue through which patients feel they can get the answers to their questions. The hospital’s “bunker mentality”⁴ may thus result in patients and their families suing everyone – including innocent doctors – just to find out basic facts because the patients and their families do not know exactly who is responsible for a mistake. However, if open and sympathetic communication of the questioned incident is instituted by the hospital with the patient, litigation may be entirely avoided, and steps towards reaching reasonable and timely settlement might ensue. According to medical malpractice attorney Robert M. Higgins, of the law firm Lubin & Meyer, “[o]ne of the things we hear from clients a lot is, ‘I might not have come here if they just accepted responsibility or acknowledged the mistake.’ ”⁵

¹ R. Gertner, Legislating and Codifying the Apology Concept, 1 MASS. MED. L. REP. 12 (Winter 2006).
³ Id.
Apology and medical error disclosure policy programs typically provide that the chief of staff, acting on behalf of the hospital, along with appropriate participation from the hospital attorney, nurse reviewer, other involved clinicians and/or other staff members, provide patients with the complete facts of what occurred during the questioned circumstances in a direct and sympathetic manner. Programs also recommend that these hospital “spokespersons” also accept full responsibility and admit if someone made a mistake, explain why the adverse event occurred, and explain what steps are being implemented to avoid future reoccurrences.

Physicians often worry that an apology to an injured patient could be construed as an admission of guilt in a future malpractice action. Insurers and hospital lawyers have long discouraged doctors from apologizing to harmed patients for fear that such apologies might fuel lawsuits. Supporters of hospital-based apology and medical error disclosure policy programs argue that patients and their families are much less likely to pursue litigation if physicians provide an apology and a full explanation to the family.6

In 1987, the Veterans Administration Hospital in Lexington, Kentucky, implemented the nation’s first formal apology and medical error full disclosure program, which called for the hospital and its doctors to work with patients and their families to settle a case.7 Since the program’s inception, the hospital has had dramatically lower legal costs, gone to court only three times, and has an average settlement rate of $16,000 as compared with the nationwide average of $98,000 for similarly situated hospitals (based on February 2005 statistics).8 The U.S. Department of Veteran Affairs expanded the program to all Veterans Administration hospitals nationwide in October 2005.9 The successful results of the Lexington V.A. hospital’s program do not appear to be an isolated occurrence. The University of Michigan has reduced its medical malpractice lawsuits by 50% and has enjoyed an associated drop in legal costs from $3 million to $1 million a year since the University implemented an apology and full disclosure of medical errors program.10

If a tort has occurred, apology and medical error disclosure programs do not allow a hospital to avoid liability. An injured patient will still receive compensation for the injuries, but in the form of a settlement and typically in a lower amount than might have been awarded at trial. Many proponents argue that this approach is a major step in countering excessive malpractice premiums and run-away jury verdicts. The process offers immense psychological benefits to all parties as well. Not only do injured patients have the occasion to be heard and understood, but involved physicians embrace the opportunity to unburden themselves and can learn from their mistakes so that in the future they can become better, more sympathetic physicians. Reflecting the positive promise that these programs offer, more than 20 states since 2003 have enacted some

7 Kraman, supra note 2.
8 Gertner, Legislating and Codifying the Apology Concept, supra note 1.
9 Id.
10 Staff, Doctor’s Apology: Evidence or Not?, supra note 4.
form of legislation that specifically bars a health care provider’s apology – and, in certain states, full admission of fault – from being admissible at trial.\textsuperscript{11}

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\textsuperscript{11} Id.