



AMERICAN OSTEOPATHIC ASSOCIATION

TREATING OUR FAMILY AND YOURS

**I'm Sorry I Didn't Say  
I'm Sorry**





AMERICAN OSTEOPATHIC ASSOCIATION

TREATING OUR FAMILY AND YOURS

# Early Disclosure and Compensation Models

An alternative to traditional tort  
reforms.





# Traditional Tort Reforms

- Limits on non-economic damages
- Joint and Several
- Attorney contingency fees
- Statute of limitation
- Periodic payment of damages
- Patient Compensation or Injury Fund





# New Ideas in Tort Reform

- Alternative Dispute Resolutions (ADR)
  - Arbitration, mediation, pre-litigation panels, settlement conferences
- **Early Disclosure and Compensation**
- Expert Witness Standards
- Peer Review Panels
- Safe Harbors for the Practice of Evidence-Based Medicine
- Health Courts

# Early Disclosure and Compensation

- Following the discovery, the physician (or health care team) informs the patient that a mistake was made or there is an undesired outcome.
  - These policies are commonly referred to as “I’m Sorry” policies
- Such disclosures are not to be viewed as admissions of guilt, rather they are honest disclosures with patients and their caregivers.
- Many states have enacted laws that expressly prohibit such disclosures from being admissible in a civil tort proceeding.



# Consumer Attitudes

- Consumer (patients) have consistently and overwhelmingly stated that they want to be informed of an error if they have been or could be harmed from it.
- A number of studies demonstrate that the importance of the physician-patient communications in sustaining the integrity of that relationship and how communication failures can be a significant stimulus for lawsuits.



# The Hardest Words to Say

- I'm sorry might be the hardest words to say, but they may be the most important words a physician can say to a patient.
- What are the reasons physicians are hesitant to disclose adverse events or errors?
  - Fear of a lawsuit
  - Feelings of inadequacy/incompetence
  - Anxiety about public scrutiny
  - Diminished stature with peers



# Obstacles and Challenges

- Insurance policies and the disqualification of coverage for not complying with “cooperation clauses.”
  - Many physicians are advised, if not ordered, to refrain from making any statements to patients and/or their families.
- Lack of legal certitude with respect to admissibility of such statements.
- Culture of medicine



# Cooperation Clauses

- Customarily, professional liability insurance policies require insureds (physicians) to cooperate with the insurer's efforts to defend the insured against a claim.
  - A key component of the “cooperation clause” is a provision that forbids the insured from “admitting liability to an injured or harmed party.”

# Culture of Medicine Hinders Disclosure

- Physicians and other health care providers immediately begin thinking and implementing the next steps.
  - Rarely is there an opportunity to review or analyze the situation in real time.
- Instead of admitting to themselves and the patient that a mistake was made, literature finds that physicians will rationalize, blame-shift, distort, and omit mentioning any details to a patient, when faced with a harm-causing error.



# Legal Justification for EDC

- In 1898 the United States Supreme Court ruled that:
  - [any insurance policy] *“the tendency of which is to endanger the public interests or injuriously affect the public good, or which is subversive of sound morality, ought never to receive the sanction of a court of justice or be made the foundation of its judgment.”*



# Ethical Justification for EDC

- American Medical Association Code of Ethics
  - *“It is a fundamental ethical requirement that a physician should at all times deal honestly and openly with patients. Patients have a right to know their past and present medical status and to be free of any mistaken beliefs concerning their conditions.”*
  - *“Concern regarding legal liability which might result following truthful disclosure should not affect the physician’s honesty with a patient.”*



# How Does It Work?

- University of Michigan
  - Compensate quickly and fairly
  - Defend medically reasonable care vigorously
  - Reduce patient injuries by gathering and learning from patient(s) experiences
- VA Medical Center– Lexington, KY
  - “Extreme Honesty” policy
  - Patients are informed of a mistake/error
  - Patients are informed of their legal rights



# Current State Tort Reform Laws

- Limits on damages (37)
- Statute of limitation (50)
- Joint and Several (27)
- Attorney contingency fees (28)
- Periodic payments (30)
- Patient compensation or injury funds (13)
- Early disclosure and compensation (36)
- Alternative dispute resolution (27)
- Pre-litigation panels (17)
- Certificate of merit (22)
- Expert witness standards (31)
- Peer review panels (47)

# State Statutes and Legislative Activity

- Michigan
  - State law specifies that a statement, writing, or action expressing sympathy, compassion, commiseration, or a general sense of benevolence relating to the pain, suffering, or death of an individual, that was made to the individual or to his or her family, would be inadmissible as evidence of an admission of liability in a medical malpractice action.
- Oregon
  - State law specifies that a health care institution, health care facility, or other entity that employs a licensee of the Oregon Medical Board is not admitting liability when the institution, facility or other entity expresses regret or apologizes.

# AHRQ Demonstration Projects

- In 2009, the Obama Administration established a demonstration program through the Agency for Healthcare Research and Quality (AHRQ).
  - \$25 million in planning and demonstration grants
  - Awards announced June 11, 2010
  - 3 grants were designated for EDC programs
    - University of Texas will examine a system-wide program



# PPACA Grants


- Patient Protection and Affordable Care Act (PPACA)
  - \$50 million authorized for the medical liability grant program operated by HHS
  - States are required to develop an alternative liability reform system that:
    - Allows for the resolution of disputes over injuries allegedly caused by health care providers or organizations, and
    - Promotes a reduction of health care errors by encouraging the collection and analysis of patient safety data



# Key Findings

- Patients are less likely to pursue legal rights of action if they there is a perception of an open and honest relationship with their physician(s).
- Admitting a mistake is not an admission of guilt – quite the opposite
- EDC may not reduce frequency of lawsuits, but may lessen the severity of payments
  - VA Medical Center in KY found that its claims filed were in the top 25% for VA facilities, but their costs associated with resolving such claims were in the bottom 25% of VA facilities.

# Key Questions for Future Evaluation

- Can EDC programs reduce the frequency of liability claims?
  - Can they coexist with other tort reform provisions?
  - Can they exist outside of integrated health systems?
  - Are they reactionary to broader economical and legal factors?
- 



# Sources

- Agency for Healthcare Research and Quality
- National Conference of State Legislatures
- Department of Health and Human Services
- Health Affairs
- New England Journal of Medicine
- Journal of the American Medical Association
- American Medical Association
- University of Michigan



# Resources

- National Conference of State Legislatures
  - [www.ncsl.org](http://www.ncsl.org)
- Agency for Healthcare Quality and Research
  - [www.ahrq.gov](http://www.ahrq.gov)
- Health Affairs





AMERICAN OSTEOPATHIC ASSOCIATION

TREATING OUR FAMILY AND YOURS

Shawn Martin

Director of Government Relations and Socioeconomic Affairs

American Osteopathic Association

[smartin@osteopathic.org](mailto:smartin@osteopathic.org) | 202.414.0141

**CONTACT INFORMATION**





AMERICAN OSTEOPATHIC ASSOCIATION

TREATING OUR FAMILY AND YOURS

# QUESTIONS

