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A new approach to medical liability and patient safety

by Alan Woodward, M.D. and Kenneth Sands, M.D.

Ask any patient or physician who has been a party to a medical malpractice lawsuit about the experience and you'll likely hear negative responses from both sides: it was a long, drawn-out, emotional and stressful endeavor that disrupted personal and professional lives. The average malpractice lawsuit runs five to seven years – some go as long as ten - entails thousands of pages of depositions and countless hours of testimony. The dollar costs are high, as is the price paid in irreparable harm to physician-patient relationships.

Physician criticisms about the current process have long been loud and clear: it fosters unwarranted lawsuits, undermines patient safety, reduces access to care, creates a culture of silence between physicians and patients, and burdens doctors with high insurance premiums. It also encourages defensive medicine – tests and procedures done solely to protect against potential lawsuits - thereby driving health costs higher. A survey by the state medical society in 2008 found that defensive practices by physicians conservatively cost Massachusetts $1.4 billion annually. National surveys have estimated the costs at several hundred billion dollars.

While doctors say the system is onerous and ill serves patients, physicians and our health care system, attorneys contend that fairness for patients should be paramount, that the rights of those harmed must be preserved in redressing treatment that doesn't meet accepted standards of care. We have no argument there: the rights of patients who have been harmed by unacceptable standards of care should indeed have redress. Most of those familiar with the process, however, agree that the current liability system has many shortcomings.

Consider this, from The Joint Commission, the independent nonprofit that sets standards and accredits U.S. health care organizations, which has recognized the tort system's damaging effect on one of the medical profession's top priorities: patient safety. "There is in fact a fundamental dissonance between the medical liability system and the patient safety movement. The latter depends on the transparency of information on which to base improvement; the former drives such information underground. As a result, neither patients nor health care providers are well served by the current medical liability system."

A different approach offers great potential: Disclosure, Apology, and Offer.

DA&O offers what patients who have experienced harm tell us they want: full disclosure of what happened and why and what will be done to prevent a recurrence; and for those events deemed avoidable, a sincere apology and an appropriate timely offer of compensation. Such a process won't deny patients the right to bring legal action, but would make tort claims a last resort.

This model will now be formally piloted in the Commonwealth.

Led by the Massachusetts Medical Society, a coalition of seven health care organizations has released a Roadmap to Reform, which aims to improve patient safety, increase transparency and trust, reduce litigation, and cut costs to the health care system through the DA&O model. This Roadmap, the result of a 2010 grant to our two organizations from the U.S. Agency for Healthcare Research and Quality, part of the president's Patient Safety and Medical Liability Initiative, synthesizes the opinions of key representatives from eighteen different constituency groups, all with some relationship to the current liability system.

Seven hospitals – three from Beth Israel Deaconess Medical Center, three from Baystate Health in Springfield, and Massachusetts General Hospital - will pilot this model to assess its impact on patient safety, malpractice claims, and overall liability costs. All are working with their liability insurers on this initiative.

DA&O programs have proven successful as an alternative to the current tort system in other regions. We believe that patients and physicians will regard the model as fairer, timelier, and more supportive than the traditional response to adverse medical events. The new model also has the potential to bring faster resolution of cases, to enhance reporting of medical errors, and to reduce the practice of defensive medicine.

The current process is adversarial, stifles the exchange of information, and impedes patient safety efforts. It's time to pursue a better way to serve patients and advance patient safety. We invite all stakeholders – hospitals, attorneys, insurers, physicians, policymakers, and patients -- to join us in improving a system long overdue for reform.

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