October 16, 2014

Council on Ethical and Judicial Affairs
American Medical Association
330 North Wabash Avenue, Ste. 39300
Chicago, IL 60611-5885

Dear Sir/Madam:

I am writing in regard to a situation where I believe formal ethical guidance is needed.

In the wake of a medical error, it is increasingly common for medical malpractice insurance companies to recommend that physicians disclose the error to the patient and apologize. Some insurers even have 24-hour "hot lines," which make trained staff available to guide physicians through this process. The literature that accompanies these programs frequently states that apologizing is "the physician's ethical duty" and "the right thing to do" (1 - 3). Without debating the validity of these assertions, if we assume that they are the true reasons behind the programs, then issuing an apology is probably consistent with the principles of medical ethics.

However, it is unlikely that insurance companies would invest so many resources simply to help physicians fulfill an ethical obligation. It is therefore likely that there is another reason behind these programs, specifically, a belief that they will reduce the risk of the patient filing a lawsuit and thereby save money for the insurers (2, 4). While there is nothing inherently wrong with insurers and physicians creating programs to reduce financial exposure, the activities cross an ethical boundary when they involve physicians persuading injured patients to forego their legal rights.

When a patient is injured by negligent medical care, it is entirely appropriate for physicians to express empathy and compassion, just as they would with any sick or injured patient. These humanistic gestures were a fundamental component of the practice of medicine long before anyone had legal concerns, and they should continue to be freely expressed regardless of the cause of the patient's injury.

Although it has never been definitively established, it is possible that these gestures might comfort the patient in a way that deters him from filing a lawsuit. To the extent that this occurs as a "fringe benefit" of these otherwise essential communications, there is no ethical quandary. However, the analysis changes when the physician's behavior is not motivated by humanistic decency, but rather a self-serving goal of persuading the patient to not sue.

The heavily structured nature of these programs gives serious cause for concern. A true apology comes from the heart and is expressed in the person's own words, but that is not how these programs work. Physicians are instructed to follow a "Disclosure Meeting Protocol" (7), which addresses even the smallest details:

"The meeting should be in a quiet, private and comfortable setting" (7);
"There should be no table or desk between the physician and patient" (7);
"Do not wear bright colors or showy jewelry" (2); and,
"Never yawn or look at your watch" (2).

Sadly, physicians are not even permitted to apologize in their own words. Instead, "The regional patient safety risk manager will coach the physician on disclosure communication (use of empathetic statements, silent listening skills, disclosure, and apology) immediately prior to the disclosure meeting" (7). The orchestrated nature of the event is so important that one insurer emphasized: "We discourage physicians from acting alone without the support of a structured organizational program" (1).

Physicians are thus being asked to give coached apologies in scripted situations. Largely devoid of genuine emotion, the interactions are designed to control the injured patient and convince him to not sue. The methodology is similar to that which was first described by sociologist Erving Goffman after studying the manner in which con men prevent unhappy victims from going to the law, known as "cooling the mark out" (8). The basic steps include allowing the mark to vent his indignation, staying in close contact, consoling him, defining the situation in a way that makes it easier for him to accept, and finally, assigning a new role to the mark so that he feels a sense of accomplishment.

In fairness, it should be stated that these methods are not inherently improper. Provided the physician is acting in the patient's best interest, they can be a valuable way help someone overcome a difficult situation. However, it is concerning when they are used to improve the physician's legal position at the expense of the patient's.

The American Medical Association's Code of Ethics does not specifically address this situation; however, The American Bar Association has addressed a similar issue as it relates to the practice of law. Model Rule 1.8(h) states:

> A lawyer shall not … settle a claim or potential claim for … [legal malpractice] with an unrepresented client … unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel (9).

An attorney is thus prohibited from taking advantage of his superior knowledge and the trust of his client to extract a settlement for an error that he may have made. The question is whether a similar standard should apply to physicians.

It could be argued that a physician's fiduciary duty does not extend to legal matters because patients do not rely on physicians for legal advice. However, physicians have intimate knowledge of the patient's medical and emotional condition, and are skilled at influencing patient behavior. In addition, patients trust physicians with their physical and emotional well-being, and generally believe that physicians will recommend what is best for them (6). This is an extraordinary level of trust that carries with it a broad fiduciary duty recognized by CEJA Opinion 8.03, which states: "Under no circumstances may a physician place their own financial interests above the welfare of their patients."

It could also be argued that many injured patients are fully satisfied after receiving an apology and that the approach is therefore acceptable (10). This position is particularly compelling in situations where the patient is also offered "fair" compensation for his injury. However, the patient's satisfaction must be weighed against the possibility that he may not understand his legal situation and, if he did, he may not consider the offer to be "fair." Because most apology protocols are silent with respect to advising the patient of the desirability of seeking legal counsel and others specifically exclude patients who are represented by counsel (11), these are legitimate concerns.

In recognition of these shortcomings, a few institutions have modified their approach and begun advising patients to obtain legal counsel. To facilitate the process, patients are often referred to attorneys who are known to be familiar with the apology program, often based on prior dealings with the institution. However, this is also ethically problematic.

An attorney's primary obligation is to zealously represent his client (12), but doing so against an entity that is a source of referrals creates a conflict of interest. While most attorneys will resolve this conflict in favor of their client and advocate without regard to a future stream of referrals, others may succumb and be more "reasonable" with the institution. To the extent that this occurs, institutions will be tempted to steer future patients away from the zealous advocates in favor of the more reasonable attorneys and to the detriment of the patient. Apology programs which recommend that patients seek legal counsel should avoid this potential conflict by providing an impartial source of attorney information, such as the contact information for the local Bar Association.

I am not alone in raising these concerns. The issue has received considerable attention in the legal community, where these programs are viewed as taking advantage of injured patients. I enclosed a recent law review article titled, "How Medical Apology Programs Harm Patients." The paper concludes with the following paragraph:

> *[D]oing the "right thing" for patients requires something more than convincing them not to seek compensation through litigation for injuries caused by negligent errors…. [I]n situations where a person is injured and scared, the medical industry should find ways to give them an opportunity to make educated decisions and not take advantage of their weakened state.*

I completely agree with this assessment and hope that you can as well. No physician wants to be sued, but we must not resort to abusing the trust that our profession has earned over the millennia. I therefore ask that you consider issuing ethical guidance on this subject and provide the following language for your consideration:

> *In the wake of a medical error or other event that causes a patient to suffer an adverse outcome:*
>
> *Any apology issued to the patient should be purposed for the patient's best interest, genuine in nature, and devoid of any ulterior motive, such as an attempt to deter the patient from filing a malpractice lawsuit. If, after receiving the apology, the patient decides to not file a lawsuit, then that is a fringe benefit to the physician.*
>
> *Physicians should refrain from participating in scripted apology programs, such as those offered by malpractice insurance companies, as these programs are designed to manipulate injured patients out of their legal rights. In addition, physicians should be cautious about participating in apology coaching and/or training sessions offered by attorneys, risk managers, and medical malpractice insurance companies, as these entities' interests are generally adversarial to those of the injured patient.*
>
> *Physicians must not make any financial offer nor provide any form of compensation to an injured patient unless that person is first advised in writing of the nature of the situation, the desirability of seeking legal counsel, and is given a reasonable opportunity to seek the advice of legal counsel. To protect the patient from any form of psychological manipulation, this provision is valid whether or not the patient is asked to enter into a formal liability release as part of the financial offer.*

To the extent that physicians wish to assist injured patients in securing legal counsel, patients should be referred to an impartial source of attorney information such as the contact information for the local Bar Association. Physicians should refrain from providing a list of "preferred attorneys," as this creates a conflict of interest for those attorneys and potentially compromises the effectiveness of the patient's legal representation.

I appreciate the opportunity to write to you regarding this matter.

Sincerely,

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