



Evolving Legal Requirements for Medical Errors, Apologies, and Disclosures

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Evolving Legal Requirements



“Be not afraid of mistakes and thus make them crimes.”

Confucius

Evolving Legal Requirements



- Ethical responsibility (AMA, ACP)
- JCAHO Disclosure Requirements
- None have the force of law

Evolving Legal Requirements

- Dichotomy between tort system and patient safety movement
 - Patient Safety Movement about system inadequacies
 - Legal System (tort, licensure/regulatory) about fault of the provider

Evolving Legal Requirements

Medical Malpractice Action Elements of Proof

- Applicable standard of care (expert)
- Breach of that standard (expert)
- Injury
- Proximate cause between breach and injury (expert)

Evolving Legal Requirements

Providers advised not to disclose/
apologize based upon fear of having such
statements introduced against them in a
civil, administrative or criminal matter

- “Prior out of court statement”
- “Admission against interest”
- Overcomes “hearsay” exception

Evolving Legal Requirements

- Apology or “Admission” can be used to:
- Establish prima facie case (i.e., duty, breach & causation)
 - No expert testimony needed
 - Case law varies widely – gamble for providers

Evolving Legal Requirements

- States have begun to enact “apology” laws which address disclosure
- 29 states to date (See Appendix)
- Seek to protect providers who acknowledge sympathy to patients for unanticipated outcomes
- Render apologies inadmissible

Evolving Legal Requirements

Two general categories of Apology Laws

1. Protects apologies and acknowledgement of fault

- Colorado law – addresses all civil actions
 - arising out of “unanticipated” outcome(s) of medical care and precludes admission of all statements
- Expressing apology, fault, sympathy
 - Commiseration, compassion or a general sense of benevolence
 - Made by a health care provider (individual or institution)
 - Or employee of health care provider

Evolving Legal Requirements

2. Protect the Apology but not Fault Acknowledgement

- Indiana Law – addresses all civil tort actions and precludes admission of communication of sympathy
 - Includes gesture, act, conduct or a writing expressing
 - Sympathy
 - Apology
 - General sense of benevolence
 - Does not include a statement of fault which is part of that communication

Evolving Legal Requirements

Mandatory Disclosure – 5 States

- Pennsylvania
- Florida
- Vermont
- Nevada
- New Jersey

Evolving Legal Requirements

Example: Pennsylvania

- Medical facility, through appropriate designee, shall provide written notice to patient affected by a serious event
- This notice is discoverable – does not constitute an admission or acknowledgement of liability

Evolving Legal Requirements



Disclosure Not Simple Issue:

- Who must legally disclose?
- Who decides?
- What?
- When?
- How – oral/written?

Evolving Legal Requirements



Failure to Disclose Legal Consequences

- Compliance Issue
- Licensure Sanctions
- Tort Liability

Evolving Legal Requirements

- Know State Law
- Involve Board of Directors, Senior Management, Legal Counsel
- Establish Policies and Procedures
- Revise Compliance Plan
- Revise Medical Bylaws or Policies and Procedures

APPENDIX

List of States with Apology Laws

- Colorado Revised Statute §13-25-135 (2003)
- Oregon Rev. Stat. § 677.082 (2003)
- Massachusetts *ALM GL* ch. 233, §23D (1986)
- Texas Civil Prac. and Rem. Code §18.061 (1999)
- California Evidence Code §1160 (2000)
- Florida Stat §90.4026 (2001)
- Washington Rev Code Wash §5.66.010 (2002)
- Tennessee Evid Rule §409.1 (2003)
- Ohio ORC Ann §2317.43 (2004)
- Georgia Title 24 Code GA Annotated 24-3-37.1 (2005)
- Wyoming Wyo. Stat. §1-1-130
- Oklahoma 63 OKL. St. §1-1708.1H (2004)
- Maryland MD Court & Judicial Proceedings Code Ann. §10-920 (2004)
- Delaware HB 412 (2006)

(Continued)

APPENDIX

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- North Carolina General Stat. §8C-1, Rule 413
- Hawaii HRS §Sec. 626-1 (2006)
- Maine MRSA §2908 (2005)
- South Dakota H.R. 1148 8th Leg., (S.D. 2005)
- West Virginia HB 3174 (2005)
- Arizona A.R.S. §12-2605 (2005)
- Louisiana R.S. §3715.5 (2005)
- Missouri HB 393 (2005)
- New Hampshire RSA §507-E:4 (2005)
- Connecticut Public Act No. 05-275 Sec.9 (2005)
- Virginia Code of Virginia §8.01-52.1 (2005)
- Vermont S 198 Sec. 1. 12 V.S.A. §1912 (2006)
- Montana H.R. 24 59th Leg., (Mont. 2005)
- South Carolina Ch. 1, Title 19 Code of Laws 1976, 19-1-190 (2006)