The timing of early resolution: Working at the patient's pace

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In recent years, risk managers have been charged with educating providers who need to know how to communicate to a patient that an unanticipated or adverse event has occurred. Much has been written about the elements that should be part of a disclosure conversation: who should be involved, what should be said and when it should be said. Patients have acknowledged their desire to have early, and complete, information where possible. However, what is lacking is an understanding of what happens after the initial disclosure conversation, when the time comes to discuss accommodation or compensation with the patient or family. This article will look at the post-disclosure status of the patient or family, the steps of the grieving process, and the mechanisms for both the risk manager and the provider to successfully bring closure to the event.

INTRODUCTION

When an adverse event occurs in a facility, multiple levels of investigation are activated.

In the middle of all of this facility-oriented activity are the patient and the patient's family. While everyone wants information after an unanticipated outcome, care should be paid to the rate at which detail is conveyed to patients and families and the strength of the push toward early resolution.

During early meetings, social services (such as discharge planning, pastoral care, etc.) may be enlisted by the risk manager to address the patient or family's immediate healthcare needs or to begin the process of planning for longer term healthcare services post discharge.

Even while working toward putting their changed life in order, the patient or family may feel discouraged, disoriented or psychologically unable to make basic decisions.

A fact often overlooked by well-intended providers and staff is how the grieving process may interfere with the patient or family's effort to handle the discharge process and approach life after the event.

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Risk management personnel want to do the right thing in initiating early resolution by assuming responsibility for harm caused by the care provided (as well as hoping to possibly mitigate liability exposure). They may want to discuss financial matters with the patient and/or family but feel uncomfortable having these conversations before the patient's discharge. Meetings are scheduled, and discussions anticipated.

Nevertheless, the grieving process may render the patient or family incapable of having a conversation about the event's cause, or of comprehending any accommodations or compensation offered. Placing a dollar value on a death or injury is a difficult burden for many patients and families, especially when asked to do so immediately following a funeral or while adjusting to a life-altering injury.

So, when is a good time to approach a patient or family for a pre-litigation resolution? There is no easy answer, other than to recognize that it can only be determined on a case-by-case basis and when the key parties are ready to do so, which may not occur until they begin to experience the emotional stage of acceptance.

Acknowledging and sensitively assessing the progress of the grieving process is an essential skill for the risk manager.

Appreciating the grieving process

In the authors' personal experiences, interviews with family members of patients who have died as a consequence of a medical error or unanticipated adverse event have provided insight into the difficulty of participating in resolution conversations even while in the grieving process. Feedback from these individuals demonstrates that the coping mechanisms can be as diverse as the actual events. The only similarity in their comments is that there must be respect for their grieving before resolution conversations can be undertaken.

According to Merriam-Webster, "grief is deep and poignant distress as if caused by or caused by bereavement."(1) Grief is an emotional reaction to any significant loss or unwanted and unanticipated lifestyle change. In order to reach acceptance, grieving individuals must go through the various steps of the psychological process.(2)

Stages of Grief

Denial and Isolation
Anger
Bargaining
Depression
Acceptance

While there is a natural progression, people may find their grieving to be in any of these stages at one time or another until they have come to acceptance.

Individuals go through these steps at their own rates; some will take weeks, others months and others may grow to accept over an extended time span. Therefore, one cannot assume when approaching an individual during the grieving process that he or she is in a stage that allows them to be receptive to resolution conversations.

The process of apology and disclosure

Disclosure is a multiple-step process, and should include more than one conversation with the patient or family. Clearly, they must be advised of the unanticipated adverse event and whether there has been a likely error as soon as possible following the event.(3) Multiple conversations may follow as information is learned about the cause, or result, of the event or injury. Likewise, apology is not a single conversation.

According to Aaron Lazare:

"The offended party often needs days, weeks or longer to understand and psychologically assimilate what happened. If the relationship is to continue, both parties may need to meet on several occasions for varying periods of time and in designated places … to discuss and understand the meaning of what happened, the explanation of the offending party, the appropriate reparations and the future of the relationship. In other words, if a meaningful relationship is to have any chance of being restored following a serious personal offense, the apology must be a complex process conducted over time."(4)

The issue here is not whether to disclose and apologize. Instead, it is understanding how soon after the event to disclose what was learned in the investigation and to attempt financial resolution when appropriate. Acknowledging and sensitively assessing the progress of the grieving process is an essential skill for the risk manager who is committed to truly effective disclosure, apology and resolution. Equipped with this appreciation, the risk manager can then coach providers and staff as to the proper timing and mechanisms for the various conversations.

Understanding the grieving process

Patients and families want accurate information once it is known. They need this information in order to process their grief as well as their anger, frustration or disappointment. They may need to share their feelings, and to know that those feelings are validated by the healthcare providers or the risk manager. They want to know that there will be lessons learned from the event and that measures will be put in place to prevent the same occurrence from happening again.(5)

The effective risk manager must remain sensitive to patient and family reactions through multiple communications, and then inform the healthcare providers so that they too can be aware of the grief. By carefully gauging patient and family reactions to the information as it is provided, listening to what they say about how they are coping in the other areas of their life, and by maintaining open and honest contact, the risk manager can be in the best position to determine ways to facilitate the grieving process.

The pursuit of legal activity can be a reflection of emotional frustration, a feeling of helplessness and a search for answers.

While the patient or family may initiate a contact for legal representation, this does not signal the end of the risk manager's efforts to involve the patient directly in resolution. The patient or family must feel that they do not have to make this choice in order to get their questions or concerns addressed.

Often it is not the desire for specific answers but instead the search for assistance in dealing with unknown circumstances: navigating the healthcare system, the insurance/benefit system or even handling funeral arrangements. Care must be taken not to interfere with legal deadlines (for example, a statute of limitations applicable to the patient's or family's claim; however, the risk manager can continue to communicate with the patient or family (or through legal counsel). Often the pursuit of legal activity can be a reflection of emotional frustration, a feeling of helplessness and a search for answers. By continuing to reach out to the patient or family, the risk manager can keep the communication lines open and help to work through their frustrations and needs.

Working within and facilitating the grieving process

Specific steps undertaken by the risk manager can provide assistance to the patient or family while they progress through their grief. These steps include providing support, allowing participation in system changes, offering creative financial resolutions or even facilitating a memorial.

Providing support: Risk managers should make sure that the patient/family has all the resources needed to help them through the emotional process. The sharing of information about support groups, short-term financial assistance, pastoral care and access to the Risk Management staff is an essential first step. Patients should not have to work to get the help they need; the risk managers should be actively monitoring and facilitating access to necessary resources. This effort, along with monitoring the patient/ family's receptivity to financial resolution, should be an ongoing process.

Allowing participation in system changes: Some patients/families may be ready and willing to participate in investigational or educational efforts, in order to share their feelings and suggestions for the benefit of future patients. There is a movement to include patients/families in root cause analysis because of their unique perspective and valuable insights.(6)

Some patients or families may want to review revised policies to see the language outlining future processes; others may wish to be present during an opening session of an educational program where a summary of the adverse event serves as the springboard for the discussion. This sharing validates their emotions and allows them to understand that their feelings are recognized and appreciated by the providers.

State-specific peer review or quality assurance privileges may apply to information exchanged at the meeting, but more importantly, the benefit to the involved parties may offset any concerns about discoverability. If the conversation is open and honest, it is possible that future litigation can be avoided (which may mitigate discoverability concerns). If litigation does occur, there is a certain emotional freedom for a defendant who no longer feels the stress to protect incriminating information, and a perception for the jury that nothing is being hidden. This changes the landscape from arguing about liability to trying to agree on the fairness of compensation.

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Offering creative financial resolutions: Initial financial conversations should focus on financial assistance for the life changes arising from the event. If unanticipated healthcare services will be required, efforts should be made to address these costs through a conversation with the patient or family about immediate needs. If a loss of earning capacity is involved, efforts should focus on addressing the anticipated wage loss. If funeral costs are incurred (and unanticipated), they should be addressed by the risk manager with an offer to reimburse the family.

By focusing on the specific needs of the patient or family, immediate accommodation concerns are addressed and can help facilitate resolution of the grieving process.

Often the risk manager (or the facility's defense counsel) has access to annuities, through a structured settlement provider, which can alleviate some of the fears about financial needs through a protected, non-taxable format (interest earned on the investments remains tax-free to the recipient). In this way, a settlement can be provided to the patient or family in a monthly or periodic payment, rather than in a lump sum. The benefit to the patient is that the interest earned on the future monies is not taxed (as it would be if they were to invest a lump sum and earn interest); the benefit to the facility is the resolution of the underlying matter in a way that meets the patient's needs.

Other times, the patient/family may qualify for a special needs trust, to protect their qualification for local or national funding resources addressing future healthcare needs. Special schooling and future medical costs may require specific funding mechanisms (such as a trust) to prevent the patient's disqualification from social or health resources.

Identifying these resources for the patient or family can allow them to focus on the psychological impact of the lifestyle changes, rather than fearing (and focusing on) the financial implications of future care needs.

Facilitating a memorial: A remembrance such as a memorial or scholarship allows the family to keep the spirit of their loved one alive and to feel that the injury or death of their loved one did not go unrecognized. Listing the patient's name on a memorial plaque, establishing an educational fund in the patient's name or making a donation to the family's chosen charity in the patient's name are all ideas that have been utilized in lieu of a direct indemnity payment.

Consideration of the risks

In each instance, the risk of approaching the subject of the early offer and having it used against the healthcare providers in resultant litigation is one to be considered.

Successful resolution of the case can start with these early conversations, preventing the need for the matter to go through expensive litigation. However, if litigation is pursued, the risk manager should provide any information on resolution offers or efforts to defense counsel, so that it can be determined if this information can be used in pre-litigation negotiations. The least desired outcome might be that pre-payments may be a setoff against a jury award. Clearly, the most desired outcome pre-payments or early accommodations may have is to discourage the patient or family from feeling the need to pursue litigation to trial.

Whatever the mechanism or benefit offered, the risk manager needs to be sensitive to whether the patient is ready to begin thinking about future needs.

CONCLUSION

Appreciating the grief process allows the risk manager to be much more effective in attempting to resolve a potential claim or lawsuit with a patient or family after a significant adverse event. The effective risk manager must be available when needed by the patient or family, even when the timing is inconvenient. For the grieving patient or family, closure can only come through the process of grief and healing, with assistance from individuals who understand the sensitivity of the conversation and fragility of the relationship.

The goal of all conversations between the risk manager and the patient/family should be the development of an open and trusting relationship. The patient/family must feel that they are able to reach out to the facility risk manager when needed. Even when investigations are still outstanding, it is appropriate for the risk manager to say to the patient or family, "I am here for you. Here is my number to call when you have questions or wish to talk." The key to successfully establishing this trust and potential resolution is the skill of the risk manager to recognize and acknowledge the effects of grief and anger on the ability of patients/families to engage in meaningful dialogue.

By working with the patient and family while they transition through the grief process, the risk manager can utilize creative resources to reach a resolution beneficial to all.

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TWO FAMILIES, TWO ADVERSE EVENTS

Based on actual incidents known to the authors.

Scenario 1
An active, independent elderly patient is taken to surgery for a valve replacement. Twenty minutes post anesthesia induction, the patient is noted to be cyanotic and the intubation is found to be in the esophagus. Aware of the error, providers decide to correct the intubation and proceed with the surgery. Five hours later, the family is told that the patient is brain-damaged and not likely to recover. (The patient dies.) The anesthesiologist, already on probation for repeatedly turning off the alarms during surgery, is dismissed from the hospital. The family pursues a claim, demanding to talk with providers present during the surgery to understand what happened.

As a requirement to resolve the claim, the family demands to see revised policies and procedures (requiring audible alarms on all anesthesia equipment). Satisfied that the event could not occur again at this facility, the family agrees to settle the claim for the wrongful death of their parent. Once the matter is resolved, the family donates part of the settlement funds in the patient's name back to the facility for resident education on the dangers of misusing alarms.

Scenario 2
An infant is brought to the emergency room with abdominal distension and a history of vomiting. A diagnosis of intestinal blockage is made, and the patient undergoes a pneumatic reduction of the blockage. The infant arrests during the reduction and a code is called, but unsuccessful.

The parents pursue a claim, demanding to know what happened and what efforts have been undertaken to prevent a reoccurrence of this tragedy. They learn through the facility's investigation that the providers conducting the reduction never performed the procedure before without supervision. The parents want to know that the providers learned from the event and participate in educational efforts by sharing their story.

Notes

- In Scenario 1, the parents later shared that while their claim resulted in a financial settlement, the true closure for their loss was the knowledge that 1) the event could not happen again to another patient (through changed processes) and 2) the providers learned from this specific event.
- The Scenario 1 family wanted to talk about the event and obtain information within months of the family member's death. In Scenario 2, the family needed almost a full year to make contact with the facility risk manager. In both situations, the invitation was given for the family to make contact when they were ready to talk about the event, and they initiated the contact that resulted in the resolution of the cases.