

Forum

The Sorry Works! Coalition: Making the Case for Full Disclosure

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The overheated political debate surrounding the medical malpractice crisis has left many people dissatisfied with the oversimplified political solutions of caps on damage, insurance reform, and stricter discipline of doctors. Since July 2001, the Joint Commission on Accreditation of Healthcare Organizations has required disclosure of adverse outcomes,^{1*} and the experience of the Department of Veterans Affairs (VA) Hospital in Lexington, Kentucky suggests one model of how this can be done.^{2,3†}

This article describes The Sorry Works! Coalition, an organization of doctors, lawyers, insurers, and patient advocates that is dedicated to promoting full disclosure and apologies for medical errors as a “middle-ground solution” to the medical malpractice crisis.

Enter The Sorry Works! Coalition

The Sorry Works! Coalition (<http://www.sorryworks.net>) was officially launched in February 2005 and currently has more than 1,500 members. The coalition is not funded by any medical, insurance, or trial lawyer organizations, and the board members and staff are volunteers.

We at Sorry Works! believe that apologies for medical errors, along with up-front compensation, reduce anger of patients and families, which leads to a reduction in medical malpractice lawsuits and associated defense litigation expenses. We also believe this approach provides swifter justice for more victims; people maintain their

* Standard RI.2.90: “Patients and, when appropriate, their families are informed about the outcomes of care, treatment, and services that have been provided, including unanticipated outcomes.”

† Dr. Steve Kraman is a board member of The Sorry Works! Coalition.

Article-at-a-Glance

Background: The Sorry Works! Coalition, an organization of doctors, lawyers, insurers, and patient advocates, is dedicated to promoting full disclosure and apologies for medical errors as a “middle-ground solution” in the medical liability crisis. If a standard of care was not met (as shown by a root cause analysis) in a bad outcome or adverse event, the providers (and their insurer) should apologize to the patient/family, admit fault, provide an explanation of what happened and how the hospital will ensure that the error is not repeated, and offer compensation. The Sorry Works! protocol is based on the disclosure program developed at the Department of Veterans Affairs Hospital in Lexington, Kentucky.

Goals: The coalition’s goals are to (1) educate all stakeholders in the medical liability debate, (2) serve as an organizing force for the full-disclosure movement, and (3) advocate for legislative incentives, including pilot programs.

Overcoming Cultural and Legal Obstacles: In large part, the coalition’s educational efforts are intended to overcome cultural and legal barriers to full disclosure, which often represent emotional, knee-jerk responses within the medical, insurance, and legal communities. Perhaps the greatest hurdle of all is the culture of the medical profession; considerable changes are needed if doctors are to enjoy the benefits of Sorry Works! and other full-disclosure programs.

Conclusion: Sorry Works! entails changing the culture of medicine, medical risk management, and the associated insurance and legal support structure.

ability to sue but will rarely choose to do so. Finally, we believe that honesty is the key to reducing medical errors, especially repeat medical errors, and we view Sorry Works! as the gateway to the patient safety movement. The Sorry Works! middle ground should meet the most important needs of all stakeholders—fewer lawsuits for doctors, swift justice with no constitutional infringements for patients and lawyers, and fewer medical errors—which benefits everyone.

How exactly does “sorry” *work*? The coalition advocates that after every bad outcome or adverse event, providers (in conjunction with their insurer and risk management team) should perform root cause analyses to determine if the standard of care was met. This process may take weeks to months and may involve the assistance of outside experts.

If a root cause analysis shows that the standard of care was *not* met—through medical error or negligence—the providers (and their insurer) apologize to the patient/family, admit fault, provide an explanation of what happened and how the hospital will fix the procedures so the error is not repeated, and make a fair offer of up-front compensation (as determined by an actuary or *qualified party*). The attorney(s) representing the providers and plaintiffs’ attorney usually negotiate the compensation, and the case is usually closed in a few months.

If, however, the standard of care was met—there was no medical error or negligence—the providers and their legal counsel still meet with the patient/family and their attorney(s) and explain what happened, apologize, and offer empathy but do not admit fault or provide up front compensation. The providers open and explain medical charts, answer all questions, and basically prove their innocence. However, the providers do not settle or offer compensation for a nonmeritorious claim, and the hospital and insurer fight all charges when their doctors committed no error. (Providers are never “sold out” to settle a claim quickly and cheaply.)

The Sorry Works! protocol is based on the disclosure program developed at the VA Hospital in Lexington, Kentucky,^{2,3} which has been replicated in other organizations, such as the University of Michigan (UM) Health System.⁴⁻⁶

The Sorry Works! Coalition believes that full disclosure addresses the root causes of the medical malpractice

crisis better than any other political solution or reform program currently offered. Sorry Works! (1) restores the doctor–patient relationship and improves communication and trust between all parties, and it (2) repairs the reputation of doctors and hospitals by turning them into “straight shooters” who can be believed when they say a death or injury wasn’t their fault. Preliminary experience suggests that this “honesty dividend” reduces the filing of nonmeritorious claims, which saves money for doctors and insurers (see page 346).^{2,3}

Many health care professionals are becoming aware of the value of apologies, but many are still reluctant to combine up-front compensation with apologies. The Sorry Works! Coalition emphasizes that up-front compensation is what makes “sorry” work. Indeed, without compensation, patients and families might view an apology as flippant or not meaningful and become even angrier and more likely to pursue litigation.

The goals of The Sorry Works! Coalition are to (1) educate all stakeholders in the medical liability debate, (2) serve as an organizing force for the full-disclosure movement, and (3) advocate for legislative incentives, including pilot programs.

Goal 1. Educational Efforts

Many people are surprised when they hear that legislation and lobbying are not The Sorry Works! Coalition’s number-one priority. After all, the medical malpractice crisis can only be solved in Congress or state legislatures, right? Wrong.

Stakeholders do not have to wait for Congress or the courts to act, as is the case with capping noneconomic damages, creating health courts, or insurance reform. The Sorry Works! pilot programs and other legislative initiatives provide extra incentives and exposure for the full-disclosure movement, but they are not necessary for providers to implement such programs on their own initiative. Health care providers can do Sorry Works! right now—they need only to hear the economical and ethical arguments and learn how the program works.

The coalition’s educational efforts are represented in the Sorry Works! Web site, which provides resources, recent media coverage, and a bibliography section. For example, visitors can link to a video on effective apologies, download a presentation on the Lexington VA’s

successful full-disclosure program, and find contact information for other full-disclosure programs. In 2005, the Web site received more than 350,000 hits. The coalition also distributes free biweekly e-newsletters to all members.

Perhaps the largest part of the coalition's educational effort is telling the many success stories through popular and industry media sources. Indeed, the more people who hear about the success stories, the more who are going to say, "Why aren't we doing this?" At the Lexington VA, during a seven-year period, the hospital sank to the lowest quartile of a comparative group of similar hospitals for settlement and litigation costs. The Lexington VA's average payout was \$16,000 per settlement, versus the national VA average of \$98,000 per settlement, and only two lawsuits went to trial during a 10-year period.^{2,3}

The UM chief risk officer, Richard Boothman, reported recently that UM has "excited actuaries"⁴ because its full-disclosure program has halved the number of pending lawsuits and reduced litigation costs per case from \$65,000 to \$35,000, resulting in annual savings of approximately \$2 million in defense litigation bills.⁵ Boothman reports that doctors, patients, and lawyers are happier with this system. Furthermore, because honesty and openness pervades all of the system's dealings, it is better able to improve systems and processes to reduce medical errors—especially repeat medical errors.

Boothman has recently summarized the UM disclosure program in the following three points^{6(p. 7)}:

1. We will seek to compensate quickly and fairly when our unreasonable medical care causes patient injuries.
2. We will defend our staff and institution vigorously when our care was reasonable or when we did not cause a patient injury.
3. We will seek to learn from our mistakes and our patients' experiences.

Successes with disclosure programs have also been reported, for example, by Jeff Driver, chief risk officer at Stanford University Medical Center (and former president of the American Society for Healthcare Risk Management),⁷ and one of the authors [C.H.], who developed the Medical Ombudsman/Mediator Program (MEDIC+OM). First implemented in 2001 at the National Naval Center in Bethesda, Maryland, the ombuds/mediator program is now used in dozens of Kaiser Permanente hospitals. In thousands of

cases, skilled and highly trained ombuds have been resolving disputes, restoring trust, and preserving resources—as well as avoiding litigation. Patients and families have been receiving the answers they seek, physicians have been disclosing honestly, and hospitals have been making necessary quality improvements to increase patient safety. Simply put, the program is designed to reduce litigation, save money, and, most importantly, "do the right thing."

The medical centers' experience with MEDIC+OM reflects an important transition for full-disclosure programs from government hospitals to private facilities with captive insurers. For too long, the main criticism of full disclosure was that it can work only at VA or government hospitals. It is logical that full-disclosure programs would have started in government hospitals because doctors are on the hospital payroll and covered by government insurance. In a streamlined system such as the VA, it is necessary to get buy-in from only one group of administrators and lawyers versus multiple insurance companies. However, the private Kaiser Permanente hospitals, which also employ and cover their doctors, are now conducting a successful full-disclosure program. As more and more doctors become hospital employees rather than independent hospital contractors, Sorry Works! and other full-disclosure programs will become progressively easier to implement.

Recently, Catholic Healthcare West persuaded several insurance companies covering their independent contractor doctors to participate in successful full-disclosure programs.⁸ The COPIC Insurance company of Denver has successfully tested a full-disclosure program for cases of less than \$30,000 in value and is now studying how to implement such a program for all cases. The COPIC has reduced the number of lawsuits by half and reduced settlement expenses by 25%.⁹ Another full-disclosure (Sorry Works!-type) program, at the Children's Hospitals and Clinics of Minnesota, has also reduced the number of lawsuits by half¹⁰—in a setting with high liability exposure (because of its young patients) and in a state without tort reform (for example, that does not cap claims).

Although The Sorry Works! Coalition advocates implementation of full-disclosure programs at the hospital and insurance company levels, individual practitioners can also apply the disclosure principles. For example, as reported in *The Wall Street Journal*,¹¹ Sorry

Works! board member Dr. Rick Van Pelt apologized to a patient, against the advice of hospital attorneys. In a meeting in a coffee shop, he apologized for the mistake that almost cost her life and led to months of pain and suffering. The woman forgave Van Pelt and decided not to sue, and she and Van Pelt are now friends and work together on patient safety initiatives.

We like to educate people that disclosure is simple common sense. Reducing anger among patients and families and avoiding the appearance of cover-ups decreases the number of lawsuits, defense litigation expenses, and health care providers' settlement costs. When the emotions of patients and families are acknowledged and constructively addressed, money becomes a secondary issue.

Plaintiffs' lawyers often say that the fastest way to defuse a lawsuit is to be honest and forthright and to fix peoples' problems. The old axiom of "deny and defend" is a tried-and-failed risk management strategy because it increases patients' and families' anger and tendency to file lawsuits. It sends a message of "Come and get us." Deny and defend also gives the perception of a cover-up, even when the standard of care was met, as reflected in the number of nonmeritorious lawsuits that are filed every year. David Patton, a medical malpractice plaintiffs' attorney and another Sorry Works! board member, has stated, "We never sue the nice, contrite doctors. Their patients never call our offices. But the doctors who are poor communicators and abandon their patients get sued all the time. Their patients come to our offices looking for answers."¹²

Overcoming Cultural and Legal Obstacles

A large part of the Sorry Works! Coalition's educational efforts are intended to overcome cultural and legal barriers to full disclosure, which often represent emotional, knee-jerk responses within the medical, insurance, and legal communities. Lucian Leape has stated:

For decades, lawyers and risk managers have claimed [that admitting] responsibility and apologizing will increase the likelihood of the patient filing a malpractice suit and be used against the doctor in court if they do sue. However, this assertion, which on the surface seems reasonable, has no basis in fact. There is to my knowledge not a shred of evidence to support it. It is a myth.^{13(p. 17)}

We now address some of the most common challenges we receive to full disclosure.

Challenge: *Sorry Works! will only lead to more lawsuits against doctors and hospitals*

Response: The current system of deny and defend makes doctors vulnerable to litigation. Doctors and hospital administrators are left to wonder if an unanticipated outcome will be followed by a process server bringing bad news. That's no way to live. If a mistake occurs, doctors have to ask themselves one question: "Would it be better to handle this situation on my terms or have it fought out by high-priced attorneys in front of a jury of strangers?" Sorry Works! provides the protocol to constructively and positively handle errors and bad outcomes.

Challenge: *What if sorry doesn't work and a doctor has just admitted guilt?*

Response: A doctor apologizes for an error and offers compensation, but the compensation is rejected, and a lawsuit is initiated. So, the doctor will go to court, looking like the person who tried to do the right thing by apologizing and making a fair offer but was rebuffed. The doctor will be the sympathetic defendant and better insulated from attacks by the trial lawyer. The jury will become angry, but not at the doctor. Many states have or are planning to implement so-called apology laws, whereby an apology from a doctor is not admissible in court. The Sorry Works! Coalition supports such laws and legislation.

Challenge: *Lawyers simply file too many lawsuits in my hometown for Sorry Works! to be successful here.*

Response: If a region or county is considered to be friendly to plaintiffs' attorneys, all the more reason for providers to implement Sorry Works! Doctors, hospital administrators, and insurers should do everything possible to make sure that patients and families don't leave their offices angry in litigious regions. Sorry Works! provides the protocol and methods to alleviate anger and significantly diminish the chances of lawsuits being filed, especially in the most litigious areas. An overly aggressive trial attorney is powerless without an angry, yet sympathetic, plaintiff.

Challenge: *Not all bad medical outcomes are the result of errors. Sometimes people just die or are injured, despite the medical staff's best efforts. We can't be handing out checks every time someone dies or doesn't heal completely.*

Response: People die from medical errors, but not all deaths are caused by medical errors. Many times the standard of care is met, but people still die or do not completely heal. Doctors and hospitals certainly should not be expected to “hand out checks” under these circumstances. However, they still need to communicate with patients and families. A lack of communication and perception of a cover-up produces lawsuits even when the standard of care is met.

Sorry Works! stresses communication with patients and families, including circumstances in which an error did not occur. Medical records and charts should be quickly provided to patients, families, and their attorneys. Medical staff and administrators should make themselves available to answer questions, provide insight, and empathize with the patient and family, but a settlement is not required.

If the patient or family attempts to file a lawsuit, the hospital must be clear that it will defend itself vigorously and not settle. This is where Sorry Works! pays dividends. Hospitals that practice Sorry Works! develop a reputation for honesty with local plaintiffs’ attorneys. If the hospital plans to contest a case (no apology or settlement), local attorneys learn that such cases are probably without merit and not worth pursuing. Richard Boothman has explained this honesty dividend as follows:

I believe the word is out that if they [the plaintiff’s bar] have a legitimate case, they share all the details with us, including their experts’ reports and interviews with the family. I also believe that if they have a marginal or questionable case, they do not bother any more because they know we will fight those aggressively with the best of lawyers and best of experts.^{6(p. 7)}

Challenge: *Dr. Kraman developed Sorry Works! in a VA hospital. It will never work in a private or not-for-profit hospital.*

Response: As discussed earlier, Kaiser Hospitals and Catholic Healthcare West show this to be untrue. Furthermore, as more and more hospitals become captive insurers, Sorry Works! will become easier to implement.

Challenge: *Sorry Works! increases settlements, which means more doctors are reported to the disciplinary board.*

Response: Not necessarily. According to the National Practitioner Data Bank, “A payment made as

a result of a suit or claim solely against an entity (for example, a hospital, clinic, or group practice) that does not identify an individual practitioner is not reportable.”^{14(p. E-8)} In addition, “Medical malpractice payments are limited to exchanges of money and must be the result of a written complaint or claim demanding monetary payment for damages.” This suggests that if disclosure is rigorous, forthright, and speedy, then a written claim/complaint may be avoided and, thus, physicians’ names not reported.

Avoiding the database is an important topic for many health care providers; however, there is considerable disagreement among patient safety advocates on this subject, including many members of The Sorry Works! Coalition. Health care leaders and regulators should craft a solution to encourage nonpunitive reporting that keeps track of the worst offenders so that “sorry” doesn’t become an easy out for bad doctors.

The Greatest Challenge of All

Perhaps the greatest hurdle of all is the culture of the medical profession: Considerable changes are needed if doctors are to enjoy the benefits of Sorry Works! and full-disclosure programs:

The occurrence of a serious, harm-causing medical error often triggers an intense feeling of shock combined immediately with anxious feelings of concern. The first object of concern is usually for the welfare of the harmed party, while the second is for the welfare of the erring professional. . . . Many health professionals will seek tension-relieving strategies . . . [whose objective] will be to avoid precisely what moral reflection and action require, namely, confronting the reality of the error and its consequences in a patient-centered way.^{15(p. 88)}

The professional who succumbs to the temptation of excusing or rationalizing away his or her moral responsibility to disclose an error and apologize for it, however, runs the immense risk of seeming distant, aloof, or deceptive to the harmed parties as he or she tries to “explain” what happened, as stated below:

[I]f the health professional attempts to offer his or her rationalized version of what occurred to the harmed party, that communication might well strike the listener

as dismissive and even deceptive, because the listener will want truthful information delivered in a way that acknowledges his or her own pain and sense of outrage.

A professional's rationalizing or minimizing response will accomplish just the opposite.^{15(p. 88)}

Indeed, the greatest hurdle to Sorry Works! will not be the "outside world" of patients, lawyers, and courts but the "inside culture" of hospitals and the medical community. Cultural change will take years, if not decades, to implement. An aggressive education campaign will need to take place not only in medicine, business, and law schools but also in health care organizations, law firms, and insurance companies. However, the economic benefits of full disclosure will, hopefully, cause health care, legal, and insurance leaders to push the needed cultural reforms within the medical community.

Goal 2. Organizational Efforts of The Sorry Works! Coalition

Many organized constituencies, from the tort reform movement, to the plaintiffs' bar and consumer advocates, to patient safety groups, are engaged in the medical malpractice crisis. There are many good people across the United States who are either practicing full disclosure or want to implement such programs; however, the full-disclosure movement is not yet fully organized. The number-two priority of The Sorry Works! Coalition is to serve as an organizing force and connectivity point for the movement. Its volunteer staff and board are helping to organize and build the necessary framework. The coalition is planning a nationwide Sorry Works! conference and is seeking additional leaders to help it further organize and increase the scope of the movement.

Goal 3. Legislative Initiatives/Pilot Programs

The Sorry Works! Coalition has recently gained attention because of the introduction and passage of a Sorry Works! pilot program in Illinois.¹⁶ This pilot program allows hospitals to have a risk-free try at Sorry Works!—with the state paying for any excessive liability costs (settlements, litigation expenses) over the hospital's normal liability costs.

Other states have followed the lead of Illinois and are considering similar legislation. Tennessee is considering Sorry Works! pilot program legislation (SB 3325), while Vermont legislators are reviewing legislation (SB 198) that will provide grants to health care institutions to assist with implementation of Sorry Works!-type programs. Also, legislators in South Carolina, Utah, Hawaii, and Massachusetts are pushing apology-immunity laws.

At the federal level, in 2005 Senators Enzi (Rep.-WY) and Baucus (Dem.-MT) introduced S. 1337 to provide federal funding for disclosure pilot programs, and Senators Clinton (Dem.-NY) and Obama (Dem.-IL) introduced S. 1784, which would also provide federal grants for disclosure programs and immunity for disclosure of events.

Although The Sorry Works! Coalition welcomes and supports legislative efforts to encourage the development of disclosure programs, it is always careful to stress to health care providers that legislative actions or mandates are not necessary preconditions for implementation of full-disclosure programs.

Conclusion

Sorry Works! entails changing the culture of medicine, medical risk management, and the associated insurance and legal support structure, which requires leaders and decision makers to implement a multi-pronged educational effort in their respective fields. Practicing health care professionals and students must be taught that Sorry Works!-type disclosure is the new way and that covering up errors and bad outcomes is no longer acceptable. This culture shift will not happen overnight, but the anticipated economic and ethical benefits make the long journey worthwhile. **J**

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