

On the Same Page

Improving Patient Care and Reducing Medical Liability Litigation Using Pre-Suit Mediation

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Medical liability litigation is among the most complex policy issues facing the U.S. healthcare system. Many of the well recognized inequities of the current litigation-driven system derive, in my opinion, from a conflict between the requirement of tort law to establish fault on an all-or-nothing basis and the highly variable and probabilistic nature of biology, disease, and medical judgment.

The UF&Shands Pre-Suit Mediation and Patient Safety Program (PSMP), which was implemented on both the Gainesville and Jacksonville UF&Shands campuses on January 1, 2008, presents an alternative to the current litigation system and shows great promise as a patient safety and medical liability innovation.

Under the leadership of Randall C. Jenkins, J.D., Senior Associate Director, Business and Patient Safety Operations at the UF Health Science Center and Adjunct Associate Professor of Health Services Research, Management and Policy in PHHP, this program has made extraordinary progress, to be summarized below. Based on the results of the PSMP to date, and the potential benefits of extending this success throughout Florida, Randy and Paul Duncan, Ph.D., Professor and Chair of the Department of Health Services Research, Management and Policy in the College of Public Health and Health Professions, applied for grant support and have received a highly favorable score from the Agency for Healthcare Research and Quality (AHRQ) for a 12-month planning grant to expand the program to other sites, and conduct careful, thorough research on its impact. The funding decision will be made at a Fall, 2011 AHRQ Council meeting. Through its first three years of operation, the PSMP has successfully improved patient safety and has been well received by physicians, other professionals, patients and their families, and participating hospitals. It allows the involved parties to address concerns that, if left unanswered, might lead to a lawsuit. Additionally, mediation communications occur in a timely manner; therefore, if "quality of care" issues are revealed, corrective action occurs far sooner than it would after the conclusion of prolonged litigation. The PSMP effectively addresses both large and small malpractice claims by providing a trained, neutral, medical malpractice mediator to facilitate candid, confidential communication between the patient and the healthcare provider during pre-suit mediation.

The current litigation system: impact on medical liability costs and on patient safety and satisfaction

The costs of physicians' malpractice insurance and the cost of litigation associated with medical practice have contributed materially to the overall increase in health care costs. The average payment for a malpractice claim rose from about \$95,000 in 1986 to \$336,437 in 2010. Each year, about 15 malpractice claims are filed for every 100 physicians. Further, legal defense costs have grown by about 8% annually over the past several decades. Ultimately, of course it is patients and their employers who pay these costs in the form of higher prices for health care and health insurance. Ironically, patients often retain less than half of the payout, even if their claim is successful. A recent study from the University of Michigan found that 54 cents of every dollar spent on compensation went for expenses related to attorney fees, and the costs of experts and the court's administrative process. (*J Health & Life Sciences Law* 2009;2:128-32)

Further, in part because the stakes can be very high, litigation takes an enormous amount of time, resulting in long delays before a patient receives proper compensation for a demonstrated error. In Florida, Missouri, and Texas, medical malpractice claims were filed with insurance companies an average of 15 to 18 months after an injury. After claims were received, it took an average of 26 to 29 additional months to close the claim. And therefore, few if any steps can promptly be taken to mitigate whatever circumstances caused the injury.

Is pre-suit mediation part of the solution?

Early pre-suit mediation represents an alternative approach that might be more effective than litigation in resolving the claims associated with perceived medical errors. In litigation, the facts of the case are analyzed by a jury, which hands down a decision that is binding on both parties. Mediation, on the other hand, is a method of nonbinding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution. While litigation can take years, the time required for pre-trial mediation

can be measured in weeks. Under mediation, the patient receives a much larger percentage of the compensation, instead of less than half of the payment under litigation. While litigation is designed for large claims (as most attorneys receive payment on a contingency fee arrangement), mediation can handle both large and small claims. Finally, if the mediation is unsuccessful or the claimant is not pleased with the outcome, the claimant maintains the right to proceed with filing a traditional lawsuit.

Building on mediation as a potential alternative to immediate litigation, the primary objectives of the UF&Shands Pre-Suit Mediation and Patient Safety Program have been:

- (1) a timely and fair evaluation of the quality of care provided;
- (2) confidential communication between the patient and healthcare provider that can lead to an early apology and appropriate resolution, while reducing the frequency of frivolous lawsuits.
- (3) mediation by a Florida Supreme Court certified neutral third-party mediator, facilitating a candid discussion with the patient regarding the claim's potential strengths and weaknesses;
- (4) reduction of medical liability costs for providers;
- (5) appropriate payments for meritorious claims, with a higher percentage of payments going directly to patients; and, perhaps most important,
- (6) prompt assessment of any apparent issue in patient safety and provider liability, producing a two-page overview of the allegations, facts, and outcome that identifies quality improvement opportunities.

Key elements of the UF&Shands Pre-Suit Mediation and Patient Safety Program

The above objectives have been accomplished by implementing the following two key elements of the PSMP:

Confidential Pre-Suit Mediation Forum for Early Apologies: According to an oft-cited study in *Lancet* (Charles V. et al, 1994;343:1609-13), 37% of respondents said that an explanation and an apology would have made the difference in their decision to litigate. A variety of factors have led to the reluctance of physicians and hospital administrators to speak openly with patients about medical mistakes or even complications that occurred in the absence of negligence. These fears include a natural aversion to confrontation, concerns that a full and candid disclosure might invite a claim that otherwise would not be asserted, and anxiety that the discussion will compromise future courtroom defenses. The PSMP utilizes the recent expansion of the mediation confidentiality requirements in Florida Statutes, Chapter 44, to provide absolute confidentiality to mediations that occur before a lawsuit is filed to create an atmosphere of candid, open discussion by all parties during pre-suit mediation. The success of pre-suit mediation requires a confidential forum for such discussion. This allows the parties to share information, build trust, and decide whether to resolve the dispute without fear of negative repercussions arising from sincere statements shared during mediation. The confidential environment of mandatory, pre-suit mediation fosters an atmosphere promoting early apologies by the healthcare provider to the patient. In addition to creating a nurturing environment for early apologies by the healthcare provider, the presence of a Florida Supreme Court certified neutral third-party mediator encourages patients to tell their version of the events and allows health care providers to hear directly from the aggrieved party about improving patient care.

Closed Claim Patient Safety Modules: The PSMP combines mandatory pre-suit mediation with the creation of Closed Claim Patient Safety Modules, which are two-page documents created when a claim is mediated without becoming a lawsuit. Together, pre-suit mediation and safety modules promote and improve patient safety, provide healthcare providers with quality improvement opportunities, and identify areas of liability exposure that can be avoided by improvements to patient care. Each Safety Module contains a brief overview of the facts of the claim, the patient's allegations, the outcome of the mediation, key lessons for healthcare providers, and quality improvement opportunities. All individual identifiable information is removed. The module is labeled under categories such as "miscommunication" or "misdiagnosis," and becomes part of educational materials designed to improve patient safety and satisfaction. In a medical malpractice claim, the opinions and outlook of the aggrieved patients are critical perspectives for correcting system failures for future patients, which the legal system often overlooks. Thus, the PSMP not only expands existing root cause analysis by using the information collected from the patient during pre-suit mediation, but also through the production of the Closed Claim Patient Safety Modules, provides a mechanism for healthcare professionals who were not a part of the claim to learn and benefit from the patient care issues identified. Because of expedited mediation, this process can take place years earlier than it would in the traditional litigation process. Health care providers and organizations would not be comfortable sharing closed claim learning modules if a lawsuit were still

pending for fear that the documents would be used against them in court. By resolving the claim years earlier through the PSMP, the closed claim learning modules are embraced by health care professionals and institutions.

Results to date

Three years of data are available on the PSMP. Some of the major findings can be summarized as follows:

Timely Resolution for Meritorious Claims: In addition to the early creation of closed claim educational modules to improve patient safety at the conclusion of a pre-suit mediation, PSMP claims resolved 5.44 times faster than the average amount of time for a claim to resolve that utilizes traditional litigation, thereby allowing patients to receive compensation much sooner. From 2000 to 2007, the traditional litigation process averaged between 2 and 3 years to resolve a patient's claim. Since the PSMP began in 2008, however, a patient's mediated claim averaged approximately 6 months to reach resolution.

Traditional litigation focuses on limiting financial liability using a "deny and defend" approach instead of focusing on identifying risks and hazards that lead to litigation. Closed Claim Patient Safety Modules promote and encourage early reporting, investigation, and resolution of matters without the expense and uncertainty of the legal system. Early reporting and resolution allow patient safety improvements to be identified and implemented much earlier than when traditional litigation is pursued. The earlier the patient's grievance is resolved, and the earlier the patient receives satisfaction, the less time spent litigating the case. Therefore, more money goes to the patient and less is spent on attorneys, evidence, and experts.

Reduction of medical liability costs for patients and providers: The PSMP reduces legal costs by shortening the time for resolution of a patient's claim, and also allows much of the 54% of payouts that are (on average) subtracted from a patient's recovery in litigation to now be distributed to the patient through early mediation. Unlike litigation, which punishes an undesirable event with a monetary sanction as a deterrent to future malpractice (a flawed approach at best), the PSMP recognizes that error prevention occurs by timely learning from experiences, continually improving internal deficiencies, and quickly compensating deserving patients. During the years 2000-2007, prior to the PSMP, our average legal expenses paid per claim were about \$60,000. This was reduced to an average of about \$7,000 per claim since the start of PSMP. Moreover, the data indicate that, on average, patients receive more compensation per claim, net of their legal expenses, than if they used the traditional legal system. This was due to the fact that a large portion of the legal fees and costs incurred by the patient under traditional litigation were avoided. An additional benefit of the PSMP to patients is that it encourages patients/plaintiffs to bring smaller dollar-value claims than would be economically sensible under the traditional legal system, where the costs of litigation would leave little or no net recovery.

Benefits of communication/early apology between providers and patients while reducing the frequency of unmeritorious claims: Under the PSMP, every claim begins with the mediator explaining the confidentiality provisions governing the process. The accumulated data indicate that patients have viewed the opening session as a time when the healthcare provider or their representative not only listens to their problems, but also understands how their experience could happen to other patients. The ability of patients to speak and be heard has been a critical component of the PSMP process, as the patient becomes an active participant in the decision-making process, quality improvement opportunities, and claim resolution. Similarly, the ability of the health care providers to hear directly from the patient about how their own system failed is a key component to understanding how to improve the system for future patients.

The healthcare provider then has a chance to offer an explanation or expression of sympathy - an apology - in response to the patient's opening statement. The apology takes different forms based on the facts and circumstances of each claim. For PSMP claims where the healthcare provider's review finds that the standard of care was met but that the patient did not receive adequate communication, the apology can focus on the communication problems and promises to improve the system for future patients. If the review finds that the care provided deviated from the standard of care, the apology can also include an explanation of the provider's role in the outcome and subsequent performance improvements. The early apology is a crucial component of each PSMP claim because the mere fact the claim was brought indicates the patient's expectations were not met at some level. Moreover, the candid confidential communication prompted by PSMP has been shown to

have the added benefit of deterring the pursuit of frivolous claims. Several patients participating in pre-suit mediation have not pursued a lawsuit despite the absence of compensation.

Production of Closed Claim Patient Safety Modules: The most influential benefit of candid pre-suit mediations is the ability to communicate “lessons learned” to other providers who were not involved in the claim at issue, resulting in patient safety improvement. The Closed Claim Patient Safety Module, described above, was found to be an extremely helpful learning tool for both the meritorious and non-meritorious claims asserted by patients. Even claims that met the legal standard of care from the perspective of independent expert reviewers still provided, in many specific cases, opportunities to improve patient care.

Grant funding to extend PSMP to Tallahassee and Tampa

If the AHRQ planning grant is funded, it would extend the Gainesville and Jacksonville programs for the UF&Shands PSMP to Tallahassee and Tampa. Florida State University and Tallahassee Memorial Hospital will comprise the Tallahassee site, and the University of South Florida, Tampa General Hospital and the BayCare Health System will comprise the Tampa location. The collaborating demonstration sites will assess whether the principal components of PSMP can be successfully established in diverse healthcare settings, and document any barriers to such implementation along with their potential resolutions. Furthermore, the planning grant will generate the “pre-program” data that will be necessary for the anticipated pre-post comparisons of patient safety and liability outcomes during the anticipated implementation phase.

In summary, the UF&Shands PSMP has clearly become an innovative alternative to litigation for malpractice claims. Experience during the first three years of operation supports its success as an alternative method of dispute resolution due to open and honest communication, full and frank disclosure, and early apologies. Patients have resolved their claims under PSMP more than 5 times as fast and have received equal or more compensation. Legal expenses have been decreased for providers and patients alike. We look forward to the results of the AHRQ- planning project application to extend this program into Tallahassee and Tampa, and will not be surprised if the UF&Shands PSMP becomes a national model for malpractice claim resolution.

Forward Together,

David S. Guzick, MD, PhD

Note: To learn more, please consult the following article, from which I liberally excerpted material for this newsletter:
Jenkins RC, Warren LA, Gravenstein N. Mandatory pre-suit mediation: local malpractice reform benefiting patients and healthcare providers. *Am Soc Healthcare Risk Management* 2010;30:27-35.