WiscRisk
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WISCONSIN APOLOGY LAW SIGNED
What Physicians Need to Know

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Overview

On April 8, 2014, **2013 Wisconsin Act 242** was enacted (Section 991.11, Wisconsin Statutes) after being signed in to law by Governor Scott Walker. In brief, the Republican-introduced legislation provides that a statement or conduct of a health care provider that expresses apology, benevolence, compassion, condolence, fault, liability, remorse, responsibility, or sympathy to a patient or patient's relative or representative is *not admissible into evidence or subject to discovery in any civil action, administrative hearing, disciplinary proceeding, mediation, or arbitrations* regarding the health care provider as evidence of liability or as an admission against interest. The "apology law" is just one of many tort reform measures that the Wisconsin assembly plans to address this year. Although trial attorneys feel that the bill will make it more difficult for patients to bring successful malpractice lawsuits, proponents argue that it will encourage open communication between patients and physicians.

Apology laws are not unique to Wisconsin, or even to the United States, as countries such as Australia, Canada and the United Kingdom all have addressed open disclosure. However, it should be noted that apology laws vary by state, so physicians who practice in more than one location should be aware of the apology laws in the state of practice. The value of honest communication, including apologies, is nothing

new in the healthcare community; in fact, a number of organizations such as The Joint Commission, the American Medical Association, the American College of Physicians, the National Patient Safety Foundation, and the American Society of Healthcare Risk Managers to name a few, all openly endorse or require (TJC) a process to address transparent disclosure of unanticipated adverse outcomes.

Research also indicates that there are psychological, emotional, and financial benefits between the parties to an apology. In one study, it was found that an apology gave the patient a sense of satisfaction and closure, which led to faster settlements and less demand for damages. In addition, the study found that accepting responsibility was more effective than expressing sympathy. When apologies contain admissions of fault, individuals reported that they had a greater respect for their counterparts which also reduced the demand and increased willingness to settle.

The University of Michigan Health System reported faster settlement times and decreased payments by 47% per case with the advent of its apology and disclosure agreement. Cornell University and the University of Houston analyzed health care facilities in those states that adopted apology laws and found that statements of regret facilitated faster settlement times and a decrease in malpractice claims.

Aside from the financial considerations of an apology, this expression carries emotional and psychological benefits for all parties. An apology can undo the negative effects of an action and defuse an individual's anger, even if it cannot undo the harmful action itself. And, because an individual no longer perceives the offender as a personal threat, emotional healing occurs. Apologizing also helps rid an individual of guilt or self-reproach while simultaneously reducing arrogance and promoting self-respect.

Breaking Down 2013 Wisconsin Act 242

The full text of the Act is located at: https://docs.legis.wisconsin.gov/2013/related/acts/242.

In addition to its applicability to health care providers, the Act also includes a definition of locations beyond the hospital or traditional practice setting where the disclosure may take place including: ambulatory surgery centers, an adult family home, and a residential care apartment complex that is certified or registered by the department of health.

Further, the protection of inadmissibility only applies if the statement, gesture, or conduct of the apology:

(1) Was made before the commencement of the civil action, administrative hearing, disciplinary proceeding, medication, or arbitration, and

(2) The statement, gesture, or conduct must express the apology, benevolence, compassion, condolence, fault, liability, remorse, responsibility or sympathy directly to the patient, or his/her relative or representative.

While the statue does not define "representative", we believe the Legislature intended a broad interpretation of "patient representative" to include patients' surrogate decision-makers, legally authorized representative and other representatives.

In other words, an apology made to a patient after a law suit or other legal action is brought is not likely to be protected. Likewise, an admission of fault made only to a Risk Manager or other staff without being made directly to the patient, patient's relative, or representative could potentially be discoverable and admissible. However, while an apology or related gesture must be made prior to legal or administrative actions, this should not result in hasty admissions of guilt.

The responsible physician and members of the health care team should refrain from offering subjective information, conjectures, or beliefs relating to possible causes of an adverse event, even if they believe that the root cause appears to be apparent. Remarks or criticisms made by members of the health care team absent knowledge of all of the facts should be avoided.

Practical Steps in Managing Disclosure

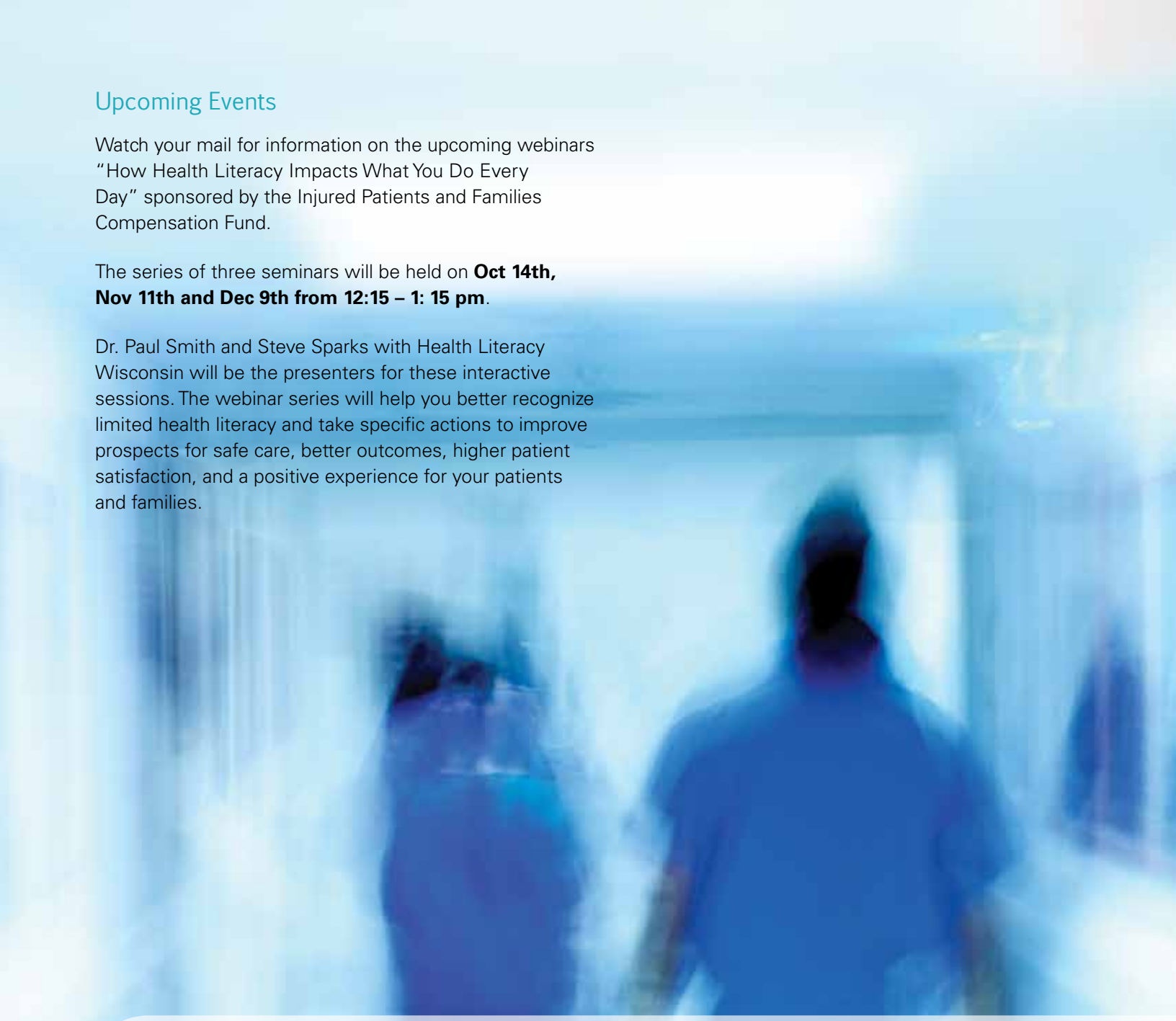
1. Know the disclosure policy and policy for responding to adverse events for the hospitals you practice at and establish a disclosure policy for your practice. Ensure that all providers and staff are knowledgeable regarding the process of disclosure and State law.
2. Manage the patient first. Ensure that the patient receives all necessary treatment, and communicate with all involved providers to revise the plan of care as needed.
3. After the patient is taken care of, plan to provide disclosure at the earliest possible moment.
4. Ensure that the most appropriate personnel are present to support the patient and family. The appropriate administrative (such as nursing, laboratory or radiology) and attending physician (or designated medical leader if this is not possible) should provide an apology gesture directly to the patient, relatives, or representative as soon as possible with empathy. Others such as the Chief Nursing Executive, patient representative, or chaplain may also be present, but avoid having large numbers of staff present during the disclosure as this can be overwhelming to the patient/relatives/representative. Ensure that there are appropriate accommodations made if translator or interpretive services are needed. Make sure tissues and water are available, and that the disclosure is conducted in a safe, comfortable and private area.
5. State what is known, but avoid rash determinations until the root cause analysis is completed and advise the patient/relatives/representatives that an investigation is being undertaken which may take some time.
6. Allow the patient/relatives/representatives to ask questions, but avoid speculative responses and provide empathetic emotional support to the patient/relative/representative during the process.
7. As appropriate, ensure that there is adequate support (chaplains, patient representative, social services, etc.) and provide follow-up counseling as appropriate to the situation (e.g., offer counseling support in the event of an unanticipated death).
8. Ensure that the patient/relatives/representative know who will be contacting them to provide ongoing follow-up and when. Ensure they have the business cards of the person directly responsible for providing follow-up and disposition information.
9. The administrative staff and attending provider making the apology and providing disclosure should document in the medical record that an apology was made, that the currently known facts were reviewed, and that the patient/relative/representative will be kept advised as the investigation proceeds and final outcome of the investigation.
10. Set a reasonable time for next contact. Do not let excessive time lapse prior to contacting the patient/relative/representative in the follow-up period and ensure that all providers and personnel involved communicate with each other to avoid giving mixed messages prior to ongoing contacts.
11. There should be a clear endpoint to disclosure when all facts are known. Those involved in disclosure and follow-up should be able to advise the patient/relative/representatives what was found and what was done to prevent a reoccurrence of a similar type of event. However, ensure that a designated person will be available to them should additional questions arise.
12. Do not hesitate to contact Risk Management if you have questions regarding the disclosure process, and ensure that appropriate executive and clinical leadership are notified and involved as appropriate.

Upcoming Events

Watch your mail for information on the upcoming webinars "How Health Literacy Impacts What You Do Every Day" sponsored by the Injured Patients and Families Compensation Fund.

The series of three seminars will be held on **Oct 14th, Nov 11th and Dec 9th from 12:15 – 1: 15 pm**.

Dr. Paul Smith and Steve Sparks with Health Literacy Wisconsin will be the presenters for these interactive sessions. The webinar series will help you better recognize limited health literacy and take specific actions to improve prospects for safe care, better outcomes, higher patient satisfaction, and a positive experience for your patients and families.



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About WiscRisk

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