A Good Idea For the Private Sector?
Voluntary Disclosure of Medical Mistakes

By: Robert C. Seibel of Seibel & Eckenrode, P.C., Attorneys at Law

There has been a fair amount of publicity recently about a risk management policy adopted by the Department of Veteran Affairs requiring "proactive full disclosure" of medical mistakes and errors. The VA hospital in Lexington, KY adopted a formal policy in 1987, which required its risk management committee to disclose incidents of medical negligence to patients and their families, and then negotiate settlements of those "claims." See, Risk Management: Extreme Honesty May Be the Best Policy, Ann. Internal Medicine, Vol. 131 (12), December 21,1999.

The hospital conceded that it undoubtedly paid settlements in cases that would never have resulted in claims. However, it paid far less to settle claims since adopting this disclosure! settlement policy than it otherwise would have. Moreover, the hospital reasoned that it was more likely to devote resources to defending claims without merit rather than paying a nominal "nuisance" settlement.

The obvious question is whether this experience translates to physicians in private practice and their professional liability carriers. The proponents of proactive disclosure of medical errors as a risk management policy are quick to admit that applying such an approval to the private sector is difficult My opinion is that private sector physicians should discourage a trend toward voluntary disclosure of medical mistakes in the private sector.

One of the reasons that the Lexington, VA hospital adopted its proactive disclosure policy was due to two large awards in malpractice cases against the hospital, both of which were due, in part, to "inadequately prepared defenses." The authors also state that one of the several factors in malpractice payments that are not related to the quality of medical care is the "expertise of the attorneys representing the medical facilities."

This is probably the major reason why there is no compelling reason to apply this VA experience to the private sector. In contrast to the VA'S government lawyers, private liability insurance companies have the ability to select, empower, and compensate competent defense counsel. It is our experience that defense counsel who are willing to try the "gray area" cases - that is, those cases which SL are too close to call, and where liability is possible - will accomplish the same goal sought by the VA proactive disclosure policy of reducing amounts paid in malpractice settlements, perhaps even to a greater extent.

The keys bear repeating. Defense counsel must have a proven courtroom record in the defense of malpractice claims. The professional liability carrier must empower defense

counsel by clearly stating that the mission is to successfully defend the medical care and exhibiting trust in defense counsel's judgment The final component of compensating defense counsel is last, but not least.

It is very important for professional liability insurance companies to resist the temptation to retain lawyers who will work for rock-bottom hourly rates, and to instead provide defense counsel the hourly rates that are commensurate with the services that your premium dollars deserve.

The VA experiment - which has now become national policy within the VA hospital system - was also born with the understanding that the VA provides medical care to veterans at no charge and has the ability to provide additional compensation to veterans as the result of medical negligence under the guise of "additional disability" payments. The ability of private sector physicians to provide similar remedies does not exist As a result, it is difficult to see how - or why - the VA proactive disclosure policy would apply to the private sector. Nevertheless, I suspect that we will see a movement in such a direction under the mantle of "it's the right thing to do." Personally, I am not convinced. I believe that one could legitimately argue that prodding a patient into pursuing a "claim" for medical negligence where the patient or family had no intention to pursue such a claim may not be in the patient's best interests.

Is it a good policy to create an adversarial relationship between the physician and patient? This does not even address the professional implications for the private physician who must contend with an occasionally overaggressive Board of Healing Arts, the National Practitioners DataBank, hospital credentialing, and contracts with health insurance companies. Adopting policies of voluntary disclosure of medical mistakes would also require an overhaul of the various bodies who monitor, regulate, and control the practices of private physicians.

In conclusion, be prepared for a debate in the near future on the merits of adopting practice disclosure of medical mistakes in the private sector, and prepare yourselves to counter the movement.

Congratulations to Attorney Bob Seibel

Congratulations to Bob Seibel of Seibel & Eckenrode, P.C. for one of the top ten defense verdicts in Missouri in 1999, as reported by the Missouri Lawyers Weekly. Bob successfully defended an obstetrician in a brain-damaged baby case involving alleged complications from a vacuum extraction.

Source: The Keane Insurance Group; April 2000