“When Things Go Wrong”—Disclosure at UT System Health Institutions

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UT System Office of General Counsel’s Educational Seminars
Snapshot-Overview

- What is unanticipated outcome disclosure?

- Why does UT System require unanticipated outcome disclosure to patients and families?

- What is the effect of disclosure on health care quality, patient relationships, claims and litigation?

- What are our predictions for the future?
What is unanticipated outcome disclosure?

“Unanticipated outcome” is a result that differs significantly from what was anticipated—not limited to “errors”

“Disclosure” is the initiation of a discussion with the patient or family member about the unanticipated outcome.
UT Disclosure History

- Leadership of Dr. Kenneth Shine
  - 2007 letter to all health institutions requiring adoption of unanticipated outcomes policy— including medical errors
  - Each institution adopted own policy
  - Guidelines and policy components provided
### UT System

#### Elements of Disclosure of Unanticipated Outcomes

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UT System Guideline for Disclosure of Unanticipated Outcomes

**Scope:** This guideline applies to all University of Texas System physicians, nurses, and other healthcare providers involved with patient care.

**Position Statement:** UT System healthcare providers will communicate with patients regarding unanticipated outcomes that result in further treatment, result in harm, or are clearly significant to the patient’s well-being.

**Definitions:**
- **Disclosure:** The initiation of a discussion with a patient regarding an unanticipated outcome.
- **Unanticipated Outcome:** Any event that caused unanticipated harm to the patient, including that which resulted from a medical error, while the patient was receiving care from a UT System healthcare provider.
- **Patient Representative:** A person of the patient’s choice who may be included in the disclosure discussion. A person other than the patient who is making medical decisions for the patient is also a patient representative.

**Who Makes Disclosure:** Responsibility for disclosing an unanticipated outcome typically rests with the clinician who has primary responsibility for the patient’s care. In some situations, disclosure from other healthcare professionals may be deemed more appropriate. At least one other staff person (clinical or administrative) should be present at times of initial disclosure or at subsequent planned discussions. Where appropriate, other healthcare providers and employees who may facilitate communication, such as nurses, patient advocates, social workers or chaplains, may also be involved in conversations and follow up with the patient and/or patient representative.
When is Disclosure Made:
Disclosure should be made as soon as reasonably possible. Consideration should be given to the patient’s ability to participate.

To Whom is Disclosure Made:
Disclosure is made to the patient and/or the patient’s representative.

How is Disclosure Made:
The healthcare professional communicates to the patient what the unanticipated outcome was, what is being done to correct it, and the potential consequences of the outcome. Therapeutic communication techniques should be used throughout the discussion. The healthcare professional will give the patient a name and contact information for a person whom the patient may contact in the future. The patient’s privacy will be protected throughout the discussion.

Who is Informed of Potential Disclosure:
Any healthcare professional who believes that an unanticipated outcome that requires disclosure has occurred should report the event to the Institutional Risk Manager, the Institutional Legal Affairs Office, and the healthcare professional with primary responsibility for diagnosing the patient’s condition and prescribing treatment. If the potential disclosure event is an inpatient event in a non-UT System institution, appropriate affiliated hospital personnel are informed.
How is Disclosure Documented:

Factual documentation in the medical record is the same as for other medical care and includes the communication of a medical error. The healthcare professional making the disclosure also should complete an incident report regarding the disclosure process including who made the disclosure; time, place and date of discussion; names and relationships of those present at the discussion; and the discussion itself.

Purpose of Disclosure:

The purpose of this guideline is to assist and support care givers in their response to and communication with patients about unanticipated outcomes.

Addendum:

This guideline does not replace institutional or affiliated hospital guidelines and procedures regarding documentation and reporting of unanticipated outcomes. Documentation in the patient’s chart is for purposes of providing continuity of care and is limited to a factual description of the disclosure discussion itself.
Disclosure at UT System

– UT System in the business of health care, not the business of litigation.
– Disclosure is part of the business of health care and part of caring for our patients.
• Excellent resource on latest disclosure studies
  – “Prompt error disclosure to patients and families is the standard of care, despite varying implementation. ***
  – Reporting errors to the institution and discussing incidents with peers are also recommended safety practices. ***
  – Female physicians were more likely to favor transparency compared to male physicians, and academic physicians were more likely to favor transparency than those in private practice. Younger physicians were also more likely to support disclosure, suggesting that attitudes towards error reporting may improve over time.”
Effect on Health Care Quality

Studies show that transparency and openness in addressing unanticipated outcomes improve health care quality and reduce adverse outcomes.
Effect on Physicians & Other Health Care Providers

Health professionals described as “second victims” of medical errors.

• Error affects both performances at work and personal lives.
• No difference in emotional response as a function of degree of patient harm.

“Approach” strategy as a coping mechanism: problem focused coping strategy that aims to address mistakes directly.

• Correlates with reduced negative emotions.
• Preferred by practitioners.

“Disclosure” policy supports Approach strategy as coping mechanism.
Effect on Patient Relationships

- “Effective disclosure” improves patient relationships
- “Ineffective disclosure” makes matters worse
Disclosure from the “Trenches”

General considerations

- Timing—generally soon after event but consider immediate needs of patient/family and emotional state of patient/family and providers
- Perform by someone patient knows/trusts
- At least 2 people from institution present but try not to outnumber the patient/family
- Show empathy
- Say “sorry”
- Be honest—do not hide anything
- Interview patient/family during review phase, not just providers
- Review event through interviews, M & M conferences, peer review, RCA, medical records
General considerations part 2

• Use plain language, not medical terminology where avoidable
• Tell only what is known, do not speculate
• Do not use “mush statements”, be specific as to dates, times and follow-up
• Personalize statements—patients are humans, not diseases nor numbers
• Attempt disclosure in person and not over telephone if possible
• Say we are going to “review”, not “investigate”
• Document disclosure—who was present and what was discussed
• Allow patient/family to cry, don’t touch them unless they reach out, be willing to sit in silence with them
• Provide box of tissues
General Considerations part 3

- Are the patient/family willing to participate? Consider timing.
- Most want to be heard and questions answered including what happened and what will/can be done to keep from happening again
- Be aware of any signs of potential violence
- Focus on patient/family’s immediate needs
- Remain in communication with patient/family throughout process and be readily available to answer questions
- Consider options for compensation and future care and discuss with OGC
General considerations part 4—focus on providers and staff

- Consider emotional level of providers
- Avoid mis-speaking due to emotional level following event
- May need to have someone else disclose with the primary provider present
- Must be able to listen non-defensively and without interrupting
- Must be able to appreciate patient perspective and anger
- Pre-disclosure meeting with providers, Risk Management, any others needed to discuss legal and personal concerns
- If Risk Management is not present and the question is raised by the patient/family regarding compensation, the patient should be told that this would be shared with the appropriate person who would in turn, contact them
- Providers should never make offers or promises
- Try to meet at a time when provider is not covering or on-call, and have phones off or on vibrate
Modern Healthcare, Feb 2, 2013 report on “Full Disclosure First” Alternative med-mal approach shows promise”

• Recent data from AHRQ funded study on U of Illinois Medical Center at Chicago “Seven Pillars” program shows
  – Legal costs reduced 70%
  – Settlement time reduced 80%

• Seven Pillars:
  – reporting
  – investigation
  – communication
  – apology with resolution
  – process and performance improvement
  – data tracking and analysis
  – education
Claims/Litigation Issues

- Was disclosure incorrect?
- Patient expectations?
- Patient recording of disclosure meeting
- Reports should not be included as part medical record
- “Party admissions” creating liability
- Hospital partners who do/do not disclose
- Unrepresented parties and irreconcilable conflicts
  - Texas Tort Claims Act limitations
  - Subrogation issues
Predictions and Initiatives

• Patients as Partners

• Improved Disclosure Safe Harbors

• Alternative Methods for Unrepresented Claimants
Patients As Partners

• Recent qualitative study published in peer-reviewed journal, Health Affairs on involving patients in medical error analysis
  – Dr. Eric Thomas, Assoc. Dean for Health Care Quality at UTHealth Medical School and director of UTHealth-Memorial Hermann Center for Healthcare Quality and Safety

• Recommendations:
  – Provide unaffiliated patient advocate
  – Provide alternative methods of patient feedback
  – Encourage open communications without fear of liability

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Improved Disclosure Safe Harbors

• Texas “Communications of sympathy” rule
  – CPRC 18.061 makes *expressions of sympathy* inadmissible to prove liability
  – Other states make *expressions of fault inadmissible*

• If disclosures not admissible
  – Would improve communication
  – Reduce physician fear
  – Patient could still prove liability but not with physician's own words
Alternative Methods for Unrepresented Claimants

- Provide claimants with copies of statutes and cases with disclaimer not providing legal advice or representation
- With HIPPA release and written consent negotiate with more sophisticated family members
- Attorneys willing to undertake limited representation for mediation and subrogation negotiation
- Other options?
RESOURCES

The PROMISES (Proactive Reduction of Outpatient Malpractice: Improving Safety, Efficiency, and Satisfaction) Project was funded by the Agency for Healthcare Research and Quality (AHRQ). “When things go Wrong In the Ambulatory Setting.”
http://www.brighamandwomens.org/phrn/promises/

http://www.nature.com/ajg/journal/v109/n4/full/ajg2013375a.html
http://healthaffairs.org/blog/2014/01/07/the-moral-imperative-to-disclose-medical-error-doing-the-right-thing/


UT System Office of General Counsel’s Educational Seminars
WRAP UP

• More QUESTIONS? (if time!)
• This is one presentation in a series of seminars that OGC will be offering this year.
• For more on “unanticipated outcome disclosure” please contact Allene Evans (512.499.4630 or aevans@utsystem.edu) or Tim Boughal (512.499.4463 or tboughal@utsystem.edu).
• We will be emailing you a written set of all of the questions (and answers) we didn’t get through today.

UT System Office of General Counsel’s Educational Seminars
Thank you for your support

- We hope you will tune in again next month!
- If you would like to set up a training on another legal topic through the UT System Office of General Counsel, please contact Tamra English (tenglish@utsystem.edu) or Jason King (jking@utsystem.edu).