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Health Industry Online

HEALTH INDUSTRY ONLINE • October 26, 2007 • STRASBURGER & PRICE, LLP

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Disclosure of Medical Errors - Past, Present and Future

People make mistakes and machines malfunction. Despite the wonders of modern American medicine, the patient safety initiatives of the 21st century and the best of intentions, those facts will never change. Medical errors should be studied for lessons learned to reduce the likelihood of recurrence. Eliminating them altogether is impossible, and creating the expectation that medical care can be delivered without the risk of error is counterproductive. When medical errors do occur, they must be disclosed.

Disclosure of "unanticipated outcomes", i.e. medical errors, is a relatively new concept in the healthcare industry. But at the heart of it is an old lesson - if you accidentally hurt someone or damage something that doesn't belong to you, admit it and say you're sorry. This is a societal norm most of us learn as children. However, historically the culture within the healthcare industry was regarded as one where mistakes were not openly admitted. This has changed dramatically in recent years; with an ever-increasing expectation of transparency.

There have been a number of high profile catalysts for the change. A 1999 Institute of Medicine study highlighted awareness of medical errors and related issues. Two years later, the JCAHO (now known as the Joint Commission) mandated disclosure of medical errors by accredited hospitals. Since then, a number of other healthcare organizations have issued position statements all to the effect that patients must be told when a mistake has been made in connection with their care. A number of states (not Texas) have laws which require it. There is also increasing evidence that prompt and candid disclosure will diminish the likelihood of litigation and facilitate pre-suit resolution of cases where errors have occurred, sparing patients and healthcare providers the emotional and financial toll of

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protracted litigation. Disclosure also eliminates the basis for allegations of fraud and "cover-ups" which may be argued to toll limitation periods and greatly enhance the jury appeal of otherwise defensible cases. In summary, the current majority view in the industry is that disclosure is ethically and administratively, if not legally, required, and the usual arguments against disclosure do not appear to be persuasive.

In practice it can be a complicated and difficult task for an individual healthcare provider or institution to identify, acknowledge and properly disclose a medical error. There are many instances where it is immediately apparent that an error has occurred, and in those cases disclosure can proceed in a straightforward manner. However, the reality is it is not always known or even suspected a mistake has been made. "Surgical misadventures" can be especially difficult to evaluate. Retained object cases are easy, but what about perforations, delayed diagnosis or "failure to rescue" situations? In cases where the injury is also a recognized complication of the procedure or illness, physicians may be reluctant to characterize it as resulting from a medical error. It is also very difficult and sometimes impossible for a hospital to know such an error has taken place, and misplaced accusations are damaging and counterproductive to the goal of quality healthcare. Most hospitals today have written disclosure policies. Periodic training and other reminders of the disclosure mandates can be helpful in heightening awareness of the issue and encouraging appropriate reporting of an ambiguous situation which may require investigation and disclosure.

Once it is determined an error occurred, the manner in which disclosure takes place is important. Consideration should first be given to who the appropriate persons are to conduct the disclosure conversation. Research we have conducted indicates patients want to hear from their attending physicians, but in cases involving hospital care there should also be a hospital representative present. "Bedside manner" is extremely important. Those chosen should be effective and empathetic communicators. Unless the patient or family has already retained counsel, it is not advisable for the healthcare provider to have an attorney present as it is likely to create the appearance of adversity and an unfair playing field. However, before the disclosure conversation takes place, it is essential to consult with counsel and to contact and follow professional liability carrier-imposed guidelines for reporting potential claims. Every disclosure circumstance is different and deserves careful analysis and a tailored approach to make sure

appropriate disclosure is accomplished. This is especially true given that in most states, including Texas, statements concerning negligence or culpable conduct are admissible to prove liability of the communicator in a civil action, (CPRC 18.061) and could potentially be used in any related Board of Medical Examiner investigation.

That said, some general guidelines for average disclosure conversations include:

1. Take the lead. If you know an error has occurred, do not delay. The conversation becomes much harder with the passage of time.
2. Plan and outline the conversation with the help of counsel.
3. Disclose in person.
4. Give a sincere apology for what the patient is experiencing.
5. Expect emotion with the nature of the error and the injury.
6. Explain known information.
7. If the information is not known, explain that an investigation is underway.
8. If enough is known to do so, explain what measures have been or will be taken to guard against the error occurring again.
9. Avoid finger pointing.
10. DO NOT BILL for ANY care necessitated by or related to the error. Explain to the patient that he or she will not be charged anything for any additional care required as a result of the error. Beginning October 2009, CMS will refuse to pay for certain "hospital acquired" / not "present on admission" conditions. But even if this is not applicable it is the better practice to not bill for care resulting from a medical error.
11. Offer follow up care or meetings as appropriate. If the error resulted in injury, after discussions with your counsel you may wish to consider a monetary settlement offer.
12. Tell the patient/family that he/they are free to obtain legal counsel to advise them as any monetary settlement will require signing a settlement release.

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