

Tort Reform in Utah: Disclosure, Apology and Resolution

Intermountain Healthcare Healthy Dialogues Series

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Who is UHA?

- NFP trade association established in 1920
- Represent 55 acute and specialty hospitals, 13 health systems or management companies

Vision: To be the state's most influential, trusted and respected leader in healthcare policy and advocacy and a valued resource for information and knowledge.

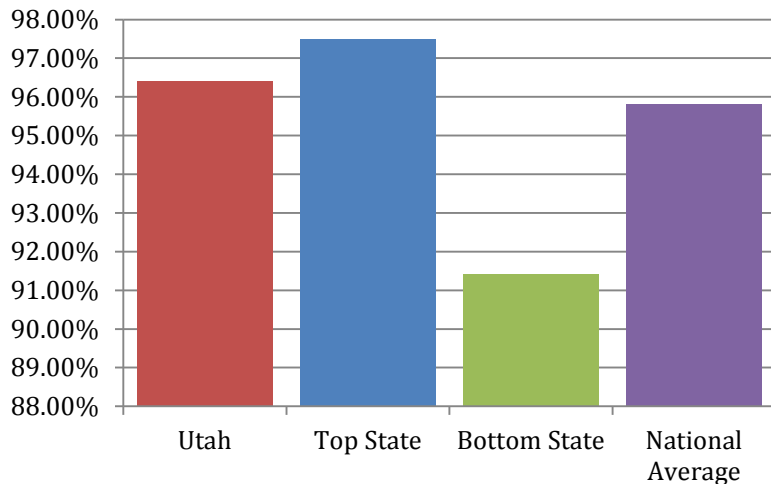
Mission: To enhance the ability of the members to achieve their missions and goals.



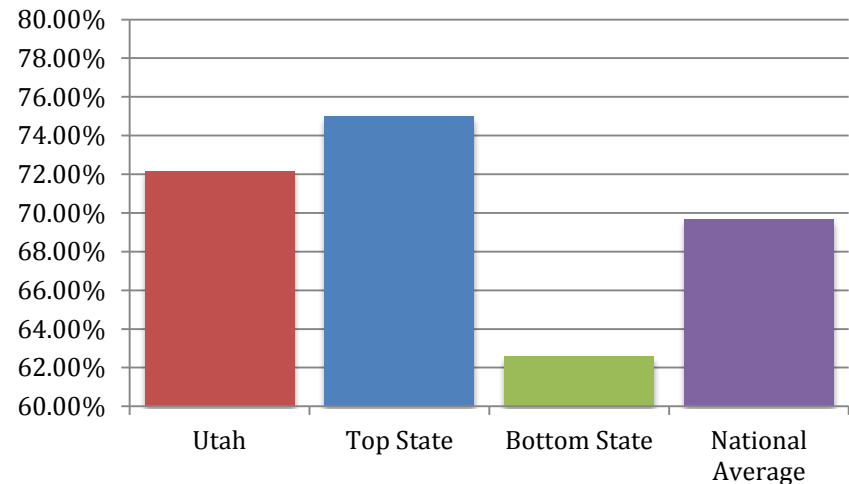
Statewide Cost & Quality

- Utah has the Lowest Cost of Healthcare in the Country
- 5th Best Quality of Care and Improving
- Patient Satisfaction Well Above National Average

Quality



Patient Satisfaction



Utah overall Score 84%
Rank 5 out of 51

Medical Errors: Size of the problem

- 1998 IOM Report: Up to 98,000 deaths occur annually from preventable medical errors in hospitals
- September 2013, *Journal of Patient Safety*, reports up to 440,000 deaths annually

Third leading cause of death in the US

Med Mal: \$ize of the problem

- 2010 study estimates cost of medical malpractice in the US at about \$55.6 billion a year
- \$45.6 billion of this amount is spent on defensive medicine
- Comprises 2.4% of the nation's total healthcare expenditure



Source: *Health Affairs*, September 2010

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Utah State Constitution

Open Courts Provision

- “...[E]very person, for an injury done to him in his person...shall have remedy by due course of law...; and no person shall be barred from prosecuting...before any tribunal in this State...any civil cause to which he is a party.” Utah Constitution Article I, Section 11.

“I’m Sorry” Legislation; Rule 409



Rule 409—Payment of medical and similar expenses; expressions of apology

- Evidence of furnishing, promising to pay, or offering to pay medical, hospital or similar expenses resulting from an injury is not admissible to prove liability for the injury.

“I’m Sorry” Legislation; Rule 409

The following cannot be used as evidence to prove liability for a medical injury:

- Statements, affirmations, gestures, or conduct made to a patient expressing apology, sympathy, commiseration, condolence, compassion, or general sense of benevolence
- A description of the sequence of events relating to the unanticipated outcome of medical care or the significance of events.

“I’m Sorry” Legislation; Rule 409

LEGISLATIVE NOTE:

“The intent...is to encourage expressions of apology, empathy, and condolence and the disclosure of facts and circumstances related to unanticipated outcomes in the provision of health care in an effort to facilitate the timely and satisfactory resolution of patient concerns arising from unanticipated outcomes in the provision of health care.”

See also Section 78B-3-422

“I’m Sorry” Legislation; Rule 409

HB135 (1st Sub.), Rep. Dean Sanpei, sponsor

- No proceeding or evidence before a prelitigation panel is admissible as evidence in a malpractice suit
- Such evidence need not be disclosed to a malpractice insurer or for credentialing at a healthcare facility.
- No claim may be made in a court proceeding in a medical malpractice matter against any person who was not so named in a pre-litigation panel

Utah Tort Reform Work Group Objectives

- Assist patients in receiving the highest quality healthcare
- Patients injured by medical errors have appropriate recourse
- Deal fairly with medical providers
- Remove incentives for costly “defensive” medicine

Questions for Consideration

- How do Utah's laws and procedures compare to other states?
- Are doctors ordering medically unnecessary tests to protect themselves from lawsuits?
- Do these costs drive up the cost of medical insurance to a significant degree?



Questions for Consideration

- Are patients receiving open and honest communication from their doctors about adverse outcomes?
- Are medical errors being shared with patients?
- Are compassion, condolences and/or apologies offered when warranted?
- Do medical providers feel free to discuss with the patient consequential follow-up care?



Current Utah Medical Malpractice Laws and Procedures

- Statute of limitations shortened to 2 years
- Medical malpractice claimants must give advance written notice of a claim
- Before lawsuit can be filed, each claim must be reviewed by a three-person pre-litigation panel
- **Plaintiff must provide an affidavit from an expert stating malpractice has occurred**

Current Utah Medical Malpractice Laws and Procedures

- Statutory ceiling of \$450,000 for pain and suffering
- Clear and convincing evidence standard for specialists in ER
- One-half of punitive damages in excess of \$50,000 relating to personal injury recovery must be paid to the State
- “I’m Sorry” laws

Early Disclosure and Resolution System (EDR)

- Developed by University of Michigan
- Openly discloses event to patient
- Seeks early resolution of patient concerns and interests

Early Disclosure and Resolution System (EDR)

- **NO WAIVER OF LIABILITY**
- Addresses patients needs first; legal issues in background
- “Open book” access to medical records
- Address patient’s immediate financial needs
- Viewed as a quality improvement opportunity

Early Disclosure and Resolution System (EDR) Benefits

- Preserves the doctor-patient relationship
- Reduces need to sue “everybody in sight”
- Simpler for plaintiffs to reach settlements

Early Disclosure and Resolution System (EDR) Results

- Eliminated the “lottery” element in payouts
- More rational payouts treating similar events similarly

Early Disclosure and Resolution System (EDR) Considerations

- Extent of discomfort, suffering and disability
- Seriousness of the medical error
- Need for extended care
- Patient's age, career and earning capacity
- Limitations on returning to full employment

Myth

- “Disclosing unanticipated outcomes to patients, especially those due to error, will cause a malpractice claims Armageddon.”

Reality

- University of Michigan (Early settlement model)
 - Since implementing disclosure-with-offer program
 - Claims half as likely, lawsuits 1/3 as likely
 - Time to resolution cut nearly in half
 - Reduced liability costs
- University of Illinois at Chicago (Seven Pillars)
 - Increase in patient safety event reporting from 1,500 to 7,500 per year
 - 50% reduction in new claims
 - Median time to resolution now 12 months compared with 55 months before program

More Myths: Real and Imagined Barriers to Disclosure

- Imagined
 - Fear of litigation
 - Misunderstanding of patient preferences
 - Does not know/Would not want to know
 - It would harm patient to know
- Real
 - Shame/embarrassment/rationalizations
 - Low confidence in communication skills
 - Mixed messages from institution
 - Fear of reporting, lack of confidence in Just Culture

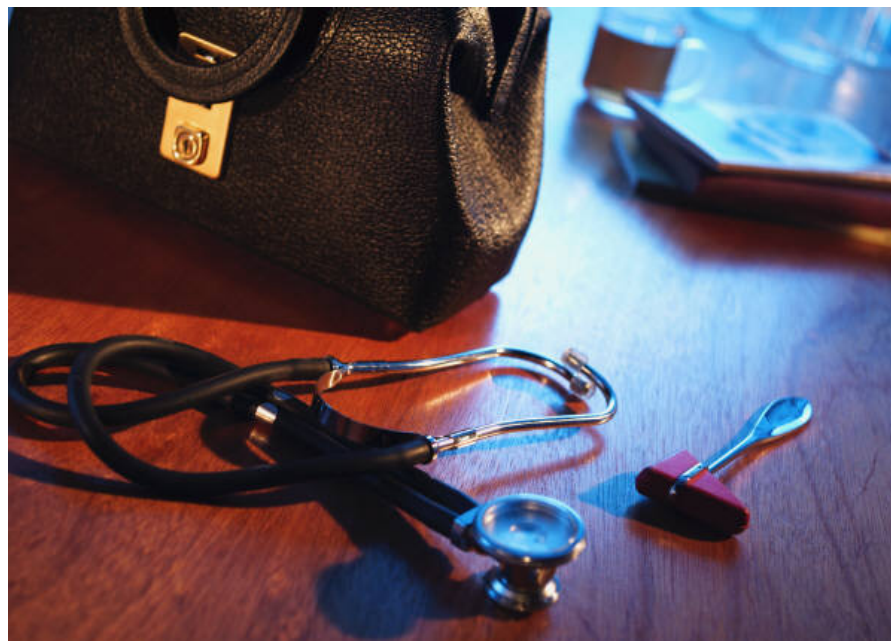
What is accountability after medical injury?

- Healthcare institutions and providers:
 - Recognize that event has occurred
 - Disclose it effectively to the patient
 - Proactively make the patient whole
 - Learn from what happened
 - Discuss the event across colleague groups, institutions
- Need to create a healthcare environment that:
 - Prospectively monitors quality
 - Identifies unsafe practices and employs effective remediation
 - Spreads learning across institutions

Grants with EDR Component

State	PI	Core DRP component	Related activities
<u>Demonstration Projects</u>			
IL	McDonald	“Seven Pillars” approach at 10 Illinois Hospitals	Patient compensation card
NY	Kluger/Conhn	CRP in place at 5 NYC hospitals	Enhance culture, AE reporting Judge-directed negotiation
TX	Thomas	DRP in place at 6 UT health campuses	Patient engagement in event analysis, resolution
Ascension Health	Hendrich	CORE program in place at 6 hospitals	Major focus on OB safety
WA	Gallagher	DRP at 6 institutions, Physicians Insurance A Mutual Company	HealthPact-transforming healthcare communication
<u>Planning Grants</u>			
MA	Sands	Create MA collaborative for DRP implementation	Implementation underway using alternate funding.
UT	Wilkins/Guenther	Create statewide DRP program for the state of Utah	Collaborative with Utah stakeholders underway
WA	Garcia	Accelerated Compensation Events	

Next Steps



Report to Governor

- Utah Health Innovation Plan in the final stages of development
- Five work groups (including Tort Reform) presented the Project goals at September Healthcare Summit
- Recommended interventions being tested
- Financial analysis and evaluation of project being completed
- Final plan will be presented to the Governor at the end of December
- Encourage all hospital systems to embrace EDR

Questions?

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