

Great Expectations Raise Stakes in Elective Surgery

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We've seen the ads for LASIK: An attractive couple frolicking in the tropical surf under the headline, "Live life to the fullest!" or "Throw away your glasses and contacts!" It's an enticing message, guaranteed to spark patient interest and cause problems down the road if the patient is disappointed with the results. I have noticed several recurring themes in many of the ophthalmic malpractice cases I have defended that complicate the defense and increase the likelihood of an indemnity payment of the plaintiff. Defense issues can arise in any ophthalmic malpractice case, but some are unique to elective procedures.

Advertisements that state or suggest that surgery will help patients feel good or better about themselves may be effective marketing, but they expose the surgeon to liability by implying a responsibility to the patient that ophthalmic elective surgery is not designed to fulfill. Advertising that promotes unreasonable expectations only makes the surgeon's job harder and a lawsuit more difficult to defend. Surgery should not be represented as being able to do anything other than alter the patient's appearance or visual acuity. Patient and surgeon need to agree and have a clear understanding in advance of what the change will be. A simple question on the intake form – "what do you hope to achieve with this surgery?" – can root out unreasonable expectations and allow them to be addressed. As long as the surgeon achieves the results that were agreed upon beforehand, the care is defensible, whether the person looks or feels better.

Some courts are scrutinizing whether a patient who wants elective surgery is capable of giving informed consent. In the summer of 2000, a New York judge permitted a lawsuit to go forward in which a patient alleged that her cosmetic surgeon should have known that she had a distorted body image and therefore was incapable of giving informed consent for cosmetic surgery. The lawsuit did not allege that the surgery was done poorly or failed to obtain the desired result, only that it never should have been done because the patient's self-perception was so irrational that any surgery was improper.

The time to get to know a patient is during the preoperative discussion. Besides answering the patient's questions, use this opportunity to ask yourself: Is this person a good candidate for surgery? Does he or she have reasonable expectations? Have there been problems with other physicians in the past? Does this person have a perfectionist personality such that he or she will not be satisfied with any result? It's all right to delegate a portion of the preoperative counseling and screening process to your staff provided you listen to their comments and assessment of the patient. More than once I have heard a physician lament, "My staff told me that patient was going to be nothing but trouble. I should have listened."

Avoid the White Knight Syndrome

In law school we were warned about clients who, having already been to several other attorneys, describe in harsh, unflattering terms the work done by them, and then appeal to your superlative skills to "help them out of the mess created by those incompetent legal hacks." The same warning applies to patients who come to you with tales of woe about the poor skills of other surgeons. Before jumping to conclusions, obtain the patient's medical records and talk to the previous surgeon. You may learn that the "bad result" the patient is complaining about is actually a remarkably good one when placed in context or that the patient has a history of noncompliance with postoperative instructions. Don't fall victim to the "white knight syndrome."

Physicians who make their patients feel special find that referrals follow. Aside from the business success it brings, making patients feel appreciated helps keep them out of their attorney's office if there is a poor result. I frequently hear plaintiffs in their depositions complain that their physician wasn't listening to them or did nothing to address their concerns. Often they are angry because they feel the physician was unwilling to tell them truthfully what happened and why. Patients who are frustrated because they cannot get answers from their physician in the exam room will attempt to get them in the courtroom. Notwithstanding the fact that sometimes a patient's questions cannot be answered with certainty, the physician must always demonstrate concern for the surgical result and endeavor to help the patient understand how it came about.

This same attention to patient needs should be evident during the preoperative phase as well. Instruct your staff to make patients feel welcome and comfortable. Let patients know from the actions of you and your staff that their safety and satisfaction is important to you. Patients considering elective surgery are likely to have some anxieties or reservations and talking with someone about their fears is the best way to allay them. A patient who is tense and anxious going in to surgery who has no outlet for those anxieties will be looking for problems when it is over, even problems not caused by the surgery. I defended a blepharoplasty case a few years ago in which the patient noticed postoperative unilateral inferior visual field loss, probably from unrelated anterior ischemic optic neuropathy (AION) that may have been present before the surgery or could have been coincident with it. We couldn't tell, though, because it was not until after the procedure that the plaintiff began paying close attention to what she could see. Unfortunately, there was no

record of a preoperative visual field examination, something that I highly recommend as part of the work-up for oculoplastic surgery.

Don't Make Promises You Can't Keep

Sometimes a patient will make an appointment for a consultation for a certain procedure but would be better served with something else. The appointment may have been made on the basis of information received from an unreliable or misleading source, such as a competitor's advertising. Explore what the patient really wants from surgery. Does the 50-year old presbyopic myope who comes in for LASIK know about monovision correction? Offer the patient an opportunity to try it out with contact lenses. Make sure they understand that they'll be trading distance correction glasses or contact lenses for reading glasses after LASIK. Many people don't understand that presbyopia is a problem of visual accommodation, not visual acuity. Document your monovision discussion with the patient's decision.

If a patient is having second thoughts about a procedure, don't try to exercise your powers of persuasion. Validate the patient's concerns; don't dismiss them. Encourage the patient to give it more thought and come back at a later time. Patients who feel they were talked into something they didn't want are more likely to blame the surgeon if it doesn't turn out well. On the other hand, patients who are allowed to decide for themselves and encouraged to think it over before proceeding are more inclined to take responsibility for any foreseeable side effects or untoward outcomes.

Neither the physician nor staff should attempt to allay a patient's concerns with promises that there won't be problems following surgery. Stick to the facts. "We've done 8,000 LASIK procedures, and the worst complication we've had is starbursting. We tell you about possible complications to help you understand that this is a surgical procedure, and therefore we cannot guarantee success. But the chances of you suffering one of these complications is very small." Show the cosmetic surgery candidate before and after pictures of other patients – not just the successful ones, but also those that didn't come out so well. The patient should understand that statistically rare complications can occur.

One of my most frustrating cases involved an RK overcorrection that occurred even though the operating surgeon used the correct data from the correct nomogram and performed the procedure flawlessly. The case was defensible; however, we had to settle because when I interviewed the defendant's nurse about the plaintiff's claim that a good result had been guaranteed, she admitted having told the patient, "Don't worry, I promise you won't have any problems with the surgery." Her intentions may have been good, but from a legal standpoint, she created an all but insurmountable obstacle to defending the informed consent claim.

Be There For Your Patients

Occasionally, a lawsuit arises because a patient who should have been talking to the doctor was “screened” by the staff and a subtle, but significant, symptom was overlooked until serious consequences arose. Even if the nurse or receptionist can answer the question, a patient who calls with questions or complaints after surgery should be offered the opportunity to speak with the doctor. If handled tactfully, that patient may decide that it is not necessary to speak with the surgeon after all. For example, “I’d be happy to have Dr. Smith give you a call this afternoon, but just so you’re not worrying, you should know that pain or discomfort is to be expected after LASIK surgery.”

But the decision to speak with the doctor or not should be made by the patient, not the receptionist or nurse. This is especially true for patients who have suffered a poor outcome or complication. Although, not common, I have seen surgeons faced with a bad outcome try to discount the severity, ignore it, or even unfairly blame the patient. In fact, the physician and staff need to spend more time with unhappy patients to validate legitimate concerns and complaints and listen sympathetically to the others.

Some patients may request a refund of the surgery fee if they are unhappy with the results. Such requests should be considered on a case by case basis. Generally, it is better to show sympathy and concern for the patient than to refund fees. On the other hand, some successful surgeons have used a refund policy as part of their overall patient satisfaction guarantee.

There are some patients who will never be happy or whose unrealistic expectations could never be met. The vast majority of patients who have ophthalmic elective surgery are very satisfied with the results. When there is a problem, however, a jury will more closely scrutinize the care of the physician if the surgery was elective, rather than an emergency or life-saving procedure. Following these suggestions will help your attorney defend your case in this event. They may also have the added benefit of making your patients feel more appreciated and understood, which could be good for your business as well.