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May 1, 2004

Protect your practice from litigious patients

By Lisette Hilton

Deer Valley, Utah - Cosmetic surgeons might think that patients would be less likely to sue for elective procedures. But, take it from C. Gregory Tiemeier, an attorney with Denver, Colo.-based Tiemeier & Hensen, who specializes in medical malpractice defense, commercial litigation and risk management, cosmetic surgeons are not immune and might be more at risk for getting sued than they think.

Tiemeier, who specializes in handling refractive surgery cases, said cosmetic surgeons should focus on two areas to avoid lawsuits common among doctors who perform elective surgical and non-surgical procedures: patient selection and informed consent.

Danger signs of troubled patients According to Tiemeier, patients who are depressed or are taking mood-enhancing or anxiety-reducing drugs initiate 70 percent to 80 percent of the LASIK surgery cases he handles. This patient characteristic is most evident, he said, "... in cases where patients get a good result but are suing anyway." Doctors should also proceed with caution in treating patients who might be obsessive-compulsive. They are "likely to be dissatisfied by anything but 'perfect,'" according to Tiemeier.

Patients who are overly impatient or demanding with the staff might be more likely to be litigious Tiemeier added. "One thing I tell doctors is to listen to the staff [because they often know who these people are]."

Tiemeier said that many refractive surgery doctors in the Denver area use patient profile questionnaires to help identify patients who might be more likely to sue, even if the doctors do a good technical job. The questions include: Are you an easygoing person? Do you tend to get upset when things go wrong? Do you adapt to change quickly? Would you be happy with good vision or do you require perfect vision?

Doctors who have contact with patients fitting these profiles do not have to turn them away; rather, the doctors have to proceed with caution, Tiemeier said.

Thoughtful consent form One way is with a well-thought-out informed consent process. Having a solid informed consent is like having a protective moat around your practice. What some doctors do not realize, however, is that informed consent is not a form, per se; rather, it is a process.

A standard informed consent form should addresses the condition and procedure or surgery that the patient might have, traditional risks associated with the procedure or surgery, alternatives to the procedure or surgery; and benefits that the procedure or surgery offers.

In addition to the form, there are the face-to-face meetings with the patient. These consultations are the obligation of the physician; though, they can be delegated to staff if the physician stays involved.

"If the staff is doing [informed consent], the physician needs to be telling the staff what they should be telling the patient," Tiemeier said. "The physician needs to meet regularly with the staff ... to keep the staff up-to-date with what is going on. The surgeon should know what the staff is telling patients."

Tiemeier has had cases in which surgeons have told him that they have extensive informed consents, including patient videos and consultations with staff. But when Tiemeier asks the surgeons, themselves, what is covered in the video or patient meetings, they often do not know. Physicians have to know what is going on, supervising the entire informed consent process, he said.

Inform patients of significant risks Another important aspect of informed consent is that it has to inform patients of the significant risks of the procedure, as well as risks that might be more detrimental to individual patients.

One example is if a cosmetic surgeon talks with a patient who is African American about a procedure that might cause scaring. While scaring might be mentioned on the informed consent form, that surgeon should also talk with the patient about the increased chance of scarring for African American patients.

"If the person has an occupation, or a physical disability or physical requirement or something that makes them unique with respect to possible side effects of a procedure, you should counsel them on it - even if it is in the consent form," Tiemeier said.

The informed consent should include complications and side effects. The physician should document all such conversations. And physicians should not give patients informed consent sheets to sign as patients are being wheeled into the operating room. Patients should have time to digest the information and make informed decisions about proceeding with procedures or surgery. "In the vast majority of refractive cases that I get, surgeons have followed the right procedures and the patient ended up with a side effect that they found to be visually debilitating: glare, decreased night vision are the most common," he said.

Informed consent vs. negligence The burden of proof in these cases involving informed consent differs than that of a negligence case, where the surgeon is accused of doing something wrong. In a negligence case, according to Tiemeier, the patient has to prove that the surgeon had a duty to inform ; there was a breach of the duty; there were damages as a result; and the damages were caused by the physician's negligence. In an informed consent claim, the patient has to show that the physician had the duty to inform the patient, the physician breached that duty, and that the patient suffered from that risk. "The jury has to find that a reasonable person if disclosed of that risk would not have proceeded with the operation," he said.

What to do if trouble lurks Surgeons who suspect that a patient might sue the practice should behave professionally, according to Tiemeier. This is not the time for unwavering confidence in one's skills and the decision not to deal with unhappy patients.

Tiemeier suggests that physicians go out of their ways to help unhappy patients. "Do not send them to collections," he said. "Do not admit liability, but tell them, 'I am sorry about what happened to you and I want to do everything I can to make it better.'"

Document your discussions with them, and tell your staff about the problem so that they also can take extra care of the patient. Be careful who you refer that patient to for a second opinion, and do not - under any circumstances - change the chart. CST