Lowering the Risks of Comanagement

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Comanagement has a number of risks that the prudent surgeon can minimize.

Like other aspects of refractive surgery, comanagement presents certain specific risks. An obvious source of risk derives from the fact that, in comanagement, the surgeon is no longer solely responsible for the patient's care.

Some responsibility for the comanager's performance may be unavoidable. However, the surgeon who is not careful about defining the comanagement relationship can be held unnecessarily liable for care over which he has little, if any, control.

Vicarious Liability

Vicarious liability is the theory under which an individual can be held responsible for another person's error. Most physicians realize, for example, that they are liable for the acts of their partners, agents, and employees. Accordingly, if the surgical technician in charge of keratome assembly makes a serious error that remains undetected and causes harm to a patient, the surgeon who employs the technician is liable for the consequences of that error.

The surgeon who appears to be a partner in the comanager's business may sometimes be held liable for the comanager's acts

In this situation, the surgeon was not personally negligent—the liability arose solely from a business relationship. In cases such as this, though, the relative abilities of the technician and the surgeon to pay a judgment virtually ensure that the surgeon will be the one sued for the employee's error.

The only way to prevent this sort of liability is to prevent problems from occurring in the first place. When critical work is delegated, that work must be inspected. In this example, the surgeon needs to check the keratome carefully before every keratectomy, because the surgeon will be responsible for any malfunction.

"Ostensible Partnership"

Can a surgeon be held liable for the acts of a comanager who isn't a partner, agent, or employee? In many states a surgeon can be held liable under a legal theory called "apparent agency," or the "doctrine of ostensible partnership." A form of vicarious liability, apparent agency can be quite insidious, since under that theory ophthalmologists can be held liable for acts they had nothing whatsoever to do with—acts that, in fact, they knew nothing about.

Under the doctrine of apparent agency, liability arises from the *appearance* of a business relationship. If the surgeon *appears* to be a partner, employer, or principal in the comanager's business, the surgeon can be held liable for the comanager's acts. (Refractive surgeons make attractive targets because they are perceived to have deep pockets.)

The appearance of a business relationship can arise from such things as shared profits, letterhead listing both practices, global invoicing, advertising, or misleading statements. For example, the following events took place recently in a community near me. An optometrist who regularly refers refractive surgery patients to the same ophthalmologist was interviewed by a local newspaper reporter, who failed to check facts carefully. When the story came, out the optometrist was identified as, "Dr. John Doe, an optometrist specializing in LASIK eye surgery...." The article included wording to the effect that "Dr. Doe and his partner, ophthalmologist Richard Roe, have together performed several thousand surgeries."

Reading this article, a member of the public could easily have inferred the existence of a business relationship where none existed. In one lawsuit that I took to trial, a large part of the plaintiff's case for ostensible agency relied primarily on the fact that the two practitioners used the same letterhead.

Billing is another way in which one can create the false impression of partnership. A single bill from the surgeon and comanager is convenient for patients. However, a single invoice for two practitioners' services can bolster a claim of apparent partnership.

It is important, too, that one's comanagers be prudent

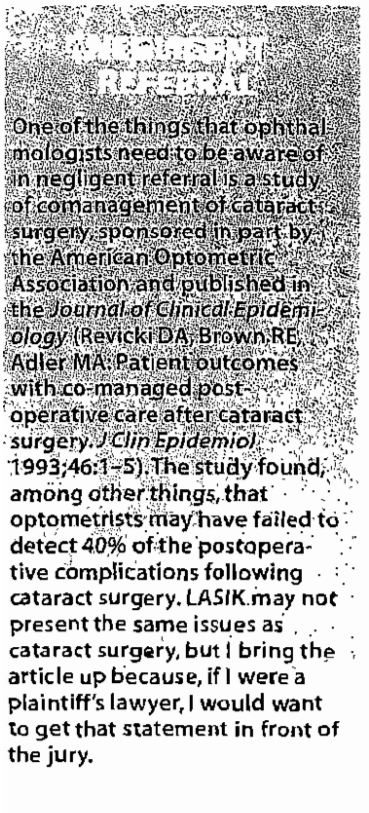
GOOD COMANAGEMENT PRACTICES

- ☑ Select comanagers with care
- ☑ Document comanagers' qualifications
- ☑ Bill separately (preferred) for services, or clearly identify each doctor's charges on a single bill
- ☑ Obtain patients' written consent for comanagement
- ☑ Delegate comanagement as a medical decision not a business arrangement
- ☑ Seek legal counsel before embarking on comanagement
- ☑ Follow the American Academy of Ophthalmology ethical guidelines
- ☑ Compensate comanagers at fair market value for their services
- ☑ Base all decisions on what is best for the patient

in their advertising. As with informed consent, advertising words and images can create impressions that subsequent information can't undo. Comanagers should agree in advance that they will not use the surgeon's name in advertising or promotion without the surgeon's prior approval.

Negligent Referral

A *negligent referral* is made when a physician sends a patient to a practitioner who the referring doctor knew (or should have known through reasonable inquiry) was incompetent. If a doctor to whom an ophthalmologist refers a patient is unqualified to comanage, and if the patient is injured by the comanager's negligence, then the ophthalmologist may be held responsible.



One of the things that ophthalmologists need to be aware of in negligent referral is a study of comanagement of cataract surgery sponsored in part by the American Optometric Association and published in the *Journal of Clinical Epidemiology* (Revicki DA, Brown RE, Adler MA: Patient outcomes with co-managed post-operative care after cataract surgery. *J Clin Epidemiol* 1993;46:1-5). The study found, among other things, that optometrists may have failed to detect 40% of the postoperative complications following cataract surgery. LASIK may not present the same issues as cataract surgery, but I bring the article up because, if I were a plaintiff's lawyer, I would want to get that statement in front of the jury.

As an example, consider a refractive surgeon who is approached by a practitioner who offers to send a patient for laser in situ keratomileusis (*LASIK*). This seems like a fairly typical comanagement situation, so the surgeon does the LASIK and sends the patient back for follow-up. When the suit is served, the surgeon discovers that the other practitioner's license was involuntarily revoked several years earlier. Since the surgeon technically referred the patient back to the unlicensed comanager, there was negligent referral.

In one real case, a primary care physician referred a chronic pain patient to an acupuncturist for treatment. In the course of treatment, the patient and the acupuncturist became romantically involved. The patient subsequently sued the acupuncturist for negligence and for inappropriate behavior in a physician-patient relationship. As it happened, the acupuncturist had no insurance, and the (fully insured) primary care physician became a target for a lawsuit on the basis of an allegedly negligent referral.

Avoiding Negligent Referral

To avoid negligent referral, surgeons who comanage with optometrists need to know something about their comanagers' qualifications and training. It would be helpful, too, to know something about the comanagers' practices.

Many refractive surgeons hold regular training seminars for their comanagers. This accomplishes two things: 1) through interaction (and even written tests), the ophthalmologist can make sure that the comanagers are properly qualified; and 2) the teaching process creates loyalty among the referring network.

AREAS OF POTENTIAL RISK IN COMANAGEMENT

- ☑ Apparent agency (the appearance of partnership where no partnership exists)
- ☑ Negligent referral
- ☑ Appearance of fee-splitting
- ☑ Joint liability for acting in concert

Surgeons can also sponsor training seminars to which any optometrist can come, not just the comanagers with whom they work. This helps in finding new comanagers and in ensuring that they are qualified and capable.

It is also useful to visit the comanagers' offices. If the surgeon doesn't have time, a staff member can be sent. Is the comanager's office professional-looking? Well organized? Are there brochures in the lobby that promise unreasonable things?

When a more thorough check is impossible, a surgeon should, at the very least, get comanagers' curricula vitae (CV). When a comanager has no CV, a call to the state Board of Optometry will ensure that the comanager is licensed in your state. A 10-minute phone call can prevent serious trouble.

A single invoice for two practitioners' services can bolster a claim of apparent partnership

Checking the quality of one's comanagers is more than just a good defensive legal strategy, it's good medical practice. Any surgeon sending patients out for further care wants to know that the practitioner to whom he has referred a patient will provide good care.

Joint Liability

In some states, there is joint liability for *acts in concert*, a doctrine that may apply to comanagement. Acting in concert could take place when two physicians are working on a patient to achieve a common goal. If, in doing that *both* physicians are negligent, each physician can be held liable for the other's acts (in addition to his own acts). Even if one party was grossly negligent and the second party made only a small error, the doctor who made the small error can be held responsible for the much more serious error of the coworker.

The Comanagement Climate

The climate in which a procedure takes place is significant. For example, when I first defended radial keratotomy (RK) claims, the climate was hostile. Most ophthalmologists didn't do RK, and many of them didn't approve of the ophthalmologists who did. There was a startling willingness to testify on behalf of plaintiffs.

One should never send a bill that does not make clear who's services are being billed

The climate for LASIK is much different. While there is a much more positive feeling toward LASIK among ophthalmologists, there is some question about how state courts and medical boards view comanagement. In some states, the comanagement climate will include what the state courts of appeal have ruled with regard to comanagement. Also part of the climate are the Academy's Code of Ethics and Advisory Opinions. Any consideration of comanagement must take all of these factors into account.

Courts and Attorneys General

In the state of Washington, the Attorney General has opined that the "Medical Board is without authority to prohibit the delegation of postoperative care to an optometrist." This is because the state Medical Board cannot prohibit referring to an optometrist care that the optometrist is licensed by the state to give. To do so would be restraint of trade. However, the duties delegated must be within the permissible scope of the optometrist.

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In the state of Florida the appellate courts have also spoken on this issue, albeit with some ambiguity. The case in point went before an administrative law judge and finally up to the state court of appeals, which upheld the administrative law judge's findings.

Once it came out, however, the opinion received different interpretations. One side, primarily optometrists, said the ruling meant that comanaging is acceptable, as long as the ophthalmologist is satisfied with the optometrist's qualifications and the optometrist regularly reports on the patient's progress and refers back to the medical doctor any care outside his scope of practice. Some ophthalmologists said flatly that the opinion barred optometric comanagement, period.

In complex situations like this, the best strategy is to consult a lawyer. One's decisions should be made from the basis of the most recent information and opinion available.

The state of California presents a more confusing picture. In 1994, the attorney general's office said that postoperative care is outside the scope of optometric practice. But in 1995, the state medical board spoke out on the issue of potential violation of the anti-kickback statute when care is managed by an optometrist. Without even addressing the legality of optometrists doing postoperative care, the board went on to say what has to be done to avoid violating the anti-kickback statute.

Can one comanage in California? Again, I don't know. I'd suggest asking a lawyer, because the board and the attorney general's office don't seem to send a consistent message as to whether comanagement is permitted or not.

The easiest way to handle the comanagement payment is to have the surgeon and the comanager bill separately for their services

Staying on the Right Side of Anti-kickback Laws

Every state has its own anti-kickback statute, and each statute is worded slightly differently. In Colorado, there is a prohibition against global billing which specifically disallows a physician billing for another's services under the auspices of billing for his own services.

So I advise my clients who want to send out a single bill to make sure they state very clearly on the bill that X amount of the bill is for the ophthalmologist's services, Y amount is for the optometrist's preoperative services, and Z amount is for postoperative services.

Other states may not allow some practices that are permissible in Colorado. A fair rule of thumb is that one should never send a bill that does not make clear who's services are being billed.

Code of Ethics

State rulings on comanagement are far from consistent. Some states claim not to allow comanagement and others, like Washington, have said they can't prohibit it. The question comes down to the following: What does postoperative care consist of? When does it start? Where does it end? Unfortunately, opinions from attorneys general and state courts don't shed much light on these questions.

You might find some help in the ethics opinions of the American Academy of Ophthalmology. While these are not law, and one can legally choose to ignore them, one takes a risk in doing so. If you end up in a malpractice suit for something that was not in conformance with an Academy ethics opinion, the plaintiff's attorney will use that. It will not sound at all good to the jury when you are on the stand and the plaintiff's attorney asks, "Doctor, isn't it true that you violated the Code of Ethics?"

WHAT CAN CREATE AN APPARENT PARTNERSHIP?

- ☑ Profit sharing
- ☑ Written or verbal references to another practitioner as a partner
- ☑ A shared business name
- ☑ Common letterhead
- ☑ Billing on the same form
- ☑ Seeing each other's patients on a regular basis
- ☑ Joint advertising

The Academy's Code of Ethics can be quite useful. For example, one point within the ethics opinions states that the allocation of fees must reflect the work done by the doctor. This also makes good legal sense. If one pays an optometrist far more than the fair market value of the postoperative care delivered, it quickly starts to look like a kickback.

LASIK Is High Profile

LASIK is the kind of procedure that has public attention and draws attorneys general's interest. Today, when a professional quarterback gets LASIK, it makes both the front page and the sports page. Attorneys general read newspapers. And when the possibility arises, they like to be in the papers too—especially as the champion of patients' rights. As a result, LASIK advertising and potential kickbacks are being closely scrutinized.

Paying a comanager more than the fair market value of the care delivered can look like a kickback

The best way to avoid running afoul of a zealous attorney general is to practice good medicine. One's comanagement model should be constructed not to maximize dollars but to maximize service to the patient. This entails making optimum use of what an optometrist can do and what an ophthalmologist can do.

Pointers for Reducing Risk

Any surgeon must disclose to the patient before surgery whether there will be comanagement. Most patients are happy with this. They are likely to know the optometrist better than the surgeon, and the optometrist is probably more conveniently located.

I recommend obtaining consent in writing with wording to this effect: "I understand that my care will be managed postoperatively by an optometrist. I understand that I can have all my care by the ophthalmic surgeon, if I so desire. Knowing this, I choose to have my care managed by Dr. X [the optometrist]." The patient should sign the document.

The easiest way to handle the comanagement payment is to have the surgeon and the optometrist bill separately for their services. This way, if the patient doesn't show up for postoperative care, the surgeon won't have to explain why she paid the optometrist $500 for one 5-minute postoperative visit.

Finally, *delegate* postoperative care. Don't *abdicate* it. At some point after LASIK, the surgeon must determine that a given patient is no longer at risk and is able to have postoperative care managed by an optometrist. There should be a note to this effect in the chart. The optometrist will follow the patient and report back to the surgeon on the patient's progress. The surgeon should make a medically based *decision* to refer this patient to an optometrist, as opposed to sending the patient as part of a business agreement.

THE BOTTOM LINE

A physician can be held liable for the acts of partners, agents, and employees. However, under the theory of ostensible (or apparent) partnership, a physician can also be held liable for the acts of others with whom there is merely the *appearance* of a business relationship. This can be prevented by avoiding the use of letterhead, billing, advertising and other materials from which a patient might infer the existence of a partnership between surgeon and comanager. In negligent referral, a physician can be held liable for injury caused by an unqualified practitioner to whom the physician referred. Diligent screening of potential comanagers can avoid this risk. State courts and attorneys general have been ambiguous and contradictory in their pronouncements about the legality of comanagement. Legal counsel is often required to interpret state regulations. The Academy's Code of Ethics and related Advisory Opinions can shed useful light on issues related to comanagement.

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