

The Legal Side: Preventing Lawsuits

The first in a two-part series sharing advice from an experienced ophthalmologist.

BY LEE T. NORDAN, MD



A significant number of the requests for advice I receive relate to legal matters and questions about how to conduct a defense for alleged medical negligence. Although I am not a lawyer, I hope to share some useful information based on

my experience as a private practitioner for 25 years who has served as both an expert witness and a contributor to many professional meetings and publications pertaining to informed consent and ophthalmic medical negligence.

RECOGNITION

During the course of their career, most ophthalmologists will be sued for medical negligence. In my experience, lawsuits usually occur for one or more of the following reasons: (1) a catastrophic surgical problem that occurs intraoperatively; (2) a surgeon's failure to diagnose a condition that leads to permanent ocular damage; and (3) unfulfilled expectations on the part of the patient.

Little can be done to prevent unexpected surgical problems beyond employing the best techniques available and using sound judgment. In my experience, ophthalmologists are usually able to defend themselves successfully against this type of lawsuit, because jurors generally understand that all surgeons experience complications despite their best efforts.

In contrast, if a failure to diagnose a preexisting condition before surgery leads to permanent ocular damage (eg, ectasia after LASIK in the presence of undiagnosed corneal pellucid marginal degeneration), defending oneself in a lawsuit can be complicated. Additionally, I have observed that, when surgeons overpromise results (eg, guarantee perfect vision with LASIK), it is easier for the average jurist to perceive a bait and switch.

PREVENTION

Informed Consent

Based on my experience, the most important steps in preventing lawsuits are (1) to establish a mutually

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respectful relationship with patients, (2) to set realistic expectations for procedures and inform patients directly regarding the inherent risks associated with the surgical procedure, and (3) to document those concepts in a manner that clearly demonstrates that patients read and understood them.

All patients should know preoperatively that compromises are sometimes necessary in order to achieve a benefit. I strongly recommend viewing informed consent as a process, not a document. The actions and attitudes of surgeons and their staff are far more important than the document or the DVD that a patient may read or watch.

In the past, I stopped using informed consent videos, because either they seemed promotional or I felt they did not adequately describe the true incidence and severity of complications. Currently available videos are superior to what I had, especially if patients can respond to answers in longhand. Whatever the format of informed consent, however, checked boxes are of little value, because they do not prove that the patient read and understood all of the material.

My experience-based advice for preventing lawsuits is as follows. First, surgeons should personally administer some of the informed consent (at minimum, its critical elements) in order to build a rapport with patients. Second, the staff should not rush patients as they complete their forms or diminish the importance of the process in any way. The staff should make a note of all questions posed by patients and document the responses. Evidence of this educational interaction is valuable.

Most important in my eyes is having patients write out a statement or statements directly within the informed consent. One example is, "I understand that the risks and benefits of surgery may include, but are not limited to, permanently blurry vision, halos, glare, infection, cataract formation, retinal detachment, and the loss of the eye. All my questions concerning this surgery have been answered to my satisfaction, and I agree to have this surgery performed on my eye." It will be much more difficult for a plaintiff to convince a jury that he did not understand the risks of the surgery before agreeing to undergo the procedure if the defense attorney can present this document to the plaintiff while he is on the witness stand and can conduct a thorough cross-examination of the witness who wrote this statement in his own handwriting.

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I have found that almost all patients will write this statement and sign the informed consent without hesitation. An individual's unwillingness to do so may indicate that he is not a good candidate for the planned procedure; he has not accepted the inherent risk/benefit ratio of surgery. It is useful to review this statement with patients who experience a surgical complication and then claim they were never informed of the complication, a common occurrence. When confronting such patients with their statement, surgeons should also explain that they will work with patients to solve the problem as best they can. Surgeons should contemporaneously document any and all conversations with patients when such discussions take place, or they may find themselves in court facing a patient who not only claims he was never made aware of the risks of the complication at issue, but will also claim that he does not recall ever having a conversation with the surgeon in which the complication was discussed.

Payment

Some ophthalmologists will refund unhappy patients a percentage of the procedural fee in the event of a complication. Often, these surgeons realize that their record-keeping or decisions were poor and that their case is thus hard to defend. A payment to a patient that improves the doctor/patient relationship may help to avoid bad

publicity, a tarnished image, and a major commitment of time to a case that may drag on for 3 to 5 years. Any surgeon who decides to refund money to an unhappy patient should do so with the assistance of legal counsel, because the surgeon's actions can often be construed as an admission of negligence and may have an impact on his case if he is subsequently sued. The ophthalmologist will want his attorney to draft a valid release and settlement agreement and ensure that they are signed by the patient under circumstances in which the documents will be enforceable.

CONCLUSION

The suggestions I have provided may help to avoid lawsuits, but they certainly are not 100% effective. Readers whose patients encounter a surgical complication should consult a legal professional as soon as possible who can provide them with legal counsel on how to manage the situation most effectively. Particularly in the early stages, effective management is often the key to avoiding a lawsuit completely or at least to positioning the surgeon so that he may defend himself more effectively in the event that the complication results in a lawsuit against him.

Next month's column will share my recommendations for surgeons when they are sued for the first time. ■

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