Informed Consent: The Verdict Is In

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While the anesthesiology community continues to debate the importance and manner in which informed consent is documented, from a liability standpoint, the verdict is in: Anesthesiologists should implement an anesthesia-specific written informed consent.

From the vantage point of handling almost 3,000 litigation files during the last 20 years, our perspective as a malpractice insurance carrier is more than theoretical. Firsthand litigation experience underscores the need for a more considered approach to anesthesia informed consent. Continuing to debate the merits of adopting an anesthesia-specific consent form promotes the status quo and contributes to the specialty's lack of progress in implementing this important risk-management strategy.

At the outset, it is worth noting that no amount of documentation will provide an absolute shield to litigation. Effectively engaging patients in their own health care through the informed consent process, however, may be one of the most practical steps in reducing the likelihood of litigation.[1] In addition, to the extent litigation occurs, implementation of an appropriate informed consent will substantially reduce the effectiveness of one tactical weapon in plaintiff attorneys' litigation arsenal.

The importance of informed consent in litigation is typically understated by the available statistical data. According to the ASA's Closed Claims Study, allegations of improper informed consent created a liability issue in a mere 1 percent of cases reviewed.[2] Our own litigation statistics demonstrate that informed consent was the central theory of recovery in only eight of 2,422 closed files.[3] These statistics fail to reflect, however, the importance that informed consent plays as a litigation strategy or as a factor in the evaluation and resolution of anesthesia malpractice litigation. In a significant number of cases, the adequacy of informed consent is included as an additional allegation, identified as a concern by defense counsel or criticized by an expert witness, and thereby influences the evaluation, defense and resolution of anesthesia malpractice litigation.[4]

Rather than focus on the rarity of true informed consent litigation, we should acknowledge that informed consent is an issue routinely included in anesthesia malpractice litigation.

Plaintiff attorneys handling medical malpractice litigation are highly organized and coordinated. As a group, plaintiff attorneys share information and collectively develop litigation strategies. The routine inclusion of informed consent allegations should, at the very least, suggest a perceived weakness in the practice of anesthesia that plaintiff attorneys believe can be exploited in the litigation environment. Lack of informed consent, while not the primary theory of recovery, is nonetheless an important strategic allegation.

Plaintiff attorneys utilize informed consent issues as a tactic to undermine a jury's confidence in the quality of the anesthesia care provided, eroding the jury's confidence in the skill, training, and professionalism of the anesthesia providers. Typically, plaintiff attorneys will use a poorly documented informed consent to suggest the anesthesiologist was less than thoughtful in the development of the anesthesia plan, failed to appreciate significant risks or was paternalistic and unwilling to engage the patient in a meaningful discussion regarding the selection of an appropriate anesthetic. The plaintiff attorney also may use an absence of detail to challenge the anesthesiologist's professionalism and compassion by suggesting that the anesthesiologist was more concerned with making money or in keeping to the surgery schedule. Plaintiff attorneys routinely use these lines of questioning to appeal to an individual juror's own dissatisfaction with the health care system, exploiting the perception that physicians are overscheduled and disengaged from their patients.

Shifting the jury's focus to informed consent is an all-too common and successful method of influencing the jury's perception on the more complex and challenging medical issues presented by the litigation. To the extent that the plaintiff's attorney is able to shift the focus, the attorney defending the anesthesiologist will then be required to use valuable trial time to rehabilitate the anesthesiologist with respect to informed consent. A thoughtful, well-documented informed consent removes this tactic from the plaintiff's arsenal and allows the defense to focus its effort on defending the key medical issues.

With this litigation strategy in mind, let us review the alternative approaches that anesthesiologists typically utilize to document informed consent:

Notes

While still utilized by a number of anesthesia practices, reliance on handwritten notes to document informed consent lacks sufficient detail to assist in the defense of most malpractice litigation. The absence of detail requires both parties to the litigation to rely on distant recollections of the informed consent discussion. Statutes of limitation in most jurisdictions allow litigation to be filed up to two years after treatment, even longer in certain situations. Credibility can be severely strained when an anesthesiologist testifies to having a detailed recollection of the informed consent discussion. The alternative is to rely on the anesthesiologist's usual custom and practice to convey what is typically discussed in terms of the risk. Neither approach is very persuasive, and the jury is more likely to consider an alternative version of events offered by the injured patient.

Hospital or Surgical Consent

Other anesthesia practices continue to rely on hospital or surgical consent forms. In our review, such forms are generally so generic that they provide little legal protection. In managing the length of such documents, facilities typically edit any detailed discussion of anesthesia risks. In crafting a comprehensive informed consent, one can anticipate that the hospital's first order of business is to adequately address its own liability concerns. Anesthesia issues are frequently reduced to a couple of sentences that provide no more protection than a cursory handwritten note.

Anesthesia Consent Form

An anesthesia-specific consent form provides the best methodology for documenting the informed consent discussion. Format and content may vary depending on the anesthesia practice, but in general, our litigation experience suggests a one-page5 document that identifies all the significant risks of anesthesia and provides some specific information regarding the available anesthetic choices. Informed consent documents that permit the anesthesiologist to direct the patient's attention to a particular anesthetic technique can help to overcome arguments that the patient had insufficient time to review the entire document. Adopting a standardized anesthesia-specific informed consent provides the most effective evidence that each anesthesiologist within a practice has provided the necessary level of informed consent.

Once an anesthesia-specific consent form is implemented, anesthesiologists should be encouraged to circle or highlight specific risks that may be present. Notations reflecting efforts to tailor the informed consent discussion to a specific patient create powerful evidence of engaging the patient in a meaningful discussion that supports, rather than distracts, from the defense of the underlying medical issues.

References:

1. Levinson W. Physician-patient communication: The relationship with malpractice claims among primary care physicians and surgeons. *JAMA*. 1997; 277(7):553-559.
2. Caplan RA. Informed consent: Patterns of liability from the ASA Closed Claims Project**.** *ASA Newsl*. 2000; 64(6):7-9.
3. Preferred Physicians Medical's review of closed litigation files identified 6 cases where "informed consent" was the primary allegation and two additional cases involving allegations of "battery" related to a failure to obtain an appropriate consent.
4. Preferred Physicians Medical Risk Retention Group conducted a preliminary review of approximately 325 closed files based on a reference to "informed consent" in the analysis fields. Further study of the role of informed consent in the evaluation and outcome of these and other files was not possible prior to the deadline for this article.
5. One-page informed consents are generally less susceptible to arguments that an average patient was unable to comprehend the document or given insufficient time. In addition, multipage documents increase the likelihood that signatures will be overlooked or that the signature page will become separated or lost or some doubt is cast on whether the patient reviewed all pages of the consent.

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