Commentary

Commentary on: Characterization of Medical Malpractice Litigation After Rhinoplasty in the United States

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The article "Characterization of Medical Malpractice Litigation After Rhinoplasty in the United States"[1] evaluates the litigation landscape surrounding rhinoplasties in the United States and reaches the ultimate conclusion that physicians can protect themselves by offering a positive bedside manner and obtaining strong informed consent. This Commentary explains in further detail why a strong bedside manner and thoughtful documentation, including robust informed consent language, will substantially reduce the likelihood of malpractice litigation. Strong beside manner decreases the likelihood that a patient will initiate a malpractice claim, and thorough documentation, including robust informed consent language, decreases the likelihood that a competent attorney will accept the case.

It is worth noting that this article is based in part upon a comprehensive search of the Westlaw database. Westlaw is an online legal research service and proprietary database for legal professionals, similar to an UpToDate (Waltham, MA) or PubMed (United States National Library of Medicine, Bethesda, MD). One of the many services it provides is collecting and gathering data related to verdicts and settlements. The article notes that there is a paucity of data concerning rhinoplasty malpractice available. This is in part because Westlaw typically only obtains published appellate court decisions from state and federal courts.[2] The majority of all malpractice claims are resolved via state trial court decisions, jury verdicts, or settlements, few of which are actually documented in the Westlaw database. A potential source for a more comprehensive overview of the plastic surgery litigation landscape would be requesting the relevant data from the malpractice insurance companies themselves. However, these companies likely will not be willing to divulge this information publicly out of concern that the plaintiff's bar would use the information against physicians. For example, approximately 98% of the cases that our practice settles out of court include a confidentiality provision as part of the settlement terms, and the information will never be available to the public. Although the data may be lacking, the sample size nevertheless provides useful information. Strategies within this Commentary apply equally to any elective, aesthetic surgery, and it might be useful to draw from a wider search outlining trends related to malpractice litigation in aesthetic surgeries in general.

Bedside Manner

Common sense—and decency—suggest that all physicians should focus on bedside manner to increase patient satisfaction, grow their business, and for a litany of other reasons. However, it is proven that taking the time to listen and communicate with your patient, carefully explain a procedure and its complications, offer

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the opportunity for questions and substantively answer them, and just generally be a nice person will also reduce the likelihood that a patient brings a malpractice claim against you. This rings true even in cases with poor outcomes, and even where malpractice may have in fact occurred. The explanation is quite simple: patients are less likely to sue physicians whom they like, and there is a direct correlation between a physician's communication skills and how well-liked he or she is by patients.[3] Data show that patients will consider the effects that a lawsuit has on a physician when deciding whether to pursue a malpractice claim. If they like that physician and have a strong relationship, they are much less likely to pursue a claim.

By way of example, an acquaintance recently contacted me seeking information regarding what a potential lawsuit against his physician would look like. The physician admitted that he made a technical error during the surgery which led to the need for a remedial procedure and a significantly prolonged recovery time. The negligence appeared fairly clear, and the patient would have likely recovered a fairly large amount of money. We discussed in detail how a malpractice suit would play out and how it could negatively impact the physician, including: stress, time it would take away from his practice, potential for a verdict in excess of his insurance, the likelihood of increased insurance rates, the impact it could have on subsequent credentialing applications, and the possibility it would have to be publicly reported. A few weeks later, my acquaintance informed me that he had elected not to proceed with a lawsuit because he believed that the physician was a "good man."

The moral of this story is clear. If you can't focus on positive bedside manner and genuinely caring for your patients simply because it is the right thing to do, you should be doing so out of your own self-interest. It might just prevent a lawsuit. "If you spend extra time in the examining chair, you often avoid any time in the witness chair."[4]

Documentation

Although strong patient relationships can deter a would-be plaintiff from actually pursuing a claim, proper documentation may protect the physician even after a patient takes the step to seek legal representation. In general, your records should state what you did and your thought process for doing it. We strongly recommend that you write detailed progress notes instead of relying on drop-down electronic medical records. As discussed further below, with aesthetic procedures such as rhinoplasty, informed consent takes on even more heightened importance. Many of these lawsuits arise out of the patient's subjective belief that the results were not satisfactory or as promised. Instead of suing for the actual results, which may have been a known complication of the procedure, they will instead sue for failure of being properly informed of the known risks.

Medical malpractice cases are extremely complex, costly, and can take years to resolve. As a defense attorney, we bill our time at an hourly rate, and typically the insurance company pays for our legal work. However, most plaintiffs, ie, the patient, do not have the means to pay for the cost of litigating a case. As such, plaintiff's attorneys typically operate on what is known as a contingency fee basis. Under this agreement, the attorney fronts all costs of litigation and receives a fixed percentage of the total recovery. In other words, the attorney assumes all of the financial risk in exchange for a portion of the overall recovery (typically 30%-40%). If there is no recovery, the attorney absorbs all the costs and time associated with the case. Litigating a complex medical malpractice case with multiple defendants and experts across the country can span several years and cost hundreds of thousands of dollars.

Because of the extensive time and resources at stake, the most successful plaintiff's attorneys—the ones who you do not want to sue you—will conduct an exhaustive investigation into a potential case prior to accepting it. Lawyers get accused of many things, but being overly generous is not one of them. If a good lawyer does not believe that they can profit from the case, then they will generally not accept it. In fact, one well-respected plaintiff's attorney indicated that for every case she accepts, she will investigate and turn down 20. This process always begins with a detailed review of the medical documentation. First, the attorney will dig into the records and then usually he or she will pay a physician to review them prior to filing suit. In most states, including Georgia, in order to bring a medical malpractice lawsuit, a qualified physician (generally one practicing in the same field) must provide a sworn affidavit and point to a specific fact that the affiant believes constituted malpractice. If the records are well documented, it may discourage a plaintiff's attorney from accepting the case and/or being able to find an expert affiant.

To understand the importance of medical documentation, it helps to understand how a trial plays out. In reality, a trial is nothing more than a storytelling event. First, the plaintiff gets up and tells her side of the story. Then, the defendant doctor and his team get the opportunity to tell their story. The audience consists of 12 random people, the jurors, who decide which story is more credible. There are numerous complex rules and regulations that must be followed when telling your story, and the judge's job is to make sure that both sides do just that. In accordance with these evidentiary rules, a defendant physician can essentially explain to the jury what happened via 1 of 3 methods:

1. Reference to the medical records;
2. Explanation from the physician's independent recollection of the facts;
3. Explanation by reference to the physician's customary practice, or the physician's normal course of conduct when treating a patient in similar circumstances.

Of these 3, the strongest form of testimony is a reference to the medical records followed by a gentle explanation in lay terms that demonstrates that the physician was thinking critically and genuinely cared for the patient in real time. This comes across as much more believable than a self-serving recollection of the events that is not supported by documentation. Moreover, any time an important fact is recalled by a physician that was not documented, the opposing counsel *will* do their best to cast doubt on the truthfulness of the defendant doctor's testimony in front of the jury. The exchange usually proceeds something like this:

- "Doctor, weren't you taught the saying in medical school, 'If it wasn't documented, it didn't happen?'"
- "You agree that important clinical findings need to be documented?"
- "And you're trained to do so in order to provide the best and safest care for the patient, right?"
- "You agree that [insert fact/testimony at issue] was an important medical finding in this patient's care? Well can you explain to the jury why you did not document [fact] back when it happened?"

Consider this hypothetical scenario for context. A female patient comes in for a rhinoplasty for aesthetic reasons and ends up with significant scarring, a well-known complication. In this instance, a potential lawsuit might hinge on whether or not the physician properly informed the patient of the known risks and benefits prior to the procedure. First, if the physician spent a significant amount of time discussing the case in detail, including the risks and benefits, took time to fully answer questions, and was professional and courteous, the patient will be less likely to feel like she was misled and/or seek legal representation. Second, if the signed informed consent thoroughly lays out the potential risks and benefits of the surgery in clear and understandable terms, and if the physician also documented in his or her progress notes that significant time was spent discussing the procedure with the patient, including risks and complications, and she expressed an understanding of these risks and a desire to proceed, then an attorney is going to have a much more difficult time convincing 12 random people that this patient was not informed of the potential risks of this procedure. In sum, a focus on bedside manner and proper documentation, including thorough informed consent language, should be incorporated into every surgeon's practice.

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