

RISK MANAGER

Victoria Jackson, RN - *Writer*

Carol A. Austin - *Editor*

Risk Management Techniques to Avoid Allegations of Sexual Misconduct

Editor's Note: Increasingly, patients are making complaints to state licensing boards and filing lawsuits against healthcare providers alleging sexual misconduct. From a risk management perspective, techniques may be implemented to reduce the physician's exposure. This article will address some of those techniques.

Sexual misconduct was addressed all the way back to the Hippocratic Oath which states "Into whatever houses I enter, I will go into them for the benefit of the sick and will abstain from every voluntary act of mischief and corruption; and, further from the seduction of females or males."¹

Many professional organizations, as well as State Boards of Medical Examiners, have offered position statements on sexual misconduct. Recent studies by the American Medical Association demonstrate that the percentage of all disciplinary orders that were sex related increased from 2.1 percent in 1989 to 4.4 percent in 1996.²

Sexual Misconduct is Unethical and Unlawful

Sexual relationships or contact between physicians and patients, contemporaneously when there is an established physician-patient relationship, can cause permanent consequences for both the patient and the physician. While some of the position statements are non-definitive about sexual relationships that might exist after the patient-physician relationship has been terminated, physicians must be cognizant of the fact that it still

may conflict with state law. Sexual misconduct can result in criminal and civil liability.

Sexual misconduct may occur even with well-meaning physicians. Physicians must be aware that some patients could misinterpret their expressions of concern or therapeutic actions. Patients generally visit a physician because they are suffering from an illness and need help, and this may make them more vulnerable. Sexual misconduct is not limited to one specialty, but is found in all specialties. Often patients develop a transference reaction to the physician by attaching feelings about other people in their past to the physician. This also increases the potential for exploitation of the patient-physician relationship. It is the physician's responsibility to refrain from unethical behavior, even when the patient appears to consent to or even initiate an intimate relationship.³

"Healthcare professionals, licensing bodies, governments and the community are paying increasing attention to the negative consequences of sexual misconduct by physicians." According to task forces established by the colleges of physicians and surgeons in Ontario and British Columbia, changes in medical training for physicians at all levels, from undergraduates to practicing physicians, are needed to educate physicians about appropriate interactions and behaviors between patients and physicians. The training recommended would include how to set boundaries for appropriate treatment and how to give care and comfort, including touching, in an appropriate non-sexual

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Risk Management Skills Help Reduce Surgery on the Wrong Operative Site

Note: The Physicians Insurers Association of America (PIAA), with the help of Lori Bartholomew, PIAA consultant, documented the incidence of wrong-site surgery for the years 1985 through 1995.¹ Data were accumulated from 22 member medical malpractice carriers representing 110,000 physicians. During this time, there were 225 claims for orthopaedic wrong-site surgery, compared to only 106 claims for other surgical specialties (see table); however, the average and median pay-outs for wrong-site surgery were smaller for orthopaedic cases than for other surgical cases.

The Joint Commission on Accreditation of Healthcare Organizations (JCAHO), the Institute for Healthcare Improvement (IHI), the National Patient Safety Foundation (NPSF), the Association of Operating Room Nurses (AORN, Inc.) and the American Academy of Orthopaedic Surgeons (AAOS) all reviewed cases where the primary recognized exposure was related to surgery on the wrong operative site (e.g. left leg instead of the right leg).



According to the JCAHO, wrong-site surgery was most common during orthopaedic procedures, followed by urologic procedures and neurosurgical procedures. These organizations all identified similar factors that may contribute to an increased risk of wrong-site surgery and provided possible strategies for reducing the risk. This article will focus on those factors identified, and the possible strategies for reducing risk.

Common factors found to contribute to surgery performed on the wrong operative site are:

- Multiple procedures conducted on the same patient during a single trip to the operating room, especially when the procedures were on different sides of the patient, and more than one surgeon was involved in the surgical intervention
- Lack of communication with the patient or the patient's family, when applicable, in identifying the correct site during the informed consent process
- No formal policy and procedure for review and confirmation of surgical site
- Incomplete review of the medical records by the physician and other healthcare providers
- Lack of physically marking the operative location
- No final check and verification of the surgical site in the operating room by all members of the healthcare surgical team
- Time pressures to speed up the preoperative procedure that subsequently lead to incomplete confirmation of correct operative site

Possible Strategies for Reducing the Risk of Wrong-Site Surgery

- Have a formal policy and procedure in place for preoperative assessments
- Include oral communication along with a checklist to ensure all relevant information sources were checked
- The patient should be involved in the physical marking of the operative site to enhance reliability
- Each member of the healthcare/surgical team should orally verify the operative procedures. All the surgeons involved in the procedures should also be actively involved in obtaining the informed consent
- Develop a verification checklist that includes all documents referencing the intended operative procedure and site, including the medical record, X-rays and other imaging studies and their reports, the informed consent document, the operating room record, and the anesthesia record and direct observation of the marked operative site on the patient
- Conduct a final check in the operating room

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➤ Ensure, through ongoing monitoring, that verification procedures are followed for high-risk procedures

➤ Do not allow time pressures to influence the completeness of the verification procedures in place

Reducing the risk of wrong-site surgery is easy if a policy and procedure is developed and all members of the healthcare team follow the policy for every procedure. ●

Wrong-site Claims²	Number Closed	Number Paid	Percent Paid	Average* Payment	Median* Payment
<i>Orthopaedic Surgeons</i>	225	189	84%	\$48,087	\$20,000
<i>Other Surgical Specialties</i>	106	72	67.9%	\$76,167	\$25,000

* The median payment is the mid-point, and the sum of all indemnity payments divided by the number of claims that it represents is the average.

¹ Physician Insurers Association of America (PIAA), Claims Data, Rockville, MD: PIAA, 1996

² Physician Insurers Association of America (PIAA), Claims Data, Rockville, MD: PIAA, 1996

Reducing Your Office's Malpractice Risks 1999 Schedule

A COST-EFFECTIVE SEMINAR FOR MEDICAL OFFICE PERSONNEL

All seminars are from noon until 2:00 p.m.

North Carolina

Wednesday, September 1

Durham

Durham Marriott - Civic Center
201 Foster Street

Georgia

Thursday, September 30

Atlanta

Radisson Hotel, Atlanta Airport
5010 Old National Highway

Wednesday, October 6

Savannah

Mulberry Inn
601 East Bay Street

Thursday, October 7

Macon

Centreplex
200 Coliseum Drive

Wednesday, October 13

Waycross

Cafetorium at Satilla Reg. Medical
410 Darling Avenue

Thursday, October 14

Tifton

UGA Rural Development Center
15 RDC Road

Thursday, November 18

Atlanta

Hawthorne Suites
2060 Crescent Century Blvd.

Florida

Thursday, October 21

Orlando

Orlando Marriott Downtown
400 West Livingston Street

To register or for more information, please call MAG Mutual Insurance Company
and ask to speak to our Risk Management Seminar Coordinator:

404.842.5681 or 800.282.4882

manner. It should also include how to recognize signs in one's own behavior that indicate a possible propensity for crossing those set boundaries.⁴

In an effort to help prevent allegations of sexual misconduct, we share with you some risk management techniques to reduce inappropriate involvement with a patient or a former patient. You may wish to investigate and implement other procedures as well.

- ❖ Provide a private area for patients to disrobe and give patients a gown and appropriate drape to cover exposed areas.
- ❖ During any examination that might be in question later, have a chaperone present in the room and document that the chaperone was present. Some practices have a space on the progress note for the chaperone to sign that they were in the examination room during the examination. Chaperones should be present especially during breast and pelvic exams, and also during any other situations that could later lead to allegations of sexual misconduct.
- ❖ Provide patient education about the various methods of examinations and details of what to expect during a particular type of examination. This will protect against a patient misunderstanding the purpose of the examination.
- ❖ Discuss with colleagues how they conduct examinations and what other risk management recommendations they might be able to share with you in preventing any misinterpretations by the patient.

- ❖ Be able to recognize the “too nice” patient who requires an abnormal amount of the physician's attention or a patient who makes the physician feel uncomfortable or manipulated.
- ❖ Educate office staff on how to avoid sexual misconduct and encourage them to share any concerns regarding patients that may demonstrate manipulative or inappropriate behavior.
- ❖ Have a sexual harassment policy in place in the medical office practice and require that all new employees are oriented and educated on the policy in place.
- ❖ With every patient-physician relationship, set and maintain boundaries that are professional.
- ❖ Do not permit any sexual advances by a patient and if this occurs, consider formally terminating the patient-physician relationship.

The key to avoiding any allegations of sexual misconduct is to recognize behaviors that could be misconstrued to support a violation in the professional boundary between the patient and the physician. While this topic may be sensitive to discuss, it is an area that can be devastating for both the patient and the physician and has the potential for permanently damaging a physician's credibility. By implementing these and other risk management recommendations, you will help to decrease your liability exposure for allegations of sexual misconduct.⁵ ●

¹ Hippocrates, Works trans., Francis Adams (New York;Loeb) vol. I, 299-301

² JAMA, 1998; 279: 1883-1888

³ Canadian Medical Association Journal, 1996; 154: 643-649

⁴ Canadian Medical Association Journal 1996; 154: 643-649

⁵ The American Medical Association's Council on Ethical and Judicial Affairs

MAG Mutual does not presume to establish any standard of care or establish rules for the practice of medicine. The particular patient-care strategies or range of patient-care strategies mentioned in this newsletter should be tempered by the physician's judgement.

This publication is produced to inform you of issues relating to medical professional liability insurance and other matters of importance to hospitals and physicians. Material given in this newsletter does not constitute legal advice or opinion. If you have any questions in any of the areas discussed in this publication, you should seek a qualified legal opinion.

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P.O. Box 52979
Atlanta, GA 30355-0979

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