PUBLICATION

Is This the Beginning of an End to a Long Controversial Debate on Concurrent Surgeries? [Ober|Kaler]

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Concurrent Surgeries and National Spotlight

According to recent guidelines published by the American College of Surgeons (ACS) as Statements on Principles, concurrent (or simultaneous) surgeries occur when "the critical or key components of the procedures for which the primary attending surgeon is responsible are occurring all or in part at the same time." This practice (most commonly performed in trauma, cardiac, brain, and vascular cases) has been ongoing for several decades but has recently been in the spotlight after various *Boston Globe* reports exposed the vulnerabilities of the practice, which has sharply divided the medical community and sparked a national debate.

Proponents of this practice argue that this practice (also known as double-booking) allows hospitals to reduce wait times and provide top-notch care to patients by utilizing its most in-demand surgeons more efficiently. Opponents, on the other hand, argue this practice compromises patient safety, especially when the surgeon is performing two or more risky, complex procedures, where there is a high likelihood one of the procedures will not unfold as expected, leaving the primary physician unable to be in two critical places at the same time.

The real issues the regulators, legislators, and the medical community are trying to reconcile are (1) where should hospitals draw the line between efficiency and providing the necessary individual attention to patients and (2) at what point, and for which procedures, does a patient have a right to know that he or she is sharing a surgeon with another patient?

New ACS Guidelines

On April 12, 2016, the ACS revised its Statements on Principles to address the national debate surrounding concurrent surgeries by introducing guidance on the intraoperative responsibility of the primary surgeon. This guidance requires a primary attending surgeon to be immediately available for the entire surgery or to have another attending surgeon immediately available when that primary attending surgeon cannot be present.

In a general statement, the ACS states:

The primary attending surgeon is personally responsible for the patient's welfare throughout the operation. In general, the patient's primary attending surgeon should be in the operating suite or be immediately available for the entire surgical procedure. There are instances consistent with good patient care that are valid exceptions. However, when the primary attending surgeon is not present or immediately available, another attending surgeon should be assigned as being immediately available.

The ACS condemns concurrent or simultaneous operations by stating, "[a] primary attending surgeon's involvement in concurrent or simultaneous surgeries on two different patients in two different rooms is not appropriate." However, overlapping operations are acceptable:

Overlapping of two distinct operations by the primary attending surgeon occur in two general circumstances.

The first and most common scenario is when the key or critical elements of the first operation have been completed and there is no reasonable expectation that there will be a need for the primary attending surgeon to return to that operation. In this circumstance a second operation is started in another operating room while a qualified practitioner performs non-critical components of the first operation allowing the primary surgeon to initiate the second operation, for example, during wound closure of the first operation. This requires that a qualified practitioner is physically present in the operating room of the first operation.

The second and less common scenario is when the key or critical elements of the first operation have been completed and the primary attending surgeon is performing key or critical portions of a second operation in another room. In this scenario, the primary attending surgeon must assign immediate availability in the first operating room to another attending surgeon.

The patient needs to be informed in either of these circumstances. The performance of overlapping procedures should not negatively impact the seamless and timely flow of either procedure.

Acknowledging that unanticipated circumstances arise, the ASC states:

Unanticipated circumstances may occur during procedures that require the surgeon to leave the operating room prior to completion of the critical portion of the operation. In this situation, a backup surgical attending must be identified and available to come to the operating room promptly.

Issue of Informed Consent

As reported by the *Boston Globe*, there is no known connection between double-booking and subsequent complications and deaths, but very few patients even know their surgeons are involved in a second operation at the same time. This essentially becomes a legal issue of informed consent and whether the patient would have chosen to have the surgery had he or she known the surgeon would be performing another surgery at the exact same time. Although hospitals have revised their patient consent forms to emphasize medical care will be provided by a team and a doctor or attending designee will be present for the critical parts of the procedure, there are generally no contractual provisions requiring that patients be informed that another surgery will be performed by their surgeon at the same time.

State and Federal Reactions

In the wake of several reports by the *Boston Globe* on concurrent surgeries, the Massachusetts Board of Registration in Medicine recently approved a new rule that will require surgeons to document each time they enter and leave the operating room. This January 2016 rule remedies the lack of documentation in operative reports about the surgeon's whereabouts, which left some patients wondering if their doctor actually performed key parts of the procedure. Additionally, the primary surgeon must identify the backup doctor who would assume responsibility if the first surgeon leaves the operating room. Other states may soon follow.

At the federal level, Senator Orrin Hatch, head of the U.S. Senate Finance Committee, has requested information from 20 hospitals regarding the total number of concurrent surgeries performed from 2011 to 2015 and the policies on whether the patients were informed beforehand. Although not a full-blown investigation, the request is a “fact-finding exercise” to assess the effectiveness and transparency on the use of concurrent surgeries due to recent concerns that patients are not informed they are sharing surgeons and hospitals may be “actively concealing” the practice from patients. This investigation follows U.S. Attorney Carmen Ortiz's

health care fraud unit's investigation on the potential abuse of government insurance programs, which allow surgeons to bill for concurrent surgeries under limited circumstances.

Ober|Kaler's Comments

Concurrent surgeries have the potential to benefit patients and hospitals. The patient is getting a top-notch surgeon who otherwise may not have been available to perform the patient's procedure within the necessary time frame, if at all. Likewise, the hospital is able to efficiently utilize its highly skilled talent. However, the issue of informed consent is a real issue that must be addressed by health care providers. Informed consent requires that a patient be told who will be performing a procedure on him or her and, in the absence of specific information to the contrary, it would seem that the presence of the primary surgeon for at least the critical aspects of the procedure (or arguably the entire procedure) is a material fact that a patient would want to know.

Now that this issue has received substantial publication, we suspect that plaintiff's counsel will be attuned to look for an informed consent issue if a patient has a bad outcome from a procedure and a review of the records reveal that the primary surgeon was involved in concurrent surgeries or otherwise left the procedure before it was completed.

We recommend that hospitals and health care systems review their informed consent policies to determine whether any remedial action is necessary in light of these developments. As noted above, Senator Hatch is gathering information on this issue and it may behoove the industry to get in front of this issue before the federal government decides to mandate a specific approach.