OBG MANAGEMENT

Malpractice risk management

Protect yourself! Make a plan to obtain "informed refusal"

Always continue the conversation when a patient declines the treatment you've recommended

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The concept of informed refusal is similar to that of informed consent. However, in working with physicians for 30 years, I have found that informed refusal is not nearly as well understood as informed consent.

Informed consent means a patient has the right to understand the risks of death, serious bodily injury, or other common outcomes of an operation or medical treatment. The patient also has the right to be told about the risks of refusing a particular operation, test, medication, or other medical intervention.

If a patient is reluctant or noncompliant, you may not be doing enough if you simply document that he or she refused your recommendation of treatment. You should also make a record of your efforts to explain to the patient the risks of refusing that treatment.

Informed refusal unfolds in 4 steps

Keep in mind these 4 components:

- The physician determines the patient needs a particular operation, test, medication, or other type of medical intervention
- The physician tells the patient about the needed intervention
- The patient refuses the recommended treatment for any reason: "I don't think I need that test." "I don't like needles." "I don't care if I die."
- The physician explains the risks of not having the treatment so the patient can make an informed decision when refusing it.

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Malpractice risk management in 4 parts

This article is the first in a series of 4 derived from a symposium on malpractice risk management at the 91st Clinical Congress of the American College of Surgeons, San Francisco, Calif, in October 2005. Mr. Goodman updated his comments in October 2006.

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Explain the risks of refusal so the patient can make an informed decision when she declines treatment

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In your backyard: The first informed refusal case

The courts first recognized the concept of informed refusal in a case in California more than 30 years ago. A woman seeing her long-time gynecologist was advised to have a Pap smear. Despite repeated recommendations, the patient declined the test. She later developed cervical cancer and sued her physician, claiming malpractice.

Because the physician and patient agreed the former had recommended the Pap smear, the trial judge threw the case out.

He determined it was the patient's fault that she did not get the test that could have alerted her to the presence of cancer.

A higher court, however, reversed that decision because the patient had the right to make an informed decision in refusing the test—informed refusal.

The appeals judge ruled the gynecologist had a duty not only to recommend the test, but also to make sure the patient understood the consequences of her refusal. Because the evidence of informed refusal was lacking, the case was returned to the lower court.

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A jury concluded that the physician did recommend a CT scan but failed to advise the patient of the risk of not having it

Writing it down. Documentation is not technically an element of informed refusal, but risk management professionals believe that physicians should make a notation of such a conversation in the medical record at the time the patient states she refuses the procedure.

Case: Patient refuses CT scan, dies; suit follows

The issue of informed refusal was used in a 1996 trial, about 20 years after the doctrine was first recognized in California. The emergency department (ED) physician in that case was found responsible for a patient's death.

The patient, who had a long history of alcoholism, had fallen at home and struck his head. He was unconscious briefly before his wife took him to the ED. Although the examination did not reveal any neurologic abnormalities, the physician recommended a computed tomography (CT) scan of the head.

According to the physician, the patient and his wife refused the CT scan because they did not have health insurance. The physician failed to document his recommendation of the scan or the discussion in which the patient refused it. The patient and his wife left the ED. The next day, the patient died of multiple subdural bleeds. The widow sued for wrongful death.

Was the recommendation made?

During the trial, the physician testified that he had recommended a CT scan to the patient and his wife. The wife denied receiving such a recommendation. The trial attorneys focused considerable attention on whether the recommendation had actually been made. No one really focused on whether the physician advised the patient about the risks of refusal.

At the end of the trial, the plaintiff's lawyer cleverly requested that the judge instruct the jury on the concept of informed refusal, knowing there had been no evidence that the doctor had advised the patient or his wife of the risk of refusing the CT scan.

The jury concluded that the physician did recommend the scan but failed to advise the patient or his wife of the risks of not having it. The trial ended in a plaintiff's verdict of several hundred thousand dollars.

What's happening nationally?

Four other states besides California have considered legislation regarding informed refusal: Nevada, Vermont, and Michigan have passed laws recognizing its existence, and Mississippi recognized the concept even though an informed refusal bill was defeated in the legislature.

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Good resources are available

If you want to learn more about patient safety and liability, the patient safety committee of the American College of Surgeons has published a booklet and manual, available on the organization's Web site (www.facs.org/commerce/catsplash.html), containing essential information for surgeons and other physicians.[1,2]

The Joint Commission on Accreditation of Healthcare Organizations offers a 50-page book, available free online: *Health Care at the Crossroads: Strategies for Improving the Medical Liability System and Preventing Patient Injury*.[3] It is available at www.jointcommission.org/NR/rdonlyres/167DD821-A395-48FD-87F9-6AB12BCACB0F/0/Medical_Liability.pdf.

1. Manuel BM, Nora PF, eds. Surgical Patient Safety: Essential Information for Surgeons in Today's Environment. 05PS-0001. Chicago, Ill: American College of Surgeons; 2005.
2. Professional Liability Committee, American College of Surgeons. Nora PF, ed. Professional Liability/Risk Management: A Manual for Surgeons. 2nd ed. 04PL-0001. Chicago, Ill: American College of Surgeons; 1997.
3. Joint Commission on Accreditation of Healthcare Organizations. Health Care at the Crossroads: Strategies for Improving the Medical Liability System and Preventing Patient Injury. Oakbrook Terrace, Ill: Joint Commission on Accreditation of Healthcare Organizations; 2005.

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Get informed refusal on the spot if you doubt the patient will return with a decision

Informed refusal is embodied in court decisions in other states. I have found no state where the doctrine has been overtly rejected.

Timing the conversation

It is not always clear when a physician should acknowledge that a patient has refused a recommended treatment. Patients are often frightened or reluctant about an operation or medical treatment. Some will want time to think about it, talk with friends or family, and, perhaps, get a second opinion.

Suppose you recommend a breast biopsy to a responsible and long-term patient. She may well want to talk to her husband or close friend about it before making a decision. You should not feel compelled to say, "Fine, but you could die of breast cancer if you don't have this done." The informed refusal discussion should occur when a patient makes it clear that she has rejected your recommendation.

A risk-management professional might say that the sooner you have this conversation with the patient and document it, the better. But you have to base your timing on the situation and your assessment of the patient's reliability.

Harsh words are unnecessary

The informed refusal conversation need not take place immediately with a patient who seems reasonable and thoughtful about the process. However, obtaining informed refusal on the spot is worth the effort if you doubt the patient will return to give you a decision.

Maintaining the patient's trust is important. Do not be so concerned about protecting yourself from a malpractice suit that you constantly make harsh comments about what could happen if patients reject medical advice. The key is for you to assess the patient's likelihood to respond later. ■

There's more for you on the Web

- www.jointcommission.org/PatientSafety/
- www.facs.org/commerce/ (link to "Patient Safety and Professional Liability")