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Concurrent Surgery: In Whose Best Interest?

By Ben Rubinowitz and Evan Torgan

An increasingly common yet controversial practice is being implemented in hospitals around the country. Concurrent or simultaneous surgery is a practice in which one surgeon is simultaneously involved in two or more surgical procedures on different patients in different operating rooms. To legitimize this practice, medical studies have been published arguing that the practice is safe and that there is no difference in mortality or complications. It is further argued that the practice allows medical residents to take on more responsibility and that it allows exceptionally gifted surgeons to make their talents more widely available. Studies have also been published which found an increase in complications with overlapping surgeries. These studies argue that the practice is not safe and suggest that the real motive for double booking is financial -- greater profit for both the surgeon and the hospital. When the surgery goes well, there is little cause for alarm; however, when the patient is injured during double booked surgery, it is up to the plaintiff's lawyer to explore whether the double booking contributed to the outcome. The plaintiff's attorney must explore whether the attending surgeon was truly present for all "critical" portions of the procedure, whether the resident performed more than "non-essential" portions of the surgery and whether the patient was advised before the surgery, of the plan to double book and gave informed consent to this.

As recently as November 2017, JAMA Surg. published a study which concluded that overlapping surgery in complex neurosurgical cases can be performed without risking patient safety. More recently, however, in January 2018, JAMA Intern Med. published a study which reviewed data from overlapping surgeries and found a significant increase in complications for patients undergoing hip replacements or other surgery for hip fractures. While arguments can be made that these studies are not inconsistent, such arguments miss the point. The goal of the trial lawyer is not to try and support a given study but to scrutinize the underlying basis for the conclusions or to argue that there were reasons for the publication of a particular study (placing profit over patient safety). Once the attorney has identified flaws in a study or developed a motive for the study, the flaws and motives can be used as ammunition for the examination of the target surgeons and medical experts.

Regardless of which study you credit, the practice of double booking surgeries raises substantive issues of medical malpractice and informed consent. If a resident is allowed to operate and negligently injures a patient while the attending surgeon is not present, the resident's acts and omissions might serve as the basis for a claim that one reason that she departed from good and accepted practice was the attending's absence. If the patient was not informed prior to surgery that his attending surgeon had double booked the surgery and would be allowing a resident to operate while he was out of the room, the patient could not have given his informed consent for the procedure since he was never properly advised of the simultaneous procedures.

Imagine a scenario in which a urologic surgeon scheduled seven surgeries in a given day, six of which were double booked. The doctor, Dr. Lucro, is a well-known robotic prostate surgeon, works at a major teaching hospital in New York City, advertises his expertise as the "best in the world", represents that he has a higher cure rate than most urologic surgeons, and claims that he has performed more than 5,000 urologic surgeries. The patient, Mike Kelly, who went to this surgeon for his expertise, was injured during the procedure and now claims that he had not been told that his surgeon would be leaving the operating room to attend to another patient in a different operating room while a resident filled in. The informed consent form does indicate that resident physicians would be present during the surgery, but there are blanks in the form where the name(s) of the residents should be. Nothing is mentioned in the form about the doctor having booked other surgeries at the same time that he would be operating on this patient.

To begin the examination of the urologic surgeon, whether conducted as an adverse direct examination or cross examination, the plaintiff's attorney could attack immediately; however, without a proper set-up the exam might go:

Q: You never told Mr. Kelly you would be leaving the Operating Room to work on another patient, did you?

A: Yes, I did.

Q: You didn't tell him that residents would be taking over, did you?

A: Of course, I explained that residents would be assisting. This is a teaching hospital.

Q: The informed consent form doesn't list the names of the residents does it?

A: Look at the form. It says this is a teaching hospital and that residents would be assisting.

The better approach is to first secure certain agreements from the doctor and then, only when avenues of escape are closed off, move in for a more thorough and probing line of questioning. To secure these agreements, the plaintiff's attorney might start with "voice

of reason” questions designed to both obtain controlled answers and to support final argument:

Q: Dr. Lucro, your most important concern as a physician is the health of your patient, true?

Q: The safety and well-being of your patient are equally important, right?

Q: You met with Mr. Kelly before his surgery was scheduled, true?

Q: You told him that you were a “world renowned” surgeon, correct?

Q: You and he even discussed the number of surgeries you performed, right?

Q: You assured him that you had done more than 5,000 robotic prostatectomies, correct?

Q: And just like in your advertisements, you told him your cure rate was 98%, true?

Q: After you told him about the number of surgeries you had performed and your 98% cure rate, Mr. Kelly told you that he was interested in having you perform the surgery, correct?

Q: You understood that Mr. Kelly was interested in having YOU perform the surgery, true?

Here, anticipating the doctor will suggest that the patient knew this was a teaching hospital and that residents would participate in the surgery, the plaintiff’s lawyer should be the one to bring out this fact first. The inquiry might continue as follows:

Q: There is no question that Eastern Memorial Hospital is a teaching hospital, correct?

Q: There is also no issue that residents would be assisting you during the surgery, right?

Q: But one of the things we know for certain is that Mr. Kelly came to YOU for this surgery, true?

To explore the point more thoroughly, the lawyer should focus on the negatives during the inquiry or use open ended, low risk questions bringing out those things that were not said or done to help prove the point:

Q: When did you tell Mr. Kelly that your residents had performed 5,000 surgeries?

Q: When did you tell him that it was your residents that had a 98% cure rate?

Q: We can agree Mr. Kelly never said: "I want one of your residents to do the surgery on me," correct?

Q: In fact, you never mentioned the names of the residents because you did not know who would be assisting on the day of the surgery, true?

Q: But that didn't matter because the patient came to you, not a resident, true?

Next, the focus of the exam should explore the omissions in the pre surgical conversation - those things that were not said but should have been said if the doctor truly wanted to provide his patient with sufficient information to obtain informed consent to the surgery:

Q: Doctor, isn't it a fact that you never said to Mr. Kelly, "I want you to know I've double booked your surgery?"

Q: You never told him: "I engage in what's known as concurrent or overlapping surgeries," correct?

Q: In fact you never said to your patient "I want you to know that I will be operating on you and a completely different person in a different room at the same time," right? In the event the doctor says "that's exactly what I told him," the attorney should follow up with the absurdity of the comment:

Q: Are you saying that the patient came to you for your experience and then all of a sudden decided: "I want the most inexperienced doctor to do my surgery"?

A: No, I am saying he knew I would be there for the critical portions of his surgery.

Q: So you told him you deliberately booked two surgeries in different rooms at the same time, correct?

A: Yes.

At this point the attorney should point to a large exhibit of the informed consent form itself and explore its omissions:

Q: Doctor, Let's take a look at the informed consent sheet. Show us where it says, "I told the patient I would be performing two surgeries at once"?

Q: Show us where it says, "I explained that I would be leaving the operating room"?

Q: Show us where it says, "I fully informed the patient of my intent to conduct another surgery on a different patient in another room while he was under anesthesia"?

Q: Show us where it says anyplace, "I engage in concurrent, simultaneous or overlapping surgeries"?

In trying to justify this practice, the one question that might be the most difficult for the surgeon to answer is the one question that attorneys are trained never to ask on cross - "why". If, however, the question is a low risk question it may be asked. In this instance, the following question might be a difficult one for the surgeon to answer:

Q: Tell us doctor, WHY was it in the best interests of your patient Mike Kelly and his health, safety and well-being for you to leave his operating room to attend to another patient in another room?

To the extent the surgeon argues that simultaneous surgeries are in the patient's best interests, the attorney should bring out the unspoken reason for conducting double booked surgeries -- profit.

Q: Doctor, are you saying you are the only attending physician who can perform robotic prostatectomies in your hospital?

Q: In fact your hospital has a whole department devoted to urology, true?

Q: There are more than 10 surgeons who routinely perform such surgeries, correct?

Q: But not all of them double book their surgeries, true?

Q: By double booking your surgeries, your personal profits are greater, aren't they?

Q: In fact, another way of looking at double booking is "half the time, twice the money," true?

Q: Can we agree that it is certainly in YOUR best interests to double book your surgeries?

If the surgeon has exaggerated his success in his advertisements, not only is this fertile ground for cross, but also it is a way of undermining the credibility of the doctor and potentially exposing fraud.

Q: Doctor, can we agree that any advertising that is done by you must be honest advertising?

Q: In other words, exaggeration or misstatement in advertising is wrong, agreed?

Q: Let's take a look at your advertisements (handing). It says you are "the best surgeon in the world", Did I read that properly?

Q: Is that fact or opinion?

Here, no matter what the answer, the cross can continue to attack the doctor's credibility. If the doctor's answer is "opinion", the follow up questions should be:

Q: Does your advertisement say "In my own opinion, I am the best surgeon in the world"?

Q: It only says "the best" doesn't it?

Q: You left out the words "In my opinion", didn't you?

If, on the other hand, the doctor answers "fact", the cross can again expose the outright self-promotion:

Q: Was a referendum held during which you were nominated and elected "Best in The World"?

Q: Or was this a one person nomination process during which you elected yourself, "the best"?

Concurrent or overlapping surgeries are becoming more common in major teaching hospitals. Although studies have suggested that the practice can be performed without endangering patient safety, the attorney prosecuting such a case should focus on the motives behind the practice. Developing "case frames" such as profit over safety will certainly answer questions in the minds of jurors as to who benefits from double booking.

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