

MEDICO-LEGAL ASPECTS IN ANESTHESIA: HOW TO LEAD A HAPPY LIFE

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Abstract

This article discusses medico-legal aspects in anesthesia. It underlines the standards of care by which anesthesiologists should abide by, as well as define malpractice, its causes, and ways to avoid it. The role of the expert witness is explained and the ethical guidelines to follow are outlined.

Introduction

It was said "To err is only human". Physicians, and in particular, anesthesiologists are human and they are bound to commit mistakes on occasion. However, their mistakes lead to morbidity and mortality. Malpractice is defined by Columbia Encyclopedia as the "...failure to provide professional services with the skill usually exhibited by responsible and careful members of the profession, resulting in injury, loss, or damage to the party contracting those services"¹. Malpractice suits are usually issued to physicians who exhibited negligence and who did not abide by the standards of care as prescribed by the anesthesia societies.

Standards of Care

The standard of care is a general formula describing how a physician should act in a particular case. It is usually employed by a court or jury to

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determine whether the physician performed his duty or failed in doing so⁶. One standard of care cannot exist. It is subjective to the locality of the case, and at times could be specific to one case. It is based on reference books and guidelines drawn by anesthesia societies⁷. If a case reaches a court or jury, then comparison will be made between the defendant-anesthesiologist and any “prudent and reasonable” anesthesiologist from anywhere around the country⁷. Table 1 delineates these standards.

Table 1
Standards of Care

<ol style="list-style-type: none"> 1. Personnel should be present throughout the conduct of general and regional anesthetics and monitor anesthesia care. 2. Evaluate continually oxygenation, ventilation, circulation, and temperature. 3. Monitor blood oxygen level.

The physician, as mentioned in Table 1, should provide proper and continuous ventilation to the anesthetized patient. This is accomplished through four methods:

1. Continually measuring clinical signs as “chest excursion, observation of the reservoir breathing bag, and the auscultation of the breathing sounds”¹⁰. Also, it is encouraged to monitor the level of expired carbon dioxide unless it was restricted by the patient, procedure, or equipment¹⁰.
2. Ensuring the correct positioning of the endotracheal tube or laryngeal mask and identifying carbon dioxide in the expired gas, as well as performing postoperative capnography, capnometry or mass spectroscopy¹⁰.
3. Attaching a device that detects whether a disconnection occurred in the breathing system when the patient’s ventilation is controlled by a mechanical ventilator¹⁰.
4. Observing the ventilation adequacy through continual observation of clinical signs and/or monitoring the level of expired carbon dioxide¹⁰.

But how did these standards of care come to exist? Two major

factors encouraged anesthesiologists to develop “ways to improve anesthesia morbidity and mortality”⁸. The first was the dramatic increase in insurance premiums for anesthesiologists. It reached two to three times the average cost for all other physicians⁸. The second factor was the airing of a program on ABC in 1992 called “The Deep Sleep, 6000 Will Die or Suffer Brain Damage”. It portrayed a number of problems in anesthesia that appeared to be preventable. The program increased the public’s awareness and pushed anesthesia patients to ask about safety procedures before entering the operating room⁸.

The Expert Witness

The issues covered in medical malpractice suits are beyond the comprehension of the judge and jury. That is why the court assigns “expert witnesses” to establish whether the standards of care were maintained or not by the defendant-anesthesiologist⁵. Expert witnesses are not necessarily medical doctors. Their services can be used if they had other appropriate training such as pharmacology⁶. Witnesses should not be a personal friend of the defendant⁷. They must be nationally acknowledged for their expertise in their field, and are expected to assist in the case through their skills and training to explain the occurred events⁷.

For anesthesiologists to serve as expert witnesses, they should meet a set of qualifications, namely:

1. The physician should have a “current, valid, and unrestricted state license to practice medicine”².
2. The physician should be board certified or holding an equivalent qualification².
3. The physician should be actively familiar with the practice of clinical anesthesiology².

Once accepted to be an expert witness, the anesthesiologist should keep to six guidelines during his service². Refer to Table 2 for the guidelines:

Table 2
Guidelines for being an expert witness²

<ol style="list-style-type: none"> 1. The physician's review of the medical facts should be truthful and complete without neglecting any important information in favor of one of the two parties. 2. The physician should evaluate the performance in light of the accepted standards of care. 3. The physician should distinguish between medical malpractice and unfavorable results not necessarily linked to negligent practice. 4. The physician should assess the alleged substandard practice in relation to the patient's outcome. 5. The fees the expert witness would collect should be a result of the time spent at work, not the result of the trial. 6. The physician should be ready to present his testimony for peer revision.
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There are ethical guidelines that the physician must adhere to for he/she is not only held accountable to patients, but also to other health professionals, society, and him/her self³. The American Medical Association (AMA) included the following principles for ethical conduct, among others:

1. A physician must be dedicated to his/her work, providing medical assistance to all those in need of medical attention³.
2. He/she must respect the law and uphold it, as well as must seek changes in its clauses if they were not to the best interest of the patients³.
3. The physician must maintain his/her professionalism, respecting his/her fellow colleagues and maintaining the trust of his/her patients, as well as remaining up-to-date with medical advances³.

As mentioned previously, anesthesiologists have a responsibility towards their patients. There are ten guidelines as of date that have been identified by the ASA; however there are cases when some of them may not be applied and then the decision lies at the discretion of the anesthesiologist³. These guidelines include placing the patient's interest foremost and remaining faithful to him/her thus protecting him/her from any exploitation when under anesthesia and providing proper care and

skill irrespective of the patient's ability to pay for this care³. The anesthesiologist also has ethical responsibilities to his/her medical colleagues. Anesthesiologists should show respect for their colleagues to provide better care for the patients³. They should cooperate with other physicians giving sound advice when asked and asking for consultations whenever necessary³. The remainder of these guidelines is also posted on the ASA website.

How to avoid a lawsuit

To avoid a lawsuit, the anesthesiologist should receive a signed "informed consent" of the patient or of his/her legal guardian was he/she underage or incapacitated to make his/her own decision. The consent should be preferably written rather than a verbal one since it would hold much better in court⁷. The consent form should include a reasonable and clear explanation of the procedure, describing the risks that might occur with specific patients due to their particular conditions. In the rare case the patient does not wish to be informed of the procedure and risks, then that should be mentioned in the consent form and preferably countersigned by the patient⁷.

For a patient to be successful in his/her malpractice suit, he/she must prove *all* four of the following points. Failure to do so would render the judgment in the favor of the defendant-anesthesiologist. The four elements are "duty", "breach of duty", "causation", and "damages"⁷. Table 3 further explains these elements:

Table 3
Points leading to a successful malpractice suit

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| <ol style="list-style-type: none"> 1. Duty: patient must prove that the anesthesiologist owed him or her a duty or obligation. 2. Breach of duty: the anesthesiologist failed to fulfill his or her obligation. 3. Causation: there is a close causal relationship between the anesthesiologist's acts and the resultant injury. 4. Damages: show that actual damage resulted from the anesthesiologist's acts. |
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Malpractice damage can be of three kinds, namely: General, Special, and Punitive. General damages include pain and suffering and the like which directly result from the injury. Special damages are consequences of the injury as medical expenses, funeral expenses, and lost income. Finally, punitive damages or “exemplary” damages are intended to punish the physician for his/her negligence. The patient’s current status is compared to how it used to be had it not been for the anesthesiologist’s actions. Exemplary damages are awarded as a deterrent to other physicians as not to repeat the same mistake⁷.

If a trial is to occur

If the case might be and the four elements are all proved, then the anesthesiologist would probably be sued. If the case does make it to trial, the anesthesiologist would go through several phases and his conduct through them would determine the final outcome of his/her trial.

Phase one

Primarily, the anesthesiologist must not discuss the details of the case with anyone, be them family members, friends or colleagues. He/she should not attempt to alter any records; instead he/she should gather all materials and records related to the case. The physician should make notes of the case and cooperate fully with his/her attorney⁷.

Phase two

The second phase is also known as the “Discovery” phase. At this stage, the physician and his/her attorney should work on gathering all facts connected to the case and on clarifying any issues in advance of the trial. Through this phase, the defendant is both assessed and harassed to determine whether he/she will make a good witness in court⁷. The anesthesiologist should answer written interrogatives including information about his/her training, experience and qualifications. This

process should be supervised by the attorney since careless or misstated facts can become troublesome later on and can be misinterpreted⁷.

The defendant will also be deposed as a fact witness, while other anesthesiologists would be deposed as expert witnesses. The defendant is thus not allowed to give his opinion on the case, merely recount what happened. During these depositions, the anesthesiologist should refrain from doing the following things: (Table 4)

Table 4
Dos and don'ts at the deposition

Dos
<ol style="list-style-type: none"> 1. The anesthesiologist/defendant should be aware that a deposition is just as important as testifying in court. 2. He/she should be factually prepared with all the details of the case, as well as carrying his/her current curriculum vitae. 3. He/she should dress conservatively and appropriately to the situation. 4. The defendant should be confident, concise and clear in his/her answers, speaking a bit slower than usual and ready with the correct spelling of a medical term if the clerk asks. 5. He/she should be prepared beforehand for the deposition by working on questions and rebuttals with the defense attorney.
Don'ts
<ol style="list-style-type: none"> 1. The deposition should not be taken in a familiar place to the defendant such as his/her office since it would give him/her a false sense of security and he/she would let his/her guard down. 2. He/she should not be arrogant when giving his/her deposition nor should he/she be humorous and make jokes. 3. He/she should not use technical medical jargon or volunteer extra information when not asked about it. 4. He/she should not be evasive or hostile or admit that there are "definite authoritative textbooks" on which he/she relies on because such a statement would hold him/her reliable to the complete content of the textbook, whether he/she agrees with it or not. 5. The defendant should not smoke and should avoid becoming angry or emotional.

The anesthesiologist should realize that the goal is to escape the suit

with the minimal cost, and that if a settlement was not reached in the discovery phase, and then the trial will occur.

The trial

During the trial, the anesthesiologist should aim at convincing the court that he/she behaved in the manner of a prudent and competent physician; that his/her behavior would have been done by any other doctor placed in the same situation. He/she should specify the reasons behind his/her choosing a specific technique or procedure and not another, assuming his/her reasons are valid. If he/she created the impression that a number of procedures were possible and he/she adopted the optimum one, then that would greatly enhance his/her defense. Finally, he/she should not claim that he/she acted out of 100% certainty meaning the opposing witness is 100% wrong. This would decrease his/her credibility.

How to decrease the likelihood of a lawsuit

The preceding points refer to if the physician encountered a lawsuit. However, how should one decrease the likelihood of encountering one? There are five points to be adhered to:

- The physician must improve his “doctor-patient” relationship.
This is accomplished by spending as much time as possible with the patient and his/her family preoperatively describing the procedure, calming nerves and building a relationship of trust. The anesthesiologist should be aware of the patient’s condition, be ready to follow up actively if any complications occur and explain it in full if it does. He/she should project a professional image and appear as a person to be trusted⁷.
- The anesthesiologist should adhere to the “standards of care” through keeping his/her knowledge bank updated, being prudent in his/her choice of agents, and maintaining the patient’s vital signs within a reasonable range⁷.
- The physician should maintain good records, adhering to the “If it

is not written, it was not done” rule. He/she should always have a preoperative note which distinguishes the difference between a bad result and actual negligence. The physician should include a differential diagnosis. He/she should not write notes admitting any wrongdoings nor accusing others⁷.

- The anesthesiologist should respond appropriately when an incident does occur through obtaining consultations and following up on the patient until his/her services are no longer needed and document that in the medical record⁷. The physician should avoid “Vicarious Liabilities”. He/she should supervise competent people since supervising assistants makes him/her liable for their actions. He/she should specify what equipment and techniques are to be used and not agree to supervise more simultaneous cases than he/she can safely handle⁷. However, in the case of an anesthesiologist supervising a nurse anesthetist, he/she is not liable for the nurse’s decision as long as he/she was not involved in the obstetrical management and the making of the decision⁴.

Settling or losing the lawsuit

In case the care was substandard, the lawsuit would be settled or lost and payment is to be given. The payments are largest in lawsuits for permanent and disabling injuries, lower for death, and lowest for temporary injuries⁹. Finally, in the case an anesthesiologist did abandon his/her patient, or inadequately supervised others, or he/she billed a patient for services he/she did not render, then that would make it very hard to defend.

Conclusion

The anesthesiologist has a duty to his/her self: he/she should maintain a competent and skilled level throughout his/her practice which is not sufficed when he/she completes his/her residency training or is certified by the American Board of Anesthesiology³. The anesthesiologist

should maintain his/her physical, mental and sensory health and should seek medical care if he/she doubts his/her capacities during which he/she should decrease or cease his/her medical practice³. Thus in conclusion, being a competent and prudent anesthesiologist while following certain guidelines and providing the proper standards of care, should keep him/her safe the jaws of malpractice lawyers, allowing him/her to lead a *happy life*.

References

1. Columbia Encyclopedia (6ed), Malpractice, 2004.
2. Guidelines for expert witness qualifications and testimony, asahq., org., 2003.
3. Guidelines for ethical practice of anesthesiology, asahq., org., 2003.
4. HAWKINS J: Certified Nurse Midwives, Obstetric Anesthesia and You, *American Society of Anesthesiologists Newsletter*; 63:8, 1999.
5. FERRARI H: Medical Malpractice Litigation, Consultants and Expert Witnesses, *American Society of Anesthesiologists Newsletter*; 61:6, 1997.
6. KRAGIE S, MATHER, K: Standards of Care and Specialists, *American Society of Anesthesiologists Newsletter*; 66:2, 2002.
7. KROLL D: Professional Liability and the Anesthesiologist, last modified, 2002, 1992.
8. PIERCE E. ASA Monitoring Guidelines: Their Origin and Development, *American Society of Anesthesiologists Newsletter*; 66:9, 2002.
9. POSNER K: Data Reveal Trends in Anesthesia Malpractice Payments, *American Society of Anesthesiologists Newsletter*; 68:6, 2004.
10. Standards for basic anesthetic monitoring, asahq., org., 2004.