Failure to obtain informed consent
by Louise Walling, Senior Risk Management Representative, TMLT

PRESENTATION
On June 30, a 63-year-old female patient came to her surgeon with an MRI report of ruptured implants in both of her breasts.

Documentation included the patient's wishes to have silicone removed from her body. The patient's prior medical history included diagnosis of cancer of the left breast with a subsequent mastectomy performed by the same surgeon. Initially the surgery included a latissimus dorsi flap of the left breast with subsequent silicone breast implants inserted in both breasts followed by chemotherapy. The surgeon followed her closely throughout recovery.

PHYSICIAN ACTION
Documentation of the first office encounter, on June 30, included the patient’s desire for reconstruction of her left breast with a contralateral superior pedicle transverse rectus abdominis myocutaneous (TRAM) flap. It was also discussed that the ruptured implants would be removed from both breasts, a mastopexy performed on the right side, and a TRAM performed on her left side. The patient signed a comprehensive consent form that included replacement of the right implant. The form was signed and initialed by the patient and witnessed by one of the physician’s staff members.

Hospital documents - including the written informed consent - failed to mention that a saline implant was to be inserted on the right side. There was also no mention of a saline implant in the physician’s order to obtain the operative permit. The anesthesia and nursing preoperative records also did not mention a plan to replace the right implant.

The patient was taken to the OR on October 17 where she underwent removal of both ruptured silicone implants with a left TRAM breast reconstruction and a right mastopexy followed by capsulectomy and placement of right saline-filled implant (Continued on page 2)

This closed claim study is based on an actual malpractice claim from Texas Medical Liability Trust. This case illustrates how action or inaction on the part of the physicians led to allegations of professional liability, and how risk management techniques may have either prevented the outcome or increased the physician’s defensibility. The study has been modified to protect the privacy of the patient.
with a volume of 225 cc. The patient's two-day hospital recovery was uneventful. Initial postoperative office documentation stated that the surgery performed was a left TRAM flap, right mastopexy, and removal of bilateral breast implants without replacements.

Postoperatively, the patient visited the surgeon on numerous occasions for nearly seven months. During this time, she experienced some wound healing problems in both breasts and developed a seroma of the abdomen that required multiple aspirations. The patient stated that she did not know that an implant was inserted on the right side until her postoperative visit on December 15. During this visit she recalled the conversation she had with the surgeon on June 30 in which she expressed her desire to not have any more silicone in her body. The surgeon last saw the patient on May 18 of the following year.

At no time during the patient's course of care did she complain about the postoperative situation. Significant improvement was achieved with regard to symmetry of her breasts after the revisionary procedures of the surgeon. While the implant used in the surgery was a saline implant, it had a silicone shell. The patient alleged that the physician placed a saline breast implant in her right breast without her consent; the implant causes her worry and anxiety; and future surgery is necessary to remove the implant.

ALLEGATIONS
Failure to obtain proper consent and comply with the patient's stated wishes.

LEGAL IMPLICATIONS
One defense expert reported that the patient underwent an appropriate preoperative evaluation. After the discovery that her implants had ruptured, appropriate options were discussed. The defense expert also believed that the patient had some knowledge that she was to undergo replacement with a saline implant. The patient signed a written surgical consent for the implant to be replaced with a right side implant, which was a separate document. Also, once the patient became aware that she had a saline implant, the surgeon told her it would be simple to remove. However, the patient did not move forward with such a request.

Both experts stated that the postoperative care and the surgical outcome were strengths in this case. However, defense experts also commented on the communication breakdown between the physician and the patient.

There was no informed consent discussion documentation about the plans for surgery to remove the right silicone gel implant and replace it with a saline implant.

There was no plaintiff’s expert testimony filed.

DISPOSITION
This was settled on behalf of the surgeon.

RISK MANAGEMENT CONSIDERATIONS
Clear communication is central to a physician-patient relationship. In this case, a disparity was evident in the informed consent documentation from physician to patient, and physician to hospital.

Should a liability claim occur, a physician has a better defense when documenting in the medical record:

• the informed consent discussion for the procedure;
• a statement confirming that the patient’s questions were answered; and
• a statement that it is your opinion, as the physician, that the patient fully comprehends the procedure to be performed, along with the associated risks.

The law places the duty to obtain informed consent upon the physician and it is non-delegable. The fact that a hospital or nurse voluntarily undertakes the duty to obtain informed consent does not relieve the physician of the duty, but merely adds additional parties that may be subject to legal liability. Nevertheless, if a nurse is assigned the task of informing the patient and obtaining the signature, the physician still remains responsible to see that it is getting done properly.1

Source

Louise Walling can be reached at louise-walling@tmlt.org
Online reputation management for physicians

by Laura Hale Brockway, ELS

As more patients go online to find information about physicians, your reputation is being built and managed on the Internet. And like it or not, your online reputation plays a role in acquiring new patients and maintaining trust with existing patients and colleagues. It is imperative for physicians to have a plan and focus on online reputation management.

Online reputation management is the process of preventing and repairing threats to your online reputation. It is done by tracking what is written about you and using techniques to address or moderate the information on search engine results pages or in social media. The goal is to promote positive or neutral content while suppressing negative content.

For physicians, online reputation management involves addressing information in three areas:

1. information found on search engine results pages (Google);
2. information found in social media (LinkedIn, Facebook, blogs); and
3. information on rating websites, such as Vitals, HealthGrades, Rate MDs, Yelp, and Angie’s List.

Recently, a physician received an email from a company offering online reputation management services to help him mitigate negative online reviews on sites such as Yelp, Google, and health care review sites such as Vitals.

There are hundreds of companies out there offering these services. However, physicians are urged to use extreme caution when choosing a reputation management company. Some companies engage in questionable techniques that could lead to disciplinary action by the Texas Medical Board (TMB).

Specifically, the company that emailed this physician said they “will post reviews for our clients to over 40 social media websites … We post up to 25 reviews per month.”

This claim is alarming in the context of medical practice. How are they managing to post reviews from the patients of a particular physician? Are they making up reviews and then posting them?

It is unethical and dishonest to post reviews on these sites that are not from actual patients. Physicians are held to a different standard than other businesses, and posting fake patient reviews is inappropriate. Doing so would also violate TMB advertising rules, as this type of advertising (and the TMB does consider this to be advertising) would be considered “misleading.”

Here are a few techniques for managing your own online reputation:

KNOW WHAT IS BEING SAID.
Conduct web searches on yourself and your practice regularly. Review the first 30 hits of the search. (Any hit past 30 is generally considered extraneous and not likely to be read.) Among the top 30 hits, what are these sites saying about you? Continue to monitor these online discussions.

KNOW WHAT YOU CAN AND CANNOT DO ABOUT NEGATIVE REVIEWS.
Because of health care privacy laws, physicians cannot respond to online reviews. The fact that a patient’s identity is protected information directly hinders the physician’s ability to refute a complaint. Simply acknowledging publicly that the complaining party is a patient breaches confidentiality and violates HIPAA.

CONSIDER GIVING PATIENTS MORE CONSTRUCTIVE WAYS TO OFFER THEIR FEEDBACK.
Conducting a patient survey, for example, would be a good way for patients to express their dissatisfaction and feel empowered.

Another option is to talk to the patient directly if you can identify who made the comment. This should be done in person or over the phone. Begin by asking the patient why he or she is dissatisfied.

It is also a good idea to investigate the patient’s complaints. Is the complaint legitimate? Was the problem with a procedure, a staff member, or the patient’s wait time? Can the problem be fixed?

OPTIMIZE YOUR WEBSITE FOR SEARCH ENGINES.
Optimizing your website for search engines will ensure that anyone typing in your name or your practice name will see your website at the top of the search list. Optimizing your site involves creating comprehensive and targeted meta tags and website page titles that help search engines index your site.

More sophisticated techniques include editing your site’s content, HTML, and associated coding; removing barriers to the indexing activities of search engines; increasing inbound links; or purchasing related web addresses.

CREATE YOUR OWN BLOG.
You cannot control what other people say about you online, but you can create your own (Continued on page 4)
(Continued from page 3)

story and your own content. Your blog could be as simple as one 300-word post per week.

The content could be about services you are offering to patients, the importance of getting a flu shot, or any other health topic that is relevant to your patient base.

CREATE A LINKEDIN PROFILE.
Your LinkedIn profile is another aspect of your online presence that you create. Add information about where you went to school, your specialty, and your practice. Make your profile public so that patients and potential patients can learn about you in a way you can control.

TAKE ADVANTAGE OF THAT “THANK YOU.”
The next time you receive a thank you note or email from a patient or family member, ask that person to post their comments on your blog, on your LinkedIn profile, or on physician rating sites.

Keep in mind that with the prevalence of smartphones and tablet PCs, patients can post a review of you — a positive or negative review — at any time and from anywhere. Even from your waiting room. Don’t ignore what’s being said.

For more information on online reputation management, please see the following TMLT resources:


Sources
1 Hoffman, T. “Online reputation management; cleaning up your image is hot, but is it ethical?” Computer World, February 12, 2008.