Learning From Others:

A Case Report From the Anesthesia Incident Reporting System

Anesthesia Quality Institute
ANESTHESIA INCIDENT REPORTING SYSTEM (AIRS)

Detailed review of unusual cases is a cornerstone of anesthesiology education. Each month, the AQI-AIRS Steering Committee will abstract a case and provide a detailed discussion based on a submission to the national Anesthesia Incident Reporting System. Feedback regarding this item can be sent by email to ***r.dutton@asahq.org****. Report incidents to* ***www.aqiairs.org****.*

Case 2012-2: Spy vs. Spy

A 62-year-old, ASA Physical Status II man presented for radical prostatectomy in the lithotomy position. During the preoperative interview on the day of surgery the patient had many questions for the anesthesia team, including legal questions about who would be present during his surgery and which specific medications would be administered. Following uneventful induction of general anesthesia, the patient's legs were elevated for positioning. At this time, a small tape recorder was found in the patient's sock. The timer on the recorder indicated that it had been operating continuously since the start of the preoperative interview.

Discussion:

The use of recording devices is not without precedent or value in health care. Many trauma resuscitations in the emergency department are recorded, as are simulator exercises in a variety of specialties. It's impossible to walk onto a labor and delivery unit without seeing proud parents with cameras and video recorders. Even though there are medical procedures involved, most patients and families treat childbirth like they do a wedding, graduation or other family event. Some hospitals even allow a significant other to bring a camera into the operating room during a cesarean delivery. This is usually done with both the knowledge and assent (if not explicit consent) of the patient and the health care providers. Patient advocates believe that recording conversations with the permission of all parties is a useful tool that prompts the patient's memory and helps them to recall important details of the conversation that may otherwise have been forgotten.[1] In general, there is nothing wrong with recording a conversation or procedure as long as other patients' privacy is preserved and all parties are aware of the recording and agree to it.

The case described here is different. It feels like the providers' rights have been violated and laws have been broken (although this may or may not be correct). More importantly, it feels as if there has been a breach of trust between doctor and patient, and this is what really matters. This review is not meant to offer legal advice, but will discuss some of these questions and offer possible resources for some answers. The first and most important point to make about this case is that the clinicians involved should do nothing (not even listen to the tape) without seeking advice from the hospital attorneys, the risk management department, Health Insurance Portability and Accountability Act (HIPAA) compliance officers or other relevant hospital support. The legal issues involved, including the rights of the patient who did the recording, those of the clinicians involved and the other patient in the holding area, are complex. Getting advice from the experts now may protect the providers and hospital later should a lawsuit arise.

Is it legal to tape conversations without the consent of all involved? Although doing so may seem wrong to physicians, most states only require the consent of one party to tape a conversation.[2,3] The fact that the patient hid the tape recorder in his sock and had turned it on would imply that he consented to taping, but does this situation change after induction? Can an anesthetized patient still be one of the "parties" being recorded?

Case Follow-up:

The on-call hospital lawyer was consulted, who advised that under state law it was illegal to record conversations without the consent of all parties. It was possible that conversations with other patients in the preoperative area had been captured as well, which might be a violation of HIPAA. The recording was therefore erased, and the recorder returned to the patient postoperatively.

System Follow-up:

Was the recording a violation of HIPAA? The short answer is "no," but only on a technicality. Patients are not subject to the HIPAA privacy regulations; hospitals and providers are. HIPAA does allow what is called "Incidental Disclosures" in places such as waiting rooms, emergency departments and holding areas.[4] The medical conversations overheard in a holding area would

likely fall into this category. Some of the important HIPAA issues raised in this case are whether the policies and procedure of the holding area are compliant with HIPAA regulations, and whether the hospital, once it knew about the recording, had an obligation to prevent the information obtained about other patients from leaving the medical center. The hospital would clearly have a responsibility to prevent a patient from leaving the grounds with a copy of another patient's medical record. Whether it has the responsibility to prevent a recording for what would likely be considered an incidental disclosure is less clear. Other privacy laws may be relevant on a state-by-state basis. Again, the best strategy is to seek expert advice before doing anything.

If the law has been broken, can the tape be handed to the police? Again, this is complicated. Although federal laws permit recording with the consent of only one party, 12 states currently require the consent of all parties to the conversation (California, Connecticut, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, Pennsylvania and Washington). Recording a conversation without the consent of all parties in one of these states may lead to a felony conviction. In this case, the recording contains protected health information of both the person doing the recording and the other patients in the holding area. These patients have protections under HIPAA that do not simply disappear once a law has been broken. HIPAA may allow prudent disclosure of PHI to law enforcement officials under these circumstances, but it is essential to get legal advice before giving the tape to anyone. Even if the law has been broken, handing the tape to the police may result in a prison sentence for the patient. Is this really the right thing to do?

What happens after the attorneys have left the room? This is perhaps the most difficult issue. The doctor-patient relationship is based on deep trust. Patients share personal stories and permit intimate physical contact by a stranger. The physician makes the kind of life-altering decisions that are allowed in no other profession. A deep bond of mutual trust is an essential ingredient in this relationship, and a secret recording demonstrates that the trust does not exist and permanently undermines the relationship.[1] It seems like the recording in this case is being made for nefarious purposes (perhaps a comment on our own trust of patients).

The clinician and the system can take some practical steps to minimize the impact of this issue and similar issues in the future:

1) Attempt to understand the patient's concerns and try to re-establish a trusting relationship. If the patient's concerns can be understood within the context of a trusting doctor-patient relationship, the physician and patient might establish protocols that allow taping of some encounters. If this does not seem possible, it is reasonable for the clinician to terminate the relationship as long as appropriate steps for medical follow-up have been taken.[5,6]

2) Develop a policy regarding recording of medical conversations or procedures and ensure that these policies are made clear to patients. Not surprisingly, most malpractice attorneys do not encourage physicians to allow recordings because of potential liability during litigation. Many physicians feel that making recordings reveals a lack of trust.[7] As mentioned above, however, some physicians and many patient advocates encourage it. Many hospitals or clinics already have policies that regulate recording devices (especially cameras), but a physician's office may not. Discussing these policies can help to prevent future occurrences.

The Last Word:

Smartphones and video recorders are becoming more advanced and easier to conceal, so this incident is not going to be unique. As anesthesiologists, we should seek to establish a strong, trusting relationship with our patients. They will be less likely to record our conversations in secret, and we will be more likely to openly allow it because we trust them. Our health care systems can protect us by creating appropriate policies and enforcement, and by providing rapid and accurate legal guidance when such an incident occurs.

References:

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