Aesthetic Care and Legal Risk

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Cosmetic procedures have seen a steady rise in recent years due to the impact of social media, the use of virtual video calls during the Pandemic and the increased variety of affordable non-surgical options to improve one's appearance. As the demand for cosmetic procedures surges, so too does the potential legal exposure for physicians. The areas of exposure often stem from issues related to the supervision, training, and lack of or inadequate documentation by advanced practice providers (and physicians as well).

The following two cases highlight the legal challenges physicians can face when procedures are lacking in documentation, training, and supervision. Often non-surgical treatments in this area of practice involve heavy use of advanced practice providers. Physicians may face liability exposure as to their supervision when APPs provide care that results in a bad outcome due to improper training and/or documentation of care. While these issues aren't unique to aesthetic medicine, the resulting harm often leads to legal outcomes that favor the patient, including financial compensation. The first case review

involves issues pertaining to poor documentation and a lack of informed consent. The claim involved Mrs. Shelton[1], a 58-year-old female with fine facial lines and moderate photodamage, who inquired into a full-face CO_2 cosmetic resurfacing laser treatment. Mrs. Shelton presented to Dr. Depp for consultation. Following a discussion of the procedure, the patient and physician agreed to move forward with a CO_2 laser treatment.

The first hurdle in defensibility of the subsequent claim concerned the lack of documentation of this discussion including the associated risks and recovery expectations for such a procedure. The patient received her first CO_2 laser treatment followed by her one-week follow-up visit with plant-based exome therapy. The patient underwent her second CO_2 cosmetic laser treatment with plant- based exome therapy to her face eight days later. The patient returned for her third CO_2 laser treatment and Dr. Depp used IPL light therapy at a 16/20 setting. When the patient presented, she was concerned with her appearance as she had severe swelling and pain. It was documented that the scabs on her face had begun to fall off and that she was healing as expected. Six days later, she underwent her fourth and final treatment to her face. The IPL light therapy was increased to an 18/20 setting, and Fontona laser treatment was used. Afterwards, Mrs. Shelton was unsatisfied with the treatment and care she received. She filed a lawsuit alleging Dr. Depp was negligent in performing multiple procedures in a short period of time, which led to permanent scaring of her face. The patient alleged that Dr. Depp failed to re-evaluate the care plan once he realized Mrs. Shelton was experiencing side effects of swelling, redness and pain. Also, she alleged his failure to take proper precautions resulted in significant burns to her face and permanent scarring described as pock marks to her face.

Defensibility was difficult in this case due to informed consent issues and the lack of documentation. While Dr. Depp discussed the procedure with the patient, the documentation of risks associated with such a procedure, as well as specific descriptions of each procedure, were was insufficient. Also, there was no formal written consent. The allegation of a lack of informed consent by the Plaintiff was bolstered by the patient portal messages that were produced in discovery between Mrs. Shelton and Dr. Depp. The messages clearly showed that Dr. Depp was treating a patient who did not understand whatt the procedure entailed and she had unrealistic expectations about the outcome of her procedure. Many of the questions she asked in the messages should have been addressed before she had the procedure. Additionally, he failed to adequately explain the recovery process and what she could expect post-treatment. Due to the gaps in documentation and communication, it was agreed that a settlement was appropriate in this case.

The second claim involved Mr. Mobley, a 25-year-old male patient with a history of eczematous atopic dermatitis. After a number of conservative therapies were exhausted without improvement, it was recommended that he consult with Dr. Thomas to be evaluated for narrowband UVB treatments. After determining he was an appropriate candidate for treatment, Mr. Mobley had a series of three treatments of total body phototherapy. Risks were discussed and an appropriate consent was signed. Mr. Mobley started his first phototherapy treatment, receiving narrowband UVB, Total Body Energy of a

low dose of 300 millijoules per sq cm. No complications were noted. His second treatment was done two days later by the same RN with a Total Body Energy of 400. Again, consent was obtained and there were no complications noted. The third treatment, performed by a different provider, was the genesis of the lawsuit. Mr. Mobley was to get 500 millijoules, and the records indicated that he received Total Body Energy of 500, with no complications noted.

Two days later, Mr. Mobley called the office complaining of a severe sunburn all over his body. He presented to Dr. Thomas for examination the next day and was diagnosed with 2nd degree burns. It was concluded that Mr. Mobley received not 500, but 5000 millijoules. It was the first time the RN had operated the booth. Although she documented that she typed in 500 as the amount the patient received, she testified in her deposition that she could have accidentally typed in a greater amount. Due to this medical error, the patient had endured 2nd degree burns and subsequently complained of skin sensitivity, twitching, and cold intolerance. Mr. Mobley had to undergo significant wound care for the burns. He also attributed his recent development of squamous cell carcinoma to excessive exposure during phototherapy. Due to the treatment error, Mr. Mobley filed a lawsuit. While Dr. Thomas' care was praised by an expert, particularly as to the subsequent wound care Mr. Mobley received, Dr. Thomas was the supervising physician and he was named as a defendant along with the registered nurse. The allegations of negligence included failing to have proper procedures and protocols for the type of therapy received; failing to ensure that the RN understood and followed protocols for this type of therapy; failure to properly train and supervise the RN; and failure to properly administer phototherapy.

From the outset, the medical error eliminated any standard of care defense that could be pursued. The patient record was poorly documented, and although the RN stated she received consent, no such documentation existed in the record. It was evident the risks were never discussed with the patient as there was no documentation of any such conversation. Defending the matter was further complicated by the poor performance of the treating RN's deposition concerning her care. She admitted in her deposition that she did not know how long Mr. Mobley was exposed to the treatment in the machine. She testified that she was trained to operate the booth, but prior to this incident, she had never seen or operated one before. Her training consisted solely of an online certified dermatology technician course completed within weeks of starting her employment. Based on her testimony, it was evident that her training was inadequate. The plaintiff's attorney was able to show that her training consisted of watching other staff members perform the skills she needed to have to do her job. Her incompetence was further bolstered by the number of negative performance reviews she received and proved to increase the supervising physician's liability exposure since Dr. Thomas was aware of her substandard performance. During her deposition, the RN acknowledged struggling with time management and workflow, and during cross examination, admitted that some statements in the medical record were false, attributing them to clerical errors by her due to her lack of detail. Notably, there was no performance review in her file related to this incident. Given these facts, the plaintiff could successfully argue that the supervising physician was aware of her deficiencies in performance and lack of training. As a result of the lack of a standard

of care defense, the case ultimately centered on damages. The case was ultimately settled due to the significant defensibility challenges.

Here are some recommendations for minimizing liability in cosmetic procedures:

1.Informed Consent. Ensure consent is executed and confirmed in the record. Not only should there be a separate consent form, but if all possible there should be documentation of the risks discussed with the patient. A blanket statement of risks discussed is not sufficient.

2.Procedure Documentation. Record device settings and parameters during each procedure. In the above case, if the registered nurse had documented the settings while she was performing the treatment, she would have likely prevented the error.

3.Training and Competency. Provide initial and ongoing training on devices and equipment. Use hands-on practice and regular assessments to obtain a level of staff competency. Implementing a comprehensive protocol that combines training, system safeguards, and ongoing oversight will reduce liability. Ensure all advanced practice providers receive thorough training on each device they use, including the manufacturer instructions, troubleshooting, and safety features. Require periodic evaluations to confirm continued proficiency.

4.Equipment Safety Protocols. Regular maintenance and calibration of devices should occur. Follow the manufacturer schedules and document all checks. Train staff to interpret and respond appropriately to device alarms. It was clear in this case that the RN had to have ignored the alarms in order to administer that much energy.

5.Documentation and Reporting. Accurate record keeping is crucial to defensibility of any claim. Be sure to log device settings, usage duration, and patient responses in the EHR.

6.Encourage Safety by open communication within the advanced practice providers and physicians.

[1] Names, some facts, and identifying details have been changed to protect the parties' privacy.

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