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# Doctor: I Want A Refund

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Most cosmetic surgeons have at one time or another been faced with the following conundrum. The surgeon performs a procedure, done with technical adeptness. Unfortunately, the patient is not happy with the result. The surgeon offers to do touch-up which the patient might or might not accept. Several weeks later, the physician receives a letter demanding a refund. Sometimes, the letter also demands additional money so the patient can pay for a second round of surgery elsewhere. Either implicit or explicit in the letter is the understanding that failure to tender a refund will lead to a potential lawsuit.

This type of problem is unique to physicians who are in the cash-pay business. Plastic surgeons who perform facelifts, ophthalmologists who perform LAS IK procedures, and dermatologists who perform Botox injections have struggled with this problem.

On first blush, it might seem reasonable to give the patient her money back in exchange for assurances that the matter is closed. That logic assumes that the physician is in the service business and he wants to do all he can to make the patient happy. And, clearly beauty is in the eye of the beholder. To facilitate such matters, some insurance carriers will provide a template of a "full release" for physicians to have their patients sign agreeing that the exchange of money means that there cannot and will not be a claim for medical malpractice.

If a patient signs this type of contract, (presumably one drafted by the carrier), it is probably a good idea for the physician to recommend that the contract be reviewed by the patient's attorney. Why? This type of contract could be perceived as being "unconscionable" and against public policy. It is assumed that a physician has superior bargaining power and the legal system wants to make sure that contracts are associated with "meaningful choice." If the physician recommends that the contract be reviewed by a representative for the patient, the playing field has ostensibly been leveled. This will increase the odds that the contract could be successfully enforced should the patient have a change of heart. Of course, if a patient has not already seen an attorney, and the physician is recommending that he/she now see an attorney, that could open up new issues and risks. Further, the attorney will want to be paid and the patient will be reluctant to make that payment from the refund.

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The next issue is related to the scope of such a contract. Most states do not allow an individual to contractually forego the right to file an administrative complaint with the Board of Medicine. In Florida, for example, grounds to discipline include: Failing to comply with the requirements of sections: 381.026 and 381.0261 to provide patients with information about their patient rights and how to file a patient complaint. Hence, a physician may find himself in the position of having tendered a refund, expecting that would be the end of the matter, only to find out that the Board of Medicine is investigating a round of specific allegations.

The third concern relates to whether such a payment is reportable to the National Practitioners Databank. The answer is that it depends. The Health Care Quality Improvement Act requires any "entity" which makes payment in settlement of (or in satisfaction of a judgment in) a medical malpractice claim to report the payment to the Databank. In American Dental Association versus Donna Shalala, US Dept of Health and Human Services in 1993, the appellate court addressed two questions. Are individual healthcare practitioners,

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**Doctor: I Want A Refund** (cont'd) such as dentists and physicians, considered "entities" required to report payments? Next, does the Act require reporting of "noninsurance" type of payments such as refunds? The court concluded that an individual tendering a payment did not have to report to the Databank, but an entity, such as the corporate entity employing said physician would. The court was silent as to whether a refund would qualify as a reportable event. It is generally thought that (a) if the refund is given after a demand threatening legal action; and (b) if the refund is given in exchange not to file a lawsuit, then that would constitute a settlement. In short, then, a refund could trigger reporting requirements to the Databank. Physicians who offer refunds would generally think to do so via their corporate entity, if nothing else, to establish the tax deductibility of the refund as a business expense. On the other hand, payment by an individual implies use of after-tax dollars, (furthering increasing the net expense to the physician.)

One might ask, how would anyone know if the corporate entity employing the physician failed to report to the Databank? If the patient signs a contract not to file a malpractice claim, and breaches, the only remedy the physician would have would be to challenge the breach in court. The physician would have to create a public record seeking to enforce the agreement. As noted, that agreement might by its very nature have established a duty to report. This would obviously tilt the balance of power to the patient in being able to secure a second monetary settlement in exchange for silencing the matter. Further, physicians are generally under an obligation to report settlements to the Medical Boards each time his/her license is renewed. Failure to report, combined with a public court record of a "reportable event" might create additional headaches with the Medical Board, hospital credentialing committees, and more.

Finally, a refund can be improperly construed as a tacit admission of guilt. That is, the act of tendering a refund can be manipulated by a clever plaintiff's attorney to support the argument that the doctor would never have given the refund unless he was guilty of malpractice. One can certainly defend against this argument, but, it can be a trap for the unwary. Physicians who just give a refund and require no obligation from the patient might find themselves unpleasantly surprised just before the statute of limitations passes.

Of course, many times a patient just wants a refund, treating the operation no differently than any other consumer purchase. Analogously, they might request their money back for a defective appliance; and, in doing so, they generally do not embark upon a product liability suit. So too with patients, many will actually be assuaged by the refund and the physician will never hear from that patient again. But, that is not always the case.

I'll close with a real world example of how these vexing problems were faced by a cosmetic surgeon. He performed a facelift and the patient was not happy with the result. She demanded her money back. He accommodated her demand in exchange for an agreement not to sue. Several months later, she wrote another letter saying that she would be incurring new expenses in having to undergo a second facelift. She asked him "to find it in his heart to do the right thing" and give her the funds. The subtext was that she might sue if he did not write the check. As of this issue, the surgeon still had not decided what to do, but he clearly felt betrayed. He had assumed that once he wrote the first check, he was done.

Sometimes even a conscious act of benevolence can create problems. As it is sometimes said, "No good deed goes unpunished."

This article answers general professional liability questions. It isn't intended to provide specific legal or tax advice.

*This article first appeared in "Medical Justice Minute" a newsletter of Medical Justice Services, Inc. Jeffrey Segal, MD is Founder and CEO of Medical Justice Services, Inc. He is a Board Certified neurosurgeon and a Fellow of the American College of Surgeons. Dr. Segal may be contacted by mail at Medical Justice Services, Inc. PO Box 49669, Greensboro, NC 27419 Tel: (877) 633-5878. Website: www.medicaljustice.com*