

## “It’s Not Worth My Time!”—The Ethical and Legal Aspects of Physician-Induced Demand

**P**atients have the right to make informed decisions about their health care. However, they may not be able to do so if they are given false, misleading, or incomplete information. A case reported to the Academy illustrates the importance of communicating honestly with patients.

### In Need of Cataract Surgery

A patient wrote to the Academy Ethics Committee about his experience in seeking cataract surgery.

**Seeking a cataract surgeon.** The patient had decreased vision and confirmed findings of 2+ cataracts in both eyes. Only two Academy members accept Medicare assignment in his local network, and he met with each of them.

**A push for premium IOLs.** Both ophthalmologists independently advocated for femtosecond laser–assisted cataract surgery (FLACS) with premium IOLs. Aware that these options would result in significant out-of-pocket expenses, the patient stated that he was comfortable with standard lens implants and understood that he would likely wear glasses after surgery.

**Standard lenses are “not worth my time.”** Neither of the local surgeons was interested in performing surgery with

standard lenses. Indeed, one of them said, “With these new reimbursements, it’s not worth my time.” This same ophthalmologist told the patient that if he chose a standard replacement lens, he would require glasses at all distances postoperatively, his lenses would lack an ultraviolet filter, and a “blade” would be used for the incision and astigmatic correction.

**A letter to the Academy.** The patient asked the Ethics Committee whether the refusal to perform surgery using a standard lens was unethical and a violation of Medicare policy. A review of the patient’s chart revealed that he indicated he was satisfied wearing glasses for everyday use and had no ocular pathology other than 2+ cataracts.

**Troubling concerns.** The patient’s complaint, coupled with documentation found in the record, raised troubling concerns with respect to the Academy Code of Ethics. Of primary concern was the surgeons’ refusal to perform standard cataract surgery because of decreased Medicare reimbursement. (Medicare reimbursement for cataract surgery has shrunk by about 18% over the past five years.)

If a physician uses a procedure less when it appears under-reimbursed

and uses it more when reimbursement rises, that could be considered *physician-induced demand*. The problem with induced demand is that it can override patient needs and informed consent.<sup>1</sup>

Ethical behavior, on the other hand, requires that the patient’s best interests are placed above an ophthalmologist’s economic interests when informing patients about the risks, benefits, and alternatives to a planned procedure.

### Ethics Concerns

Had the patient undergone FLACS with premium IOLs based on the discussion outlined above, the operating ophthalmologist may have been in violation of multiple rules of the Academy Code of Ethics ([aao.org/about/ethics](http://aao.org/about/ethics)).

**Rule 2. Informed Consent.** Although an ophthalmologist may recommend a particular course of treatment, the patient should not be denied the opportunity to consider the advantages and disadvantages of alternatives, even if access to them might require referral to another ophthalmologist. It must be stressed that inadequate informed consent or misrepresentation of material facts is a serious ethical violation, even if there is no harm or poor outcome.

**Rule 6. Pretreatment Assessment.** Ethical standards are met only if the patient’s needs are addressed. It is incumbent upon the ophthalmologist to assume the role of patient advocate by ensuring the appropriateness of the proposed procedures, and by sharing this information with the patient.

**Rule 9. Medical and Surgical Proce-**

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**dures.** Although surgery was medically appropriate in this case, the surgeon strongly advocated for an approach that is unnecessarily costly for the patient. Additionally, the description of the patient's alternative was misleading and misrepresented both the procedure and the potential outcome.

**Rule 10. Procedures and Materials.**

Surgeons have a responsibility to evaluate all surgical options and to consider which are most appropriate for a particular patient. If a procedure is likely to benefit the patient, is medically justified, and is desired by the patient, denying this service may be considered unethical.

**Rule 15. Conflict of Interest.** A conflict of interest is a discrepancy between the ophthalmologist's professional responsibilities to the patient and his or her personal interests or incentives.

## Liability Concerns

**Legal duty.** Physicians have a legal duty to provide patients with truthful information regarding their health status, treatment options, and other relevant information that may affect their care.

**Lack of fully informed consent.** In this case, the consent would have been deficient in these ways:

- **Inadequate disclosure.** If the disclosure of information is inadequate or incomplete, a patient is not able to give fully informed consent. If a patient is not aware of the risks associated with a procedure or treatment or has not been told of the alternative procedures, the patient may be at risk of harm.
- **Coercion.** Patients must be free to make their own decisions without pressure from medical personnel. If a patient feels coerced into giving consent, especially if he or she has paid money out of pocket, this can motivate them to sue the physician.
- **Misrepresentation.** Physicians must ensure that the patient fully understands the nature and purpose of the proposed treatment. If the physician misrepresents information—by, for example, not giving the patient the choice of a standard lens without the use of laser—the patient may make a decision that is not in his or her best interest.

**Liability risk.** If the patient had sur-

gery based on the limited information that the operating physician provided and had a bad outcome or later discovered that he was not told of all available options, the surgeon's liability risk could be high. If the patient then suffers harm or injury because the physician did not provide a full and accurate informed consent, the patient may file a medical malpractice lawsuit against the ophthalmologist, who may be held liable for damages, including for medical expenses and lost wages, as well as for pain and suffering.

**Risk management via honest communications.** By prioritizing honesty and integrity when interacting with patients, physicians maintain trust and greatly lower their potential liability risk.

## Medicare Contract Concerns

It is a violation of the physician's contract with Medicare to 1) refuse to perform a necessary procedure for a Medicare beneficiary when the same services are provided to other patients, and 2) to misrepresent the procedure and persuade the patient to choose unnecessary options. Violation of a Medicare contract may lead to termination from the program, as described in the Medicare Claims Processing Manual: 30.1.1.3 - *Provider Treatment of Beneficiaries*. (Rev.4163, Issued: 11-02-18, Effective: 12-04-18, Implementation: 12-04-18). *In the agreement between CMS and a provider, the provider agrees to accept Medicare beneficiaries for care and treatment. The provider cannot impose any limitations with respect to care and treatment of Medicare beneficiaries that it does not also impose on all other persons seeking care and treatment. If the provider does not furnish treatment for certain illnesses and conditions to patients who are not Medicare beneficiaries, it need not furnish such treatment to Medicare beneficiaries in order to participate in the Medicare program. It may not, however, refuse to furnish treatment for certain illnesses or conditions to Medicare beneficiaries if it furnishes such treatment to others. Failure to abide by this rule is a cause for termination of the provider's agreement to participate in the Medicare program (see the regulations at 42 CFR 489.53(a)*

(2), and also see Pub. 100-01, *Medicare General Information, Eligibility, and Entitlement Manual, chapter 5, §10.2*).

## Antitrust Guidelines

The two ophthalmologists described in the patient's complaint would have risked violating antitrust laws if they had jointly decided to perform only laser-assisted cataract surgery with premium IOLs for Medicare patients. And to encourage other ophthalmologists to follow suit would raise the risk level exponentially. Groups of ophthalmologists should never threaten or imply any form of withholding of services to beneficiaries of Medicare or a private insurer. Such action can constitute a group boycott that violates the antitrust laws and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. Even if the target of the proposed activity is a government program, such as Medicare, that does not render the conduct immune from antitrust exposure. This risk is, of course, highly dependent on specific facts and circumstances.

## The Patient's Best Interests

In this case study, the physicians placed their own financial interests above the interests of the patient, contrary to Principle 2 of the Code of Ethics.

**Patient autonomy.** Patient autonomy is one of the primary tenets of medical ethics. A patient's right to autonomous choice is an ideal; however, the ideal is undermined when misrepresentations limit the patient's autonomy in making informed, well-considered decisions about his or her eye care.

**Physician responsibility.** In this case, the ophthalmologists' lack of honesty, transparency, and integrity does a disservice to both the patient and the profession of ophthalmology. Our patients deserve better.

1 Chandra A et al. Chapter 6. Who ordered that? The economics of treatment choices in medical care. In: Pauly MV, McGuire TG, Barros PP. *Handbook of Health Economics*, Vol. 2. Elsevier; 2011:397-432.

**MORE ONLINE.** For links to more information on these issues, see this article at [aao.org/eyenet](http://aao.org/eyenet).