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MED-MAL MATTERS

In June 2016, we wrote about surgeons who “double-book” surgeries. According to *Outpatient Surgery Magazine*, surgery double-booking is euphemistically called “concurrent surgery” and it occurs when the same primary surgeon is responsible for critical or key components of two or more surgeries simultaneously. The practice came to light after the *Boston Globe* Spotlight Team published an expose on “rampant” double-booking at Massachusetts General Hospital.

The uproar caused by the *Globe* story prompted the American College of Surgeons to publish revised guidelines regarding the practice. These guidelines define procedures as concurrent if key or critical components of the procedures for which the primary attending surgeon is responsible occur all, or partly, at the same time.

Under the revised guidelines, a primary attending surgeon’s involvement in concurrent or simultaneous operations on two different patients in two different rooms is “not appropriate.” The *Globe* quoted Dr. L.D. Britt, a former organization president, who described the guidelines as a “wake-up call” to physicians whose “feet will [now] be held to the fire.”

According to former Mass General anesthesiologist, Lisa Wollman, however: not so much.

As the *Globe* reported last month, Wollman, who practiced at Mass General for 20 years, has filed a whistleblower lawsuit against the hospital and its parent company under the False Claims Act. The complaint alleges that between 2010 and 2015, orthopedic surgeons frequently kept patients under general anesthesia longer than necessary because they were “incentivized” by the hospital to perform as many procedures as possible. Wollman alleges that surgeons routinely scheduled two or three overlapping procedures.

As a result, Wollman alleges, patient safety was compromised when patients were left fully anesthetized, unconscious, intubated and paralyzed for longer than medically necessary, at times in the care of trainees, and without the backup of a qualified surgeon. In one case, according to the suit, a surgeon never appeared at a procedure for which he was the responsible attending surgeon. The patient suffered a “serious airway crisis” with only a senior resident present.

On another occasion, a surgeon scheduled two long shoulder surgeries to start within 15 minutes of each other, resulting in a 65-year-old, hyper-tensive patient being fully anesthetized for 90 minutes before the surgeon even entered the operating room. That surgeon wrote in the patient’s chart that he had participated in the entire surgery and amended his note only when Wollman protested.

After her complaints about patient safety were



ONE SURGEON, MANY PATIENTS

A Civil War-era law helps fight double-booked surgeries

By THOMAS A. DEMETRIO and KENNETH T. LUMB

ignored, Wollman told the *Globe* she felt it was her ethical duty to act to protect patients “who are unknowingly scheduled for concurrent surgeries.” The tool she chose is the False Claims Act.

According to the Department of Justice, the False Claims Act, 31 U.S.C. 3729 - 3733, was enacted in 1863 by a Congress concerned that suppliers of goods to the Union Army during the Civil War were defrauding the country’s troops. The act provided that any person who knowingly submitted false claims to the government was liable for double the government’s damages plus a penalty of \$2,000 for each false claim. Since then, the act has been amended several times.

Section 3729(a)(1)(A) of the modern act states that any person who knowingly presents, or causes another to present, a false or fraudulent claim for payment or approval, or, who knowingly makes or uses a false record or statement material to a false or fraudulent claim, is liable for a civil penalty for each such claim, plus three times the amount of the damages sustained by the government.

The fraud act also contains a qui tam provision, which allows private persons to file suit for violations of the act on behalf of the government. A suit filed by an individual on behalf of the government is known as a qui tam action and that

individual, known as the relator, can receive up to 25 percent of the damages recovered for the government.

But what does a Civil War-era law aimed at contractors who sold the government rancid bacon have to do with patient safety?

As Wollman points out, every surgeon is required by Medicare and Medicaid regulations to certify that they were present for all critical portions of a surgery or they cannot bill for it. Every single bill for a procedure in which the surgeon was not present for all critical portions is a violation of the False Claims Act and subject to treble damages and penalties.

One of the main drivers of double-booking is the desire to make more money. When hospitals and surgeons put patients at risk by incentivizing double-booking, then that old Civil War statute may have everything to do with patient safety. [CL](#)

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