

# Great Expectations: Liability Risks of Unrealistic Surgical Goals

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**OMIC**

**OPHTHALMIC MUTUAL  
INSURANCE COMPANY**

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# DISCLOSURES

- Dr. Iwach is a member of OMIC's Risk Management Committee.
- Hans is employed as a Risk Manager at OMIC.
- **Photos shown are not of the actual plaintiffs**

Consent ≠ Agreement

Patient Goals?

Vs.

Surgeon Goals?

# Great Expectations



- The cases chosen illustrate the range of disconnection between ophthalmologists and their patients...and the liability consequences if not managed.



# Adult Strabismus Surgery

# Background

- Left eye had drifted outward since childhood
- Had eye discomfort with visually demanding tasks when tired
- Asked his daughter's ophthalmologist about solutions

# Exam

- Poorly controlled intermittent left **exotropia**  
20 prism diopters for distance,  
30 D for near
- Pt. Wants surgery to correct

# Informed consent

- ✓ Under- and overcorrection
- ✓ Diplopia
- ✓ Need for additional surgery
- ✓ Loss of sight
- ✓ Infection and bleeding

# RECORD

## POV 1

Significant double vision

Exam: variable intermittent left esotropia  
up to 20 PD.

Early overcorrection with likely  
accommodative component

Plan: Trial 9 PD Fresnel prism base out left  
RTC 1 week



# RECORD

## POV 1

Significant double vision

Exam: variable intermittent left esotropia up to 20 PD.

Early overcorrection  
component

Plan: Trial 9 PD

RTC 1 week

## POV #2

Persistent diplopia

Exam: Variable esotropia 9-15 PD

Reduced esotropia

Plan: trial of eye drops to reduce variability  
of esotropia (ecothiopate)

RTC 1 week

# RECORD

## POV 1

Significant double vision

Exam: variable intermittent left esotropia up to 20 PD.

Early overcor

## POV #2

comp

Plan:

RTC 1

## POV #3

Did not get drops, no change in diplopia

Exam: Esotropia 10 PD

Fuses between 8 -12 D base out prism

Plan: use drops nightly

May need surgery if persists

# RECORD

## POV 1

Significant double vision

Exam: variable intermittent left esotropia up to 20 PD

Early on **POV #2**

compos Persistent diplopia

Plan: Tr Exam: **POV #3**

RTC 1 v Reduce Did not get drops, no change in diplopia

Plan: tr Exam: Esotropia 10 PD

(ecoth **POV4**

RTC 1 Slight improvement with drops

Less esotropia 9 P with some variability

Small symptomatic improvement but no significant improvement in measurements

Continue drops and prism

RTC 1 week

# Disconnect

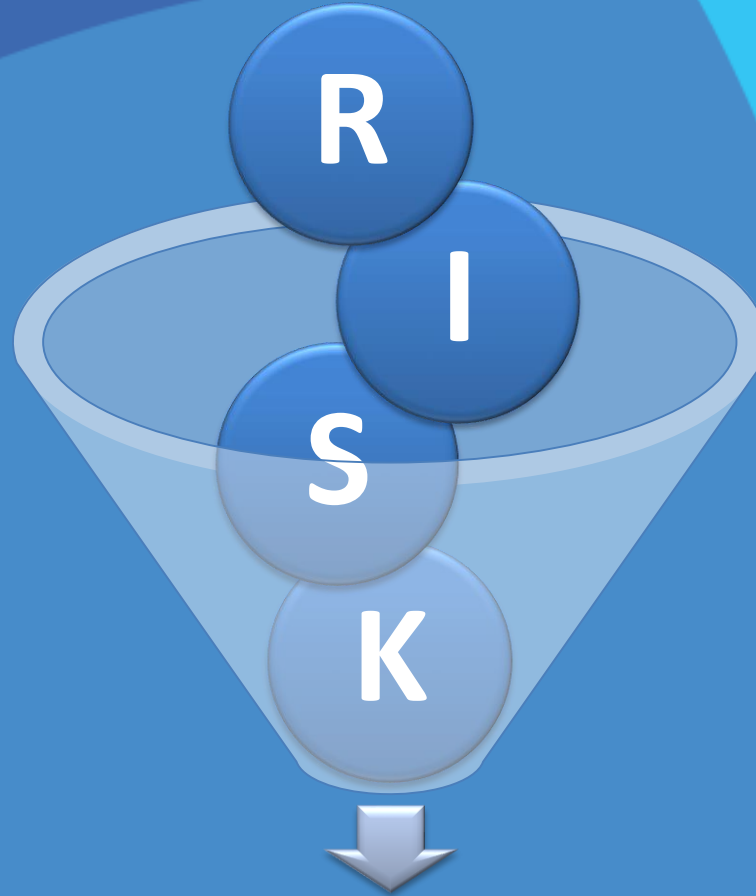


- **Patient called to request surgery**
- Preop visit
- Significant improvement
- 4 PD primary, 4 right, 8 left. Fusion at near with no esotropia.
- Surgery cancelled
- Never returned, filed claim

# Outcome



- Patient sought second opinions from two academic experts
- Both advised him to wait since the diplopia was improving
- OMIC review strongly supported
- Plaintiff attorney advised of positive review
- Did not pursue



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# Patient's perspective

- Lived with strabismus for a long time
- Decides on surgery to change appearance and vision
- Wants quick and complete resolution but:
  - Did not like wearing prism
  - Drops gave him a headache

# MD's perspective

- Long-term problem
- Expected and achieved slow improvement in alignment and diplopia following surgery
- Defendant's opinion: "High maintenance but not unreasonable..."
- Academic expert's opinion: "He is, of course, disappointed... Waiting is far superior [to Botox or additional surgery]."



# Challenge



PATIENCE

Is A Virtue

lol/ MotivatedPhotos.com

# Cultivate resiliency

- **Initial visit with diplopia**
- “We talked about this known complication, but I’m sorry you got it. Double vision can be very hard to deal with. Can you work? Can you drive?”
- “The healing process can take more than a month. What can I do to help you handle the double vision during that time?”



# Cultivate resiliency

- **Second visit**
- “The prism wasn’t enough, so I want you to try some drops.”
- “I also want to check in on how this is impacting you. It’s been two weeks since the surgery. How do you feel about the time your eye is taking to heal? What problems is this causing?”



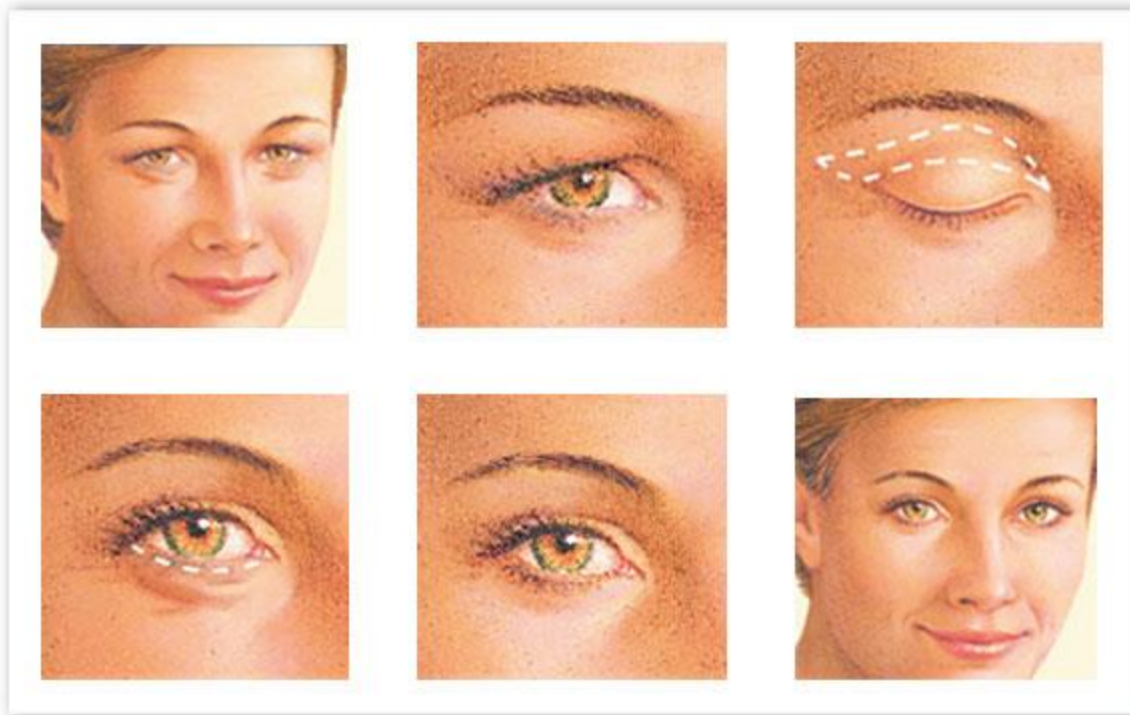
# Engage

- Week 3: “I think the drops would help. You didn’t fill the prescription I gave you last week. **Would you be willing to try the drops now?**”
- Week 5: “Thank you for being willing to take the drops. You might need another operation. But I’d like to give your eye more time to heal, and continue with the prism and drops. **Are you willing to wait?**”









## Eyelid Surgery

# Background

- Patient presented with forehead and eyebrow ptosis, eyelid involutional ptosis, and dermatochalasis
- VF tests confirmed
- upper lid problems interfered with her vision  
**(met criteria for functional upper eyelid surgery)**
- Agreed to surgery for these functional problems; covered by Medicare
- Also wanted cosmetic surgery on her lower eyelids and understood “out of pocket” ... signed ABN



- Distance between upper lid margin and light reflex (MRD)



- Mild Ptosis (2 mm of droop)



- Moderate Ptosis (3 mm droop)



- Severe Ptosis (4 mm or more droop)

# Post-op

- Small granuloma temporal LLL (excised and resolved)
- Persistent web in medial aspect of RUL
  - Treated with multiple Kenalog injections
  - “Touch up” surgery in office
  - Did not offer other surgical treatment





# Opinion

- 10 months, 2<sup>nd</sup> opinion with partner
- Patient saw 2 other MDs
- All three recommended surgical correction (z-plasty)
- Patient decided on outside MD to do the surgery

# Demand letter

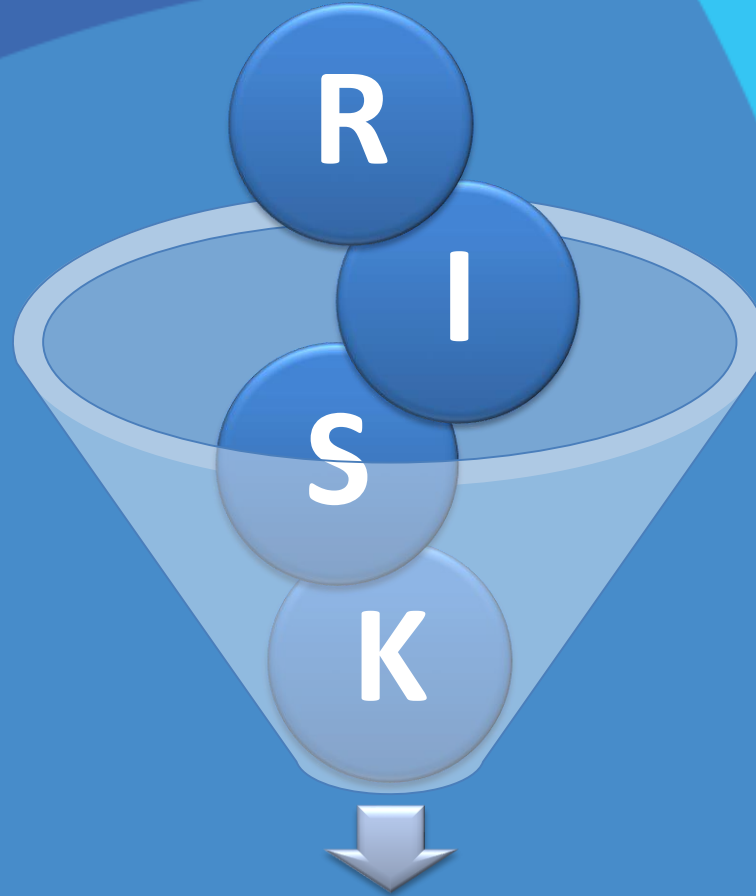
- Plaintiff wrote directly to MD (no attorney)
- Requested **\$5660** to pay for surgery by plastic surgeon to correct the web problem
- Requested another **\$15,000** for 18 months of pain and suffering

# Review

- Web is known complication of blepharoplasty
- Met standard of care for functional upper lid surgery
- **Concern:** Despite persistent complaints about web for 18 months, did not offer surgical alternative of z-plasty or skin graft

# SOC met claim denied

- The statute of limitations passed
- Closed without payment

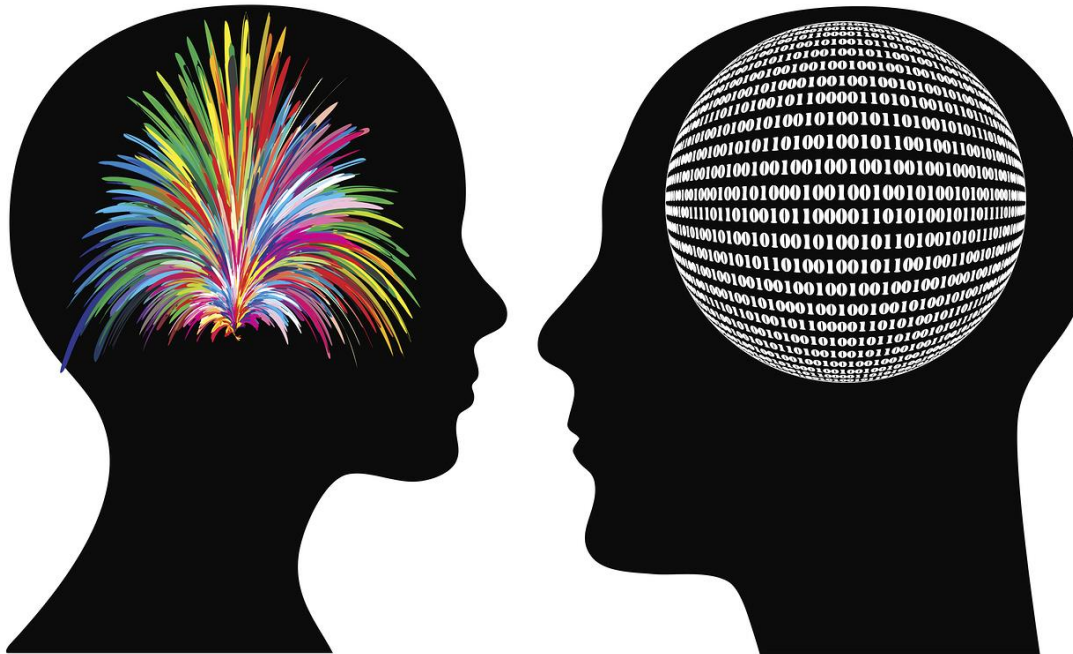


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## Perceptions



- Reported concerns +18 months, often in writing
- Told “be patient”
- MD “trivialized” her concerns
- Felt sx options were not explained

- “This patient wanted an advanced cosmetic result on an insurance budget.”

# Lessons learned

- Reviewer: Treatment of persistent web was **“reasonable but not sufficient to solve the problem”**
  - Defendant agreed with the concerns raised by the reviewer, and now offers surgical treatment earlier in the postoperative period
  - Works harder to explain to the patient the difference between functional and cosmetic surgery

# Explaining options and costs

- Problem with premium IOLs and lid surgery
- Must clarify what is and is not covered by Medicare
- Do not offer option that is not advisable





# Premium IOL

# High expectations from the start

- Engineer presented for LASIK evaluation
- Exam revealed early cataracts
- Given trial with contact lenses
- Advised not to have LASIK, wait until cataracts worse
- Noted in medical record that patient had “higher than average” expectations

# Willing to wait for the best

- Wanted to wait for multifocal IOLs to improve since wanted “high quality vision at all three distances”
- Currently wearing bifocals and did not want to wear glasses
- Surgery advised 2 years after initial exam when reported problems with poor night vision, glare, BCVA 20/40

# IOL options

- Surgeon appreciated that patient was engaged and wanted details, so sent links for available IOLs
- Patient wanted the most advanced presbyopia-correcting IOL and high quality vision at all distances
- Advised that with preexisting astigmatism, had 10 to 20% chance of needing PRK for optimal results

# Shift from engaged to demanding

- Uncomplicated surgery
- POD 1: UCVA 20/60 -1 (limited exam)
  - **Patient did not have time for full visit**
- POD 7: UCVA 20/30-, J1+ @ 14”
  - Mild hyperopia and cylinder
  - Eye still healing with some dry eye and corneal edema

# Expected VIP treatment

- POW 4: 20/20 -2 J1 @ 16" BCVA
  - Saw OD in practice, **unhappy surgeon was not there**
  - OD demonstrated possible improvement with glasses and gave prescription
  - Appointment scheduled with surgeon for one week later

# Surgeon explains options

- POW 5: 20/20-, J4 @ 12-16" with correction for hyperopia and astigmatism
- Would perform PRK at no additional charge once prescription stabilized
- Wanted full details about his IOL, so MD obtained and sent Alcon article



# Plaintiff lost patience

- Requested copy of records for second opinion
- MD encouraged him to do that and waived the usual copying fee
- Never returned

# Plaintiff attorney letter to MD

- Went to academic center for IOL exchange, chose monofocal IOL
- Soon needed YAG
- That MD opined that multifocal IOLs do not offer high resolution at all three distances
- Implied in record that IOL not appropriate and incision too large
- **\$15,000 demand**

# OMIC response

- Sent letter on MD's behalf to plaintiff attorney
  - Sorry your client was not satisfied with initial outcome and chose to leave before completing the recommended treatment plan
  - Respectfully decline to pay
  - Contact OMIC if wish to pursue

# Plaintiff attorney response

- Subsequent treating MD willing to testify against defendant
- Plaintiff “not unreasonable” in requesting **\$28,000**
- Sent authorization to obtain subsequent treater’s records

# While waiting for records...

- Filed lawsuit before OMIC received records of 2<sup>nd</sup> surgeon (as impatient as his client)
  - Negligence
  - Lack of informed consent
  - Intentional infliction of emotional distress
- Defense counsel challenged grounds for “intentional” claim

# Plaintiff on informed consent

- Testified he read the 7-page consent form with care, especially the complications and possible need for IOL exchange
- Acknowledged that surgeon had detailed informed consent discussions with him
- Stated that he and the physician agreed at the first visit that he had high expectations
- **But IOL did not provide what he asked for**

# Defense expert

- **“Totally without merit...”**
- Excellent final outcome
- One of many patients who are unable to adjust to multifocal
- Did not return to surgeon for treatment
- Development of PCO requiring YAG is well-known complication, not evidence of negligence
- Critical of speculative comments made in record by 2<sup>nd</sup> surgeon

# Plaintiff expert changes mind

- Defense attorney advised plaintiff attorney of strongly favorable defense expert review and of criticism of comments made in record by 2<sup>nd</sup> surgeon
- 2<sup>nd</sup> surgeon decided was not willing to serve as plaintiff's expert after hearing feedback
- Plaintiff dismissed case

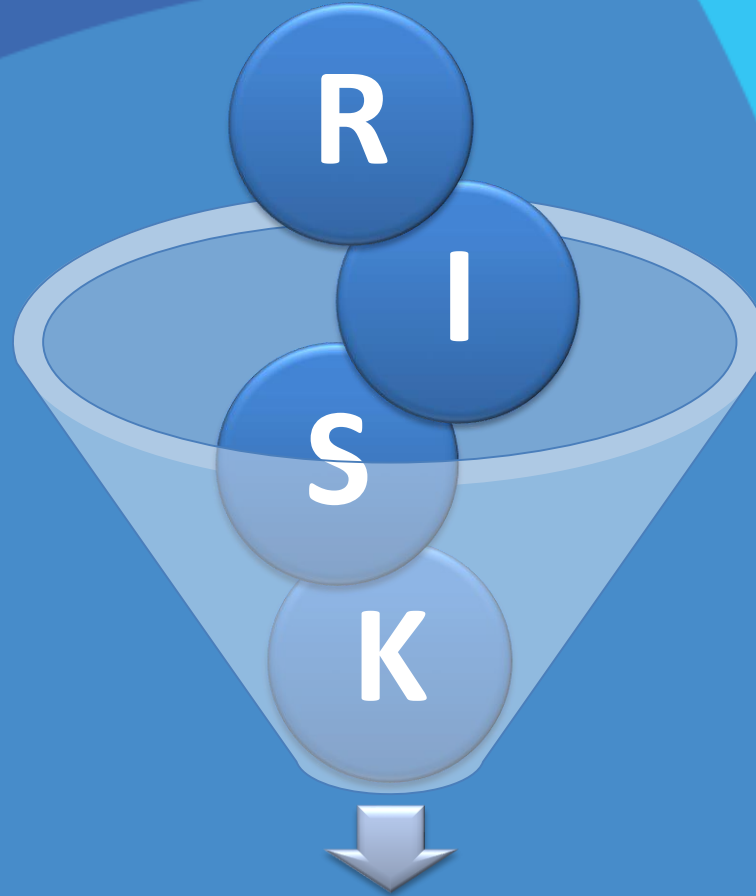


# Plaintiff posts negative YELP review

- Beware of x
- Overpromises
- Recommends expensive and inappropriate lenses
- Does not advise of compromises to vision after surgery
- Dr. X did not apologize or offer refund for failed surgery

# Defense attorney responds

- Wrote to plaintiff attorney and reminded her that
  - Plaintiff dismissed with prejudice (can't sue again)
  - Expert no longer critical or willing to testify
- Comments on YELP may be defamation
- Remove immediately



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# Plaintiff and defendant in accord

- Ophthalmologist happy to work with engaged, detail-oriented patient
- Many communications about patient's goal
- Provided detailed information about types of IOL and articles about one chosen

# Disconnect

- Ophthalmologist did not explore what would happen if the patient did not achieve high quality vision at all three distances
- Did not realize that the desired vision was actually a demand and that patient felt the result was guaranteed

# How to gauge readiness

- “I understand your goal and believe this IOL will meet it.
- But how will you feel if you do not get the vision you want? Will you feel like the surgery was worth it?”

# When to walk away

- Patient unwilling to accept anything less than perfect result
- Keeps stating expectation of perfect result after consent discussion
- “I am not comfortable proceeding since I cannot guarantee this outcome.”

# Should you offer a refund?

- If outcome the result of **error (wrong IOL)**, waive or refund your own fees for the prior and subsequent procedures in conjunction with apology
  - Often very effective in mitigating patient anger and preventing lawsuit
  - Clearly define what fees will be waived and for how long



# Should you offer a refund?

- Discuss with the Claims Department if you receive a written demand
- Refunds issued after a written demand may need to be reported to the NPDB
- Some plaintiffs may be willing to accept less money than demanded

# Should you offer a refund?

- If decide to pay fees of another physician, ask the physician to bill you directly rather than pay or reimburse the patient
  - No loss of money for patient
  - Ensures that money is for remedial medical expenses
  - Amount paid = actual costs
- **This is “indemnity payment” so call carrier.**

# Negative online reviews

- **Free speech vs. defamation**
- Free speech is protected
- Includes personal opinions and perceptions
- These do not have to be accurate

# Negative online reviews

- You must abide by HIPAA regulations and patient confidentiality in your response
- Contact patient and offer to discuss concerns if can determine who posted comments
- If patient uncooperative or difficult, follow usual response process

# Negative online review

- Contact the site
  - Explain fraudulent or inaccurate
- Seek a subpoena (consult an attorney first)
- File a lawsuit
  - Must show inaccurate and causing harm
- See [You've been yelped](#) at [www.omic.com](http://www.omic.com)

# Questions?

## FOLLOW-UP QUESTIONS

- [hbruhn@omic.com](mailto:hbruhn@omic.com) or [riskmanagement@omic.com](mailto:riskmanagement@omic.com)
- Toll free 800-562-6642, extension 662
- Direct 415-202-4662

## RESOURCES

- [www.omic.com](http://www.omic.com)