



PHYSICIANS' LIABILITY IN THE OPIOID CRISIS: A RECOMMENDATION

By Edward J. Krill, Esq.

The “opioid crisis” has drawn national attention to the fact that drug users are dying in alarming numbers and the problem seems to be getting worse. Reports from the Centers for Disease Control provide a picture of massive injury from substance use:

- In 2014, 47,055 people died from drug overdoses
- Increasingly, opiate users are combining prescription drugs with heroin
- The number of prescriptions for opioids tripled from 2000 to 2016
- In 2010, physicians wrote enough prescriptions for oxycodone to provide a one month supply to every adult American

In response to this situation, government and professional organizations have begun to take action. The DEA has imposed penalties on five times as many physicians in 2016 as five years before. At least three physicians have been prosecuted for deaths resulting from the alleged over-prescription of pain killer drugs. Civil suits are being filed for “negligent prescribing” when patients overdose on prescribed drugs. The risks to physicians of continuing to set patient satisfaction as an important goal in reducing pain are now fairly evident.

The following are recommendations to consider if the prescription of this type of pain medication is a regular component of a practice. However, there is no easy answer to this problem and each case should be assessed on an individual basis.

Evaluation: Conduct and document a risk-benefit assessment with patient participation. This would consist of asking the patient that will receive a new prescription for pain killers and patients who have been taking such drugs. The assessment would ask whether the patient is taking other drugs and the source, whether steps are being taken by the patient to remedy the underlying cause of the problem requiring pain medication, possible urine testing, perhaps a conference with family members and other care givers. One should ask about any history of addiction to any substance, including alcohol. The point of this exercise is to demonstrate that the prescriber evaluated the impact of such drugs on this individual patient and was not negligent in setting the dose, requiring follow-up visits or otherwise monitoring initial drug suitability or continuing prescribing. **(continued)**

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Alternatives: Think outside the scope of your specialty and consider the total patient profile, looking for other sources of pain killers. Ask the patient for a complete statement of his or her health situation as an intake or continuing care form, including a listing of other potential prescribers. When another source of such drugs seems probable, ask the patient and in situations that pose significant risks, call and inquire of the other practitioner(s).

Individualize Dosage: Bear in mind that long term use of pain killers can result in a tolerance, a loss of effectiveness at the original dose and a need for increased dosage to achieve the relief of pain once obtained. Balance this against the CDC's recommendation that no more than 100 milligrams of opioid medication per day be prescribed for any patient. The CDC and perhaps many hospitals and other health care organizations do not differentiate between patient with chronic lower back pain and a terminal patient with bone cancer. A careful justification for the dosage prescribed should periodically be entered into each patient's record to refute any allegation that the prescribed dosage was negligently arrived at.

Responsibility to Family: Be aware that you may have responsibilities to persons other than the patient. Obstetricians and pediatricians are most likely to be seen as needing to consider the welfare of a child in utero, a newborn or a young toddler who is in the care of someone who may be impaired. Child abuse and neglect laws that require reporting come to mind in this situation.

There is no easy answer to this epidemic for the practitioner. Avoiding risk means not serving patients with legitimate need for pain relief. Thoughtful, careful evaluation of each patient's needs, the potential for addiction and overdose and patient education should help avoid some of the liability that is being imposed on clinicians when patients suffer harm from these drugs. Failure to do so can be costly.

D.C. CIRCUIT ADDRESSES TELEPHONE CONSUMER PROTECTION ACT

By M. Therese Waymel, Esq.

On October 19, 2016, the U.S. Court of Appeals for the D.C. Circuit heard oral argument in *ACA International v. FCC* (No. 15-1211). The D.C. Circuit's decision in *ACA International* is expected to address a critical area of the Telephone Consumer Protection Act ("TCPA") regarding what constitutes an "automatic telephone dialing system" (or "ATDS") and more specifically, what type of device has the capacity to fall underneath the definition of an ATDS.

In the event that the TCPA has not made it to the top of your short list of issues in the past year (or ever), in short, the TCPA was designed to safeguard consumer privacy through the regulation of the use of auto dialers and prerecorded messages in unwanted telemarketing communications. The consequences of noncompliance come at a high cost, as the TCPA permits the award of treble damages while affording no cap on damages.

Though the issue of what constitutes an ATDS may seem like a small distinction in the overall TCPA scheme, the broadly defined term has created significant confusion in the business community as to the certainty of the statute's scope and the parameters of compliance. Such uncertainty has resulted in costly litigation and multimillion dollar penalties at the expense of businesses spanning nearly every major industry. *ACA International* provides the D.C. Circuit the opportunity to clear up some of the confusion.

Regardless of whether the D.C. Circuit takes advantage of this opportunity, the *ACA International* decision is sure to deliver sweeping consequences affecting the future of TCPA compliance. Nearing the one-year anniversary of oral arguments in *ACA International*, the closely-watched appeal undoubtedly has a captive audience on the edge of their seats. Stay tuned.