



## PHYSICIANS' LIABILITY IN THE OPIOID CRISIS: A RECOMMENDATION

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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

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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.