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Physician liability: When an overdose brings a lawsuit

Doctors often face blame after injuries and deaths by prescription drugs. But taking proactive steps can help spot risky situations and reduce liability.

By ALICIA GALLEGOS, amednews staff. ***Posted March 4, 2013.***

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The story sounded all too familiar to medical liability defense attorney Catherine J. Flynn. A patient taking prescription drugs had attempted suicide. The family blamed his physician.

The patient was on an antidepressant, and unbeknownst to his psychiatrist, he also was taking a narcotic prescribed by an orthopedist. In a drug-induced haze, the man threw himself down a flight of stairs, breaking his neck, said Flynn, chair of the Health Law Group at Weber Gallagher Simpson Stapleton Fires & Newby LLP in New Jersey. Family members sued the psychiatrist for negligence, and the case later was settled. Attorneys and the doctor decided it was not worth going to trial, even though it wasn't determined that the doctor did anything wrong.

"You had a very sympathetic plaintiff, really young, who would be sitting in the courtroom in a wheelchair," Flynn said. "It comes down to deciding, do you want to take the risk of putting this decision in the hands of a lay jury?"

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As prescription drug overdoses rise nationwide, attorneys are seeing more physicians held liable for negligence.

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Doctors make easy targets for lawsuits because they often are seen as placing would-be weapons into patients' hands, said Michael A. Moroney, a health law attorney at Flynn's New Jersey firm.

The drug overdose death rate has more than tripled since 1990.

"It's a growing problem," he said. "You have suicides. You have overdoses or near-deaths. Of course, they want to blame the doctor. [He or she] is blamed for having set patients on that course."

But paying closer attention to patients who request pain medication and communicating better with other health professionals can prevent such deaths, legal and medical experts say. Being proactive about prescription management also can deter lawsuits or aid in doctors' defense if they are sued.

"When a patient suffers an injury as a result of a prescribed medication, questions will always arise as to whether the medications were needed, whether a proper history and physical examination was conducted, or whether the physician properly documented the encounter," said Christopher E. Brown, a Florida attorney with The Health Law Firm. "Any failure on the part of the physician can open him [or] her up to liability."

A rising epidemic

Recent federal data show that drug overdose deaths have risen for the 11th straight year, with most fatalities stemming from prescription medication. In 2010, 38,329 people died of drug overdoses, up from 37,004 deaths in 2009, according to data from the Center for Disease Control and Prevention's National Center for Health Statistics. The numbers were published Feb. 20 in *The Journal of the American Medical Association*. The overdose death rate has more than tripled since 1990.

Of the pharmaceutical-related overdoses in 2010, 74% were unintentional, 17% were suicides, and 8% were undetermined. The growing epidemic has lead some states to develop drug monitoring programs to track drug users, while hospitals and health centers in some cities have tightened restrictions on medication prescriptions and refills.

Most drug overdose deaths are from prescription drugs.

"The treatment of pain and the use of controlled substances to medicate is an ever-volatile area," said Alfred F. Belcuore, a medical liability defense attorney in Washington. "Doctors have to be vigilant to make sure the patient is not abusing the prescription, not selling drugs and not overusing."

To ensure more training among physicians, the Food and Drug Administration issued a rule in 2012 requiring opioid manufacturers to fund continuing education programs for doctors and others who prescribe the medications. The training sessions will start in March, and participation for health professionals will be voluntary.

At its Interim Meeting in November 2012, the American Medical Association House of Delegates directed the AMA to promote doctor training and competent use of controlled substances and encourage use of certain screening tools to identify patients at risk of abusing prescription drugs. The AMA also launched a series of 12 webinars on topics related to responsible opioid prescribing. The webinars are available online and free to all physicians.

Pressure to settle

Plaintiffs who overdosed have sued physicians successfully. In May 2012, an Alabama jury awarded a widower $500,000 after he sued his wife's family physician. Attorneys for the husband said the woman died of an accidental overdose after being prescribed narcotic pain medications and central nervous system depressants. In April 2012, a woman was awarded $1.9 million after she sued her family physician. She claimed he overprescribed her methadone, leading to brain damage after she stopped breathing.

However, some physicians have won in such cases. A jury ruled in favor of a Massachusetts primary care physician in 2011 after family members accused him of overmedicating their daughter. The patient died after being prescribed

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the antidepressant Lexapro in a dosage higher than recommended but consistent with customary practices, said Mark Horgan, senior vice president for claims at CRICO, a professional medical liability insurer in Massachusetts.

But because of excessive injuries and tragic circumstances surrounding most overdoses, the majority of lawsuits settle, legal experts say.

"Doctors are accused of doing things wrong when they didn't do anything wrong at all. I see that a lot," said pharmacist Jeffrey Fudin, PharmD, a pain management specialist and Fellow of the American College of Clinical Pharmacy. He blogs about pain therapeutics and opioid risk management at Paindr.com. "Doctors are being sued because the patient was harmed when really the patient harmed himself."

Concern about potential drug abuse and lawsuits causes some physicians to steer away from prescribing powerful drugs. But primary care physicians especially are sometimes the only available doctors for legitimate patients who need pain relief, said Mary Lynn McPherson, PharmD, professor and vice chair in the Dept. of Pharmacy Practice and Science at the University of Maryland School of Pharmacy in Baltimore.

"We just don't have enough pain specialists," McPherson said. All "practitioners need to be very well-versed in the guidelines of how to treat pain. I think we limit exposure to drugs as much as we can, but when we need opioids, we need to screen for abuse."

Spotting abuse

Physicians blamed for overprescribing often say they were misled by patients about their symptoms and need for medication, Flynn said.

"They say, 'I knew them. I trusted the patient was telling me the correct history and that the complaints of pain were real,' " Flynn said. "There's that patient who can take advantage of the nature of their relationship with the doctor."

Treating every patient like a suspect is not necessary, but asking questions and verifying medical history is, legal experts say. Propensity for drug addiction isn't apparent by a patient's appearance, Fudin said. He recalled an 83-year-old patient who recently came to his office for morphine. She later tested positive for cocaine.

"You can't access a patient for substance abuse just by looking at them," he said. "They should all be treated equally. Everybody should be screened."

The National Institute on Drug Abuse recommends that doctors ask patients about their past drug use, including recent and lifetime use and type and amount of substances. Physicians should discuss findings and concerns with patients. The NIDA test is among several models that help physicians determine patients' risk levels for drug abuse. Past medical records also should be reviewed.

Urine tests are another tool for determining whether a patient may be abusing prescription or illicit drugs. Unusual behavior and risk patterns may warrant such a test, said a March 2010 article in *American Family Physician*. Other times to consider urine testing include when writing a new prescription for a controlled substance, when increasing a patient's dosages of analgesics and when referring patients to a pain or addiction specialist. Fudin, a clinical pharmacy specialist at the Stratton Veterans Administration Medical Center in Albany, N.Y., said his clinic conducts a urine test on every new patient and does random tests.

Monitoring and documentation

Having patients sign a contract agreeing not to abuse his or her prescriptions also is a good idea, Belcuore said. Such contracts reinforce "a doctor's right to terminate care if the patient is breaking promises they have made or using the drugs inappropriately," he said.

Physicians should conduct regular monitoring of patients on prescription medication and stress short-term, rather than long-term, drug use, said Robert Wettstein, MD, a forensic psychiatrist and clinical professor of psychiatry at the University of Pittsburgh.

He added that physicians should share addiction risks of drugs with patients

Quotable

What was said: "The basic idea is that patients have some rights, but they don't have the right to be attended only by someone of a particular race."

Who said it: David C. Harlow, principal of the Boston-based Harlow Group, a health care law and consulting firm, on action taken at a hospital after a patient's husband demanded that African-American nurses not be allowed to take care of his baby

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and counsel them on the dangers of sharing prescriptions with relatives and friends. Communicating with other treating physicians and pharmacists also is key to spotting abuse, McPherson said.

"Prescribers know when all the little hairs on the back of their neck go up, and that's probably happening to the pharmacist, too," she said. "Pick up the phone and have a 30-second conversation with that pharmacist" about those concerns.

Brown, of The Health Law Firm, said thorough documentation when prescribing drugs is a must.

"Physicians must make sure their records meet all requirements of state laws and regulations," he said. "In cases where a patient has been 'doctor-shopping' or seeing multiple physicians in order to abuse opiates in some form, we frequently see state disciplinary investigations initiated against each physician who prescribed that individual medication. In most cases, these physicians have no knowledge of the other prescribers. Disciplinary actions such as these can often be defended when the physician has taken the safeguards to properly document the encounter."

If physicians are unsure how to proceed with a patient, Fudin said they should ask for guidance from a specialist or a colleague with more experience.

"This is particularly important with drug interactions or complex dosing and in cases where aberrant behavior is involved," he said. "It's just not worth the risk to treat these complex patients without documented input from an outside expert. If you ever do get sued, at least you can say, 'I got another opinion from an expert, and it's all in the chart.' Should your decisions come under scrutiny, you will want to show that the average reasonable provider would have acted similarly under the same circumstances."

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ADDITIONAL INFORMATION:

Identifying potential prescription drug abusers

Physicians face challenges when trying to spot patients who may be abusing prescription drugs or inappropriately sharing them. However, certain behavior raises red flags for patients who:

- Refuse to grant permission to obtain old records or communicate with previous physicians.
- Demonstrate reluctance to undergo comprehensive histories, physical examinations or diagnostic testing, especially urine drug screenings.
- Request specific drugs (often because of the higher resale value of brand names).
- Profess multiple allergies to recommended medications.
- Resist certain treatment options.
- Threaten doctors or display anger during visits.
- Consistently target appointments at the end of the day or during off hours.
- Repeatedly lose prescriptions.
- Request escalation in dosages.
- Demonstrate noncompliance with prescription instructions.

Source: "Urine Drug Screening: A Valuable Office Procedure," *American Family Physician*, March 1, 2010 (link)

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Reducing legal risks of prescribing opioids and other drugs

After an overdose or drug injury, it's not uncommon for patients and family members to sue the physicians who prescribed the drugs. To reduce liability, attorneys recommend determining the best course of treatment for the patient, while ensuring the proper documentation is completed.

Patient history. Obtain medical history from the patient regarding use of narcotics prescribed by other physicians at any time, the reason taken, frequency and dosage. This includes history of emergency department or clinic visits and whether treatment included the patient being given pain medication or narcotics. Ascertain diagnostic tests performed and the results.

Clinical work-up. Order appropriate diagnostic tests to support prescription of pain medications. Document all physical examination findings.

Patient education. Educate the patient on the use of the pain medication being prescribed, including the known risks and complications and potential for dependency. Document the discussion with the patient.

State regulations. Doctors should educate themselves and their staffs on the relevant licensing board, federal and state regulations governing the prescribing of medications, narcotics and controlled substances.

Referrals. Make referrals to specialists as appropriate. Consider such referrals especially for patients who request or need long-term pain medication.

Sources: Catherine J. Flynn and Michael Moroney, Weber Gallagher Simpson Stapleton Fires & Newby LLP in New Jersey

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"Pharmaceutical overdose deaths, United States, 2010," *The Journal of the American Medical Association*, Feb. 20 (jama.jamanetwork.com/article.aspx?doi=10.1001/jama.2013.272)

AMA webinars on prevention and public health, including a series of 12 webinars on opioid prescribing (eo2.commpartners.com/users/ama/series.php?id=1214)

"Urine Drug Screening: A Valuable Office Procedure," *American Family Physician*, March 1, 2010 (www.ncbi.nlm.nih.gov/pubmed/20187600)

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