Practice Tips for Prosecuting and Defending "Pill Mill" Cases

By Michael Metz

There is a recent epidemic of arrests of physicians and their staff in what are commonly being referred to as "pill mill" cases. The state and federal governments are expending significant resources in prosecuting these cases. Whether a state or federal prosecution, there are many common issues in preparing these cases that a practitioner on either side of the fence must consider. This Practice Points article identifies some issues that are paramount to success in the battle ahead.

Typically, "pill mill" cases result in physicians being arrested and charged with racketeering and multiple counts of trafficking in controlled substances. They generally follow a factual scenario as follows: A physician is employed with a facility that sees a high volume of cash only paying patients.[1] Many of the patients travel in from other States to obtain pain medication (controlled substances). They are generally required to have with them some form of a radiological test. If they do not, the physician will ordinarily provide a prescription to obtain one locally. Generally, the patients do not have prior medical records with them, but discuss their injury(ies) with the physician, possibly including the pain medications they have been previously prescribed. After a physical examination, albeit sometimes brief, the physician prescribes the patient medications; often a combination of oxycodone, roxicodone and xanax or similar type medications.

1. Learn the regulations, statutes and other laws that are applicable in your jurisdiction.

The ultimate question in these cases will be, with slight variation depending upon the jurisdiction, whether the physician was prescribing the medication in good faith and for a medically necessary purpose, or was he merely utilizing her license to, in effect, sell drugs. The applicable regulations and laws in your jurisdiction provide a roadmap to a successful result for both the prosecution and defense. These resources should be your starting point in defining the rules that govern whether a physician has committed a criminal act:

a. Board of Medicine/Dept. of Health(regulations)
b. State Statutes
c. Jury Instructions
d. Administrative Code

2. Meticulous review of patient charts is mandatory.

For the defense, the client will be the most valuable asset in reviewing the patient files with you in order to substantiate her treatment plan and prescribing habits.[2] In reviewing the charts, create a spreadsheet that focuses on the issues relevant to your case. Here are some suggestions:

a. Did the physician keep an "adequate" medical chart? Compare the requirements of your jurisdiction to that which is contained in each particular chart. For example, Florida Administrative Code, Section 64B8-9.003, provides the Standards for Adequacy of Medical Records. It sets forth minimum requirements that include "... patient histories; examination results; test results; records of drugs prescribed, dispensed, or administered; reports of consultations and hospitalizations; and copies of records or reports ... in determining the appropriate treatment of the patient." As you review each patient chart, check the appropriate spot on your spreadsheet to indicate whether the physician or his assistant (when appropriate) fulfilled the obligation.

b. Did the physician issue the prescriptions in "good faith" and with medical necessity? Your spreadsheet should focus on whether the medical charts demonstrate the following indicia of good faith:

1. Do they contain pain management contracts;
2. Did physician make referrals to specialists (ie. neurologists, orthopedists, chiropractic, physical therapy, etc.) as a treatment option;
3. Were there referrals for radiology tests (ie. MRI, CT scans, etc.) to *assist* in diagnosing the patient's pain[3];
4. Were the patients required to provide urine samples to confirm they had the medication in their systems (as would be expected if taking the medication in accordance with physician's instructions)[4];

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5. Did physician titrate the medication as needed in order to provide individualized treatment of patients;
6. Were prior medical records obtained;
7. Did physician or his assistant conduct an "adequate" physical examination (was it a "directed" or "focused" type of examination);
8. Were patients discharged for violating the terms of the pain management contract (ie. diverting medication, using other drugs or alcohol in addition to those prescribed, etc);
9. Did physician warn patients about not sharing or diverting medication as well as the medications side effects;

c Your physician will have seen more patients than those specifically chosen and named in the Indictment by the government There may be several thousand additional patient charts. Unless your client tells you that all of the files are similar to those specifically named in the Indictment, then the time consuming task of reviewing all (or a relevant sample) of the remaining files is imperative. Focus on those same issues that were discussed, *supra* The purpose is to establish that, as a whole, your physician's treatment and prescribing habits were at least minimally compliant with the relevant regulations and statutes

3. **Experts**

Expert(s), with full knowledge of the applicable regulations and laws of your jurisdiction as well as the specific content of the patient charts, are a key to victory for either party. As with all experts, she must be qualified if you want your jury to accept your requested verdict. Here are some issues for consideration when it comes to experts in these cases:

a. How many and which type of experts should you consider for your case? Finances aside, a practitioner should consider not only utilizing a pain management expert (ie anesthesiologist, etc.), but also a pharmacologist (that can explain the propriety (or not) of prescribing the different types of medication to a given patient). Consider, as with all experts, if they have the qualifications that a jury would expect them to have. For example, does she hold a Board Certification in pain management? Does she have a clinical practice or a pure forensic one? Does she have a history of testifying for one "side" or the other? If she has testified in the past, obtain her prior testimony(ies) along with any publications or treatises she has authored.

b. Challenge the admissibility of the opposing expert's opinions before trial. Be prepared to file motions *in limine* to prevent the opposing expert from testifying about her personal opinion(s) regarding your client's treatment and prescribing habits. Require expert testimony to be rooted in the law. For example, the opposing expert may suggest your physician failed to spend enough time performing a physical examination on a given patient. Do your state regulations and applicable statutes set forth a specified time requirement? If appropriate, request a *Daubert* hearing (or similar type hearing that is applicable to your jurisdiction) to prevent the personal opinion or "junk science" opinion of the opposing expert.

c. Your expert should be prepared to testify about the contents of the spreadsheet that you created indicating all the indicia of "good faith" and to substantiate your physician's lawful care of the patients which includes appropriately administering medication(s). It is critically important that your expert can explain the treatment and prescribing habits by your physician of the named patients in the Indictment met at least the minimum level of care required by the regulations and laws of your jurisdiction.[5]

4. **Discovery**

a. DEA Administrative Trial - A physician that is arrested as a result of his employment at a pain clinic will be faced with losing his DEA registration number(s). He will be given the option of voluntarily surrendering his number(s) by signing a DEA Form 104 or defending himself at an administrative trial. Although the likelihood of prevailing at the administrative level is less than optimal, do not overlook the fact that the proceeding will provide fertile ground for obtaining discovery and cross examining governments witnesses and experts that you will likely see in the criminal trial in the days to follow. For federal prosecutions and in state cases (where depositions are not permitted), this may be your best opportunity to obtain impeachment material for the criminal case.

b. *Brady* evidence - Often, this evidence exists in the form of data collected during undercover operations. It is critical to obtain and review the undercover recordings. But do not stop at what the government provides to you. Consider making a specific *Brady* request for all recordings and reports where law enforcement was denied treatment and/ or medication or was discharged by the physician. Specifically request all charts for those patients that were discharged from the practice. Keep track of the basis(es) for discharge (ie. doctor shopping, urinalysis issues, abusing medication, diverting medication, etc). These are examples of "good faith" treatment and prescribing by the doctor that your expert must present to the jury.

c. Take your investigator for a tour of your physician's office (which has, in most cases, already been subject to the execution of a search warrant). Be on the lookout for all indicia that the facility was a legitimate medical office. Take photographs (or a video tape) of the location and gather documentary evidence (which juries always appreciate) to further establish the physician's legitimacy in treating his patients. These items include:

1. Medical books for treating pain and on conditions which cause pain;
2. Pamphlets in the waiting room addressing pain related issues;
3. Pain management contracts;
4. Urinalysis kits;
5. Seminar materials demonstrating the physician's attempts to educate himself on relevant pain management issues.

Let's face it. Physicians, like all of us, are human and can be fooled by patients. This is especially true when the government sends in a "trained" law enforcement official to your physician's office feigning an injury. He is equipped not just with a "story" of lies, but with apparent radiological evidence of the "injury" he complains is causing him pain. The undercover officer may show the doctor a scar from a prior surgery in the location on his body that he complains is causing the pain. The goal is to try and fool the physician into providing him controlled substances where he, in reality, has no medical injury to speak of.

If it is law enforcement's goal to determine if a physician will dispense medication without any legitimate medical necessity (thus, in bad faith), why not just send in an undercover and tell the physician that he does not have any pain, but wants pain medication because he is an addict. Consider this as a basis for a fruitful cross examination of the officer/agent.

Winning a criminal case, regardless of whether you are on the prosecution or defense team, requires thorough preparation. In these "pill mill" cases, a practitioner's preparation should be focused on the details found within the patient files, preparation of the experts and full appreciation of the applicable laws and regulations in his particular jurisdiction.

Notes

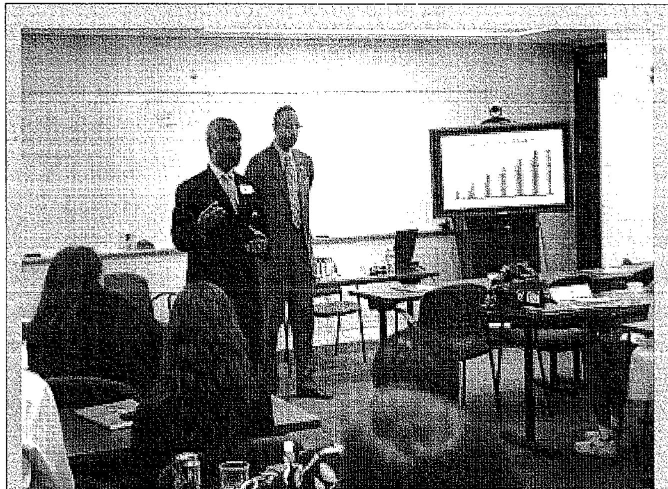
[1] Among the patients, you should expect the government will send in an undercover agent(s) who will feign an injury in an attempt to dupe the physician into prescribing controlled substances. Along with his "story," the agent(s) will often have a radiological test (i.e. MRI) in an effort to further the deception.

[2] For the prosecution, your expert(s) will serve a similar role in their review and analysis of the patient files.

[3] While a radiological test may be helpful in treating a patient suffering from pain, there is not a specific "test" that can determine how much pain, if any, a patient may be feeling. An MRI that shows minimal or no deformity does not necessarily mean that a patient is not suffering from some level of pain.

[4] Even if the urine test is positive, indicating that the patient has the medication in his or her system, such a result does not confirm that the patient has been abusing the medication by obtaining it from the streets, by doctor shopping or otherwise. Therefore, the urine screening is certainly limited in its reliability. It may, however, establish that the patient has been abusing illegal or non prescribed medications/drugs - - - a factor that the physician must take into account in treating the patient.

[5] The law does not require that the physician be the "best" one at his specialty. Perhaps your client was just a "good" one or maybe even "not so good" at pain management. Nevertheless, that does not automatically translate into criminal conduct.



The Criminal Justice Section, in partnership with the ABA Section of Individual Rights and Responsibilities and the ABA Council on Racial and Ethnic Justice, has continued to develop the **Racial Justice Initiative** through its cultural competency Model Curriculum & Instructional Manual.

Consultant Catherine Beane along with Wayne McKenzie and Edwin Burnette (pictured above) conducted the final training on cultural competency at the American Bar Association in Washington D.C. on May 12, 2011 during a full day conference. Over 20 individuals with racial justice expertise from Washington D.C., Maryland and Virginia were in attendance. The free workshop provided leaders of judicial, prosecutorial, and defense agencies the information, resources, and training tools necessary to support educational efforts in cultural competency.

For more information on the published curriculum or training on cultural competenc, contact CJS Staff Attorney Salma S. Safiedine at Salma.Safiedine@americanbar.org.

Feedback Welcome

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