

Kiefer & Gaerte: Defending addicted doctors has hidden consequences

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The opioid crisis plaguing the U.S. affects people in all walks of life, including doctors. A significant number of physicians suffer from chronic pain and use opioids to cope and to allow them to continue to practice medicine. But because physicians are prohibited from writing controlled substances prescriptions to themselves, they often obtain them in violation of federal and state statutes and regulations. Lawyers representing these doctors must be aware of the myriad ramifications and consequences of addiction for licensed physicians.



Kiefer

Criminal prosecution and OIG exclusion

The most severe consequence for addicted physicians is criminal prosecution. Prosecutors throughout Indiana increasingly are filing felony controlled-substance charges against physicians who have obtained them illegally (which doesn't mean buying them in dark alleys). Physicians are, by statute, exempted from controlled substance laws provided they possess, administer or prescribe the controlled substances for legitimate medical purposes as part of a physician-patient relationship.



Gaerte

But, if the physician diverts opioids from the hospital or a private medical office or writes phony scripts to support an addiction, prosecutors argue the doctors are no longer protected by their statutory exemption. In many cases, the physician may have admitted to illegally obtaining the opioids before defense counsel has been retained. In those cases, if counsel cannot convince the prosecutor to decline prosecution based on the doctor's medical addiction and subsequent treatment, a dismissal of charges or not guilty outcome may be out of the question. Settlement may be the only viable option.

Nearly all criminal defense lawyers would regard a negotiated diversion or first-offender program for a physician criminally charged as a success. Such programs often involve a guilty plea to a felony drug offense that is not reduced to a judgment, participation in treatment programs and a dismissal of the criminal charges upon satisfactory completion of the program. Although Indiana prosecutors have been reluctant recently to agree to such outcomes, defense lawyers and their clients need to be aware of the adverse consequence of what appears to be a very good outcome.

Federal law requires a minimum five-year exclusion from participation in the Medicare and Medicaid programs following “conviction” of a program-related offense or a felony controlled-substance offense. Congress defined “conviction” to include diversion and first-offender programs in which no judgment of conviction is entered. A physician who is excluded from participation in federal health care benefit programs is prohibited from billing Medicare or Medicaid and from working for any provider who bills Medicare or Medicaid (or other federal health care benefit programs). Even diversion from a misdemeanor drug offense may lead to a permissive exclusion of a minimum of three years. Exclusion may also mean that the physician may not be reimbursed for services payable by private health insurance providers, as many of those entities have provisions in their provider agreements that prohibit payment to a physician who has been federally excluded.

The Office of Inspector General at the U.S. Department of Health & Human Services is responsible for exclusions after convictions or other events that violate the federal exclusion statute. Often, OIG attorneys will discuss potential settlement of a permissive exclusion before defense counsel has finalized a settlement with a local prosecutor. Attorneys representing physicians in criminal matters may be able to negotiate a guilty plea to an offense that does not require a five-year exclusion, and may then be able to negotiate with the OIG a three-year permissive exclusion that begins as soon as the state conviction is entered, thus allowing the physician to potentially resume the practice of medicine in the least amount of time.

DEA controlled substance registration

In many cases, the first thing that happens to a doctor with an addiction to opioids is an unannounced “visit” by diversion investigators from the U.S. Drug Enforcement Administration to the physician’s offices, demanding to see the physician. They ask about the physician’s addiction to opioids, how the drugs were obtained and demand a “voluntary” surrender of the physician’s DEA controlled substance registration. If the physician surrenders it on the spot, it is likely gone for at least three years.

Physicians who understand their rights may tell investigators that they will not surrender their controlled substance registration without first speaking with an attorney. If that happens, the attorney’s first responsibility will be to assess the likelihood that the DEA will prevail in an administrative action to revoke the registration and the pros and cons of agreeing to a voluntary surrender. Sometimes, a voluntary surrender may be the best course of action.

Medical Licensing Board and Pharmacy Board proceedings

Physicians who have addiction problems must face licensing proceedings before the Medical Licensing Board of Indiana. The DEA, employers or others file a consumer complaint with the board or the licensing section of the Attorney General’s Office. The Attorney General’s Office typically sends the consumer complaint to the physician and seeks a response. Defense counsel has an opportunity to submit a response explaining why a formal complaint before the board should not be filed or to support a settlement

that preserves the doctor's license. Separate proceedings before the Pharmacy Board will address the physician's Indiana Controlled Substance Registration (CSR).

ISMA's Physician Assistance Program

If the attorney is contacted before the physician has entered any treatment program, one of the defense lawyer's top priorities is to explain the benefits of entering into the Physician Assistance Program of the Indiana State Medical Association. The PAP will refer the physician to an inpatient addiction program, which is usually two to three months long. Upon satisfactory completion of the program, physicians are required to sign a contract for PAP-monitored outpatient treatment. The outpatient program is onerous, but in combination with the inpatient program, has a very high success rate.

Equally importantly, the ISMA-PAP is highly regarded by the Medical Licensing Board. A physician who successfully completes inpatient treatment and who is in full compliance with the outpatient program is likely to have a much more favorable outcome before the board.

Other potential consequences

Physicians addicted to opioids may also face medical malpractice lawsuits and proceedings to revoke their hospital credentials or suspend or terminate their employment. In each of these, the physician may be asked to respond to allegations about their addiction. If criminal charges are being threatened, the lawyer for the physician must explain the pros and cons of refusing to answer those questions based on the Fifth Amendment. In civil proceedings, the assertion of the Fifth Amendment privilege may result in an "adverse inference" that, had the doctor answered the question, the answer would have been incriminating.

If counsel does not represent the physician in a medical malpractice case, it is essential that counsel works with the physician's medical malpractice attorney so the attorney is aware of the Fifth Amendment issues. If the physician admits in a civil lawsuit deposition to diverting controlled substances to support an addiction, a transcript of that deposition may be turned over to the prosecutor and could provide evidence that supports a conviction.

Attorneys representing physicians with addictions in any of these proceedings must continually evaluate the potential impact decisions in one proceeding may have on other current or potential proceedings. When in doubt, contact an attorney experienced in these matters. •

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