Pain and the Courtroom—Paving the Way for a Long-Overdue Showdown

We all know that statistics do not tell the whole story, yet I believe you will find that Goldenbaum et al. are on the right track with the statistics and conclusions presented in their article Physician’s Charged with Opioid-Analgesic Prescribing Offenses. The article describes the “big picture” relating to the characteristics and outcomes of criminal and administrative cases against physicians and opioid-prescribing behaviors. The article presents the study data in a variety of ways and uniquely uses three scenarios to provide readers with some valuable guidance on the patterns and challenges that might increase a prescriber’s exposure to criminal and/or administrative lawsuits. Goldenbaum et al. conclude that their statistics show “practicing physicians, including pain medicine specialists, have little objective cause for concern about being prosecuted by law enforcement or disciplined by state medical boards . . .” I applaud the authors for their tremendous contribution to the pain community, which goes well beyond the written word. I believe this article offers tremendous insight, focus for future research strategies, and most of all, hope for the pain community in its efforts to achieve the principles of balance defined by Joranson and Gilson [1].

Insight

Underlying Goldenbaum et al.’s article is the pain community’s ongoing challenge of reducing fears and achieving balance. Pain educators must move educational programs and materials beyond the “what to do” format, and take steps to do more mentoring and “how to do it” workshops. The pain community should use Goldenbaum et al.’s research to dig deeper—to gather evidence—both clinical and legal—for what I characterize as a long-overdue showdown between law and medicine.

Strategies

Based on what I have seen in my recent case work, including the language used by the government in two recent indictments, I agree with Goldenbaum et al.’s assertion that we should be asking questions about the criteria used by federal and state prosecutors relating to the decision to bring a criminal case and whether the prosecutor should first have the matter evaluated by a state licensing board. Some of the more recent indictments sound as if they were written by or from the reports of medical experts and contain surplusage, or what the law refers to as nonstatutory and noncharging language. Is this acceptable from an ethical standpoint? Is this what we want the future of balance to be? What can we do about this conduct? These are all fair questions and are right in line with Goldenbaum et al.’s suggestions.

There are similar challenges in licensing board cases, raising the question of whether there is a way to hold licensing boards more accountable for education about regulatory expectations concerning the use of opioids and other controlled substances to treat pain, as well as the careful and correct evaluation of expert witness testimony (in whatever format and from either side). It is hard to say how these issues have played into the physician’s decision to plead guilty or a licensing board or jury verdict, yet once again the principles of ethics, professionalism, and balance demand that we continue on with the suggested research and ask these hard questions.

Hope

Goldenbaum et al.’s article begins the laborious process of identifying the reasons for fear and provides hope that these groups might one day stand balanced together and dedicated to preserving an individual’s access to treatment, including opioids, for pain and minimizing the potential for the abuse and diversion of important medications including opioids.

Reprise—Time for a Showdown

No doubt there are cases where the behavior on trial surely represents unprofessional, negligent, reckless, or criminal conduct, but my own experience and research tells me there is tremendous room for doubt about the validity of cases (and even the propriety of some verdicts) when administrative bodies and law enforcement agencies,
through their lawyers, allow/use medical experts to present subjective and scientifically unsupported opinions to hearing boards, judges, and juries. Or, worse yet, when administrative bodies and law enforcement personnel allow/encourage/elicit testimony from medical experts about their “feelings” and “reactions” to a defendant/physician’s prescribing patterns, as illustrated by the federal appellate decisions in two criminal cases—United States v. Merrill and United States v. Williams, both involving the same expert and almost exactly the same string of words elicited before the jury during the trial [2,3].

Critics may argue that these and other cases involved plenty of evidence against the defendant-physician, and they may be right. Nonetheless, the validity of any case is tainted when any witness, and especially a medical expert, presents unsupported evidence or prejudicial testimony such as feelings and reactions to prescribing patterns. This conduct, no matter when identified, lives on past the initial decision/ruling/verdict and taints the future by supplying precedent that others may or must follow. I see this as a tremendous threat to the principle of balance and access to pain management, and a valid justification for current and future inquiries into any such behaviors. The pain community must explore all of these issues for the sake of professionalism and the overall quality of pain management in this country, and it must do so no matter what discipline of medicine one represents or which side one takes in a courtroom battle.

This showdown between the worlds of law and medicine is, in my opinion, long overdue. And I believe articles like the one by Goldenbaum et al. encourage us to approach the showdown with balance and professionalism in mind. Future research on the topics identified by Goldenbaum et al. will lead to significant changes in how professional pain societies qualify and handle medical experts, and how the legal field handles cases and evidence. Let us strive to help all stakeholders speak a common language as we continue to work toward balance and removing the fear of prosecution.

So, what do we do now? We work harder and dig deeper, always with an eye on the ultimate goal—to improve pain education, management, and cooperation from the pain community, law enforcement, and regulators, to achieve balance, and to demand excellence from all fronts when pain is on trial.

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References
2 United States v. Merrill—U.S. v. Merrill, No. 06-14076 (11th Cir. 2008).