

POLICE REQUESTS FOR PATIENT NARCOTICS AGREEMENTS:

Placing Physicians Between A Rock and A Hard Place[®]

by Robert I. Rubin, JD

AN UNDERCOVER

detective shows up at your medical office and tells you that he is investigating one of your “pain management” patients for “doctor shopping.” He produces a pharmacy printout with your prescribing information and demands a copy of your “Narcotics Agreement” with the patient in question. This is a situation that my client, a respected neurologist, faced recently. My client, who was unsure of his legal rights and responsibilities, asked the detective if he was required to turn over the agreement. The detective threatened there was a “Florida Statute” mandating disclosure and my client could be “liable” for failure to cooperate.

Reprinted with permission from:



FloridaMedical
ASSOCIATION

Helping Physicians Practice Medicine

Acting under duress, and without the advice of counsel, my client turned over to the detective the "Narcotics Agreement." Using the Narcotics Agreement and prescription information he had obtained from the pharmacy, the detective obtained an arrest warrant from the State Attorney's office and charged the patient with fraudulently obtaining a prescription, commonly referred to as "doctor shopping."

The patient heard a rumor concerning possible criminal charges filed against her and contacted an attorney. The attorney called the detective to setup a meeting because the patient claimed she was not guilty of doctor shopping; all of her prescriptions were legal. The attorney also agreed to voluntarily surrender his client when an arrest warrant was issued, all on the condition that the patient was willing to "confess." Because the patient asserted her innocence, the meeting never took place.

Several months later, the patient was arrested at home in front of her young children. The patient was brought to a public location and paraded before the media along with numerous other individuals who were arrested under warrants for fraudulently obtaining prescription narcotics.

Shortly thereafter, the patient's counsel succeeded in persuading the State Attorney that there was insufficient evidence of a crime, and the charges were dropped. The patient then sued the law enforcement agency for false arrest and malicious prosecution, and sued my client for breach of fiduciary duty. Although my client's action in

turning over the Narcotics Agreement was understandable, the court indicated that it was inclined to grant a "summary judgment" against my client prior to trial on liability, based on his breach of the statutory duty of confidentiality to his patient. This would leave only issues of causation and damages for the jury. In other words, the plaintiff still had to establish that the breach of confidentiality was a substantial contributing factor to her arrest and incarceration. The patient likely could establish this, however, because the narcotics agreement was a key element of the charge. The jury also would decide the issue of damages. This would entail placing monetary value on mental and physical pain and suffering from the arrest and incarceration, as well as the legal fees associated with having the criminal charges dismissed. As a result of the court's ruling, the case was settled for a minimal sum, with the consent of my client.

Interestingly, at the time I was defending my client in this matter, I represented an internist who also was sued by his patient for breach of confidentiality. The internist appropriately reported to the police that his patient had violated her Narcotics Agreement, because she was obtaining narcotics from two prescribers at the same time and fraudulently attempted to cover this up. I obtained a defense verdict for my client before a jury in 2007. The key difference between the case involving the neurologist and the case involving the internist is that the internist's Narcotics Agreement specifically authorized the physician to contact the authorities if the patient violated the Narcotics Agreement, whereas the neurologist's did not. The jury agreed that the patient violated the Narcotics Agreement; therefore, the internist was within his rights to report his patient to the police.

WHAT IS A NARCOTICS AGREEMENT?

There are many patients who suffer from legitimate intractable pain, including the pain associated with cancer. These patients are entitled to compassionate pain management, usually with narcotic pain medication. In both cases described above, the physician used a "Narcotics Agreement" with the patient. In the majority of cases, manufacturers of narcotic pain medications furnish these agreements. However, some physicians draft their own Narcotics Agreements, often with the assistance of counsel. In addition, some



law enforcement agencies provide sample Narcotics Agreements to physicians in their areas.

1 A Narcotics Agreement is a written contract between the physician and the patient. Although the form of the Narcotics Agreement varies, it has some similarities to an informed consent, in that it usually warns that narcotics have risks and benefits, can be addictive, and should not be abused by the patient. A Narcotics Agreement generally sets forth rules that the patient must follow, which can include an agreement to obtain narcotics from only one prescribing physician, to fill the narcotics prescription at only one pharmacy, to refrain from "losing" or "destroying" the prescription and asking for a duplicate, to refrain from obtaining narcotics by illegal means, to not sell any prescriptions, and to take the prescriptions in accordance with medical instructions, etc.

2 One purpose of a Narcotics Agreement is to protect the physician from liability for patient abuse of the prescriptions. A Narcotics Agreement also protects the patient because the patient must understand

and acknowledge his or her obligations under the Agreement, which are implemented for their therapeutic and legal benefit. It is extremely important that the Narcotics Agreement contain language that, if a physician has reason to believe that the patient has violated the agreement, the physician has the right to notify and cooperate with law enforcement. Thus, a physician can obtain important protection if the Narcotics Agreement contains this provision.

IS A NARCOTICS AGREEMENT A MEDICAL RECORD?

My neurologist-client testified that he thought the Narcotics Agreement was an "administrative document," not a "medical record," and, he did not believe that he was giving the police a confidential medical record. With this in mind, we investigated a potential defense that the Narcotics Agreement was not subject to the confidentiality provisions of the statute. The statute delineates dozens of categories that would constitute medical records, including progress notes, radiology reports, patient histories,

MEDICAL RECORDS ARE CONFIDENTIAL UNDER FLORIDA STATUTE §456.067

A patient's medical records are confidential under Fla. Stat. §456.067 and can be provided to law enforcement investigating a patient for "doctor shopping" only if one or more of four legal requirements have been met:

- 1. AN AUTHORIZATION FROM THE PATIENT;**
- 2. A VALID SUBPOENA FOR THE MEDICAL RECORDS;**
- 3. A SEARCH WARRANT FOR THE RECORDS; OR,**
- 4. A COURT ORDER.**

As a practical matter, it is extremely unlikely that a patient would sign an authorization allowing their physician to release medical records to a law enforcement agency. If the medical records are sought under

a subpoena, as opposed to a search warrant, the law requires that the law enforcement agency issuing the subpoena give notice to the prospective defendant. This notice allows the patient/prospective defendant's legal representative time to challenge the validity of the subpoena in court before the records actually are subpoenaed.

A criminal search warrant requires that the law enforcement agency make a showing to a judge of "probable cause" that a crime has occurred. However, unlike the request for records under a subpoena or authorization, the patient/prospective defendant normally would not be on notice of the police application for a warrant.

lab work, insurance information, medication records, etc.

Interestingly, however, there is no mention of the phrase "Narcotics Agreements" in Florida Statute §456.067. Because the statute was silent, we looked to other legal sources to determine whether we could support our argument that the Narcotics Agreement was not a medical record. Specifically, we researched the case law interpreting the statute and the legislative history behind the statute. Both were silent on the issue. However, the Florida Administrative Code, written by the Florida Department of Health Board of Medicine, titled "Standards for the Use of Controlled Substances for Treatment of Pain" provides:

The physician is required to keep accurate and complete records to include, but not be limited to. . . (5) Discussion of risks and benefits . . . (8) instructions and agreements [emphasis added].

A Narcotics Agreement is an "instruction" or an "agreement." Although Florida Statute §456.067 is silent

concerning whether a Narcotics Agreement is a medical record, the Florida Administrative Code clearly states that it is a medical record, and thus is subject to confidentiality protection.

FINAL THOUGHTS

Absent an authorization, subpoena, court order, or search warrant, it is illegal for a physician to produce medical records or discuss a patient's medical condition with law enforcement investigating the criminal act of "doctor shopping." It can be intimidating to the physician when a law enforcement officer appears and demands medical information or a patient's medical record, but this does not mean the officer is aware of your rights or your patient's rights. Nevertheless, when faced with this situation, a physician must advise the law enforcement officer that the records cannot be turned over, nor can the patient's medical information be discussed, until the due process requirements have been satisfied. Otherwise, the physician could be liable for civil damages for breach of fiduciary duty.

Robert I. Rubin is a shareholder in the West Palm Beach office of Becker and Poliakoff. He has more than 25 years of experience representing physicians in medical malpractice, administrative and business matters. He can be reached at Rrubin@Becker-Poliakoff.com



Reprinted with permission from:

FloridaMedical
ASSOCIATION
Helping Physicians Practice Medicine