

Mesotherapy and the Off-Label Use of Approved Drugs

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Off-label use, or the use of FDA-approved drugs for purposes other than their approved indications, is a widespread practice among physicians in general. Although no accurate data exists, it is estimated that one-third to 60% of all prescriptions written by physicians are for indications other than those listed on the drug label. For mesotherapy, these estimates might be even higher, because mesotherapists routinely employ FDA approved drugs for uses not reviewed by the FDA. Examples of such off-label use in mesotherapy include aminophylline (approved for asthma treatment but used in mesotherapy to promote fat breakdown and increase blood flow), procaine (approved as an anesthetic, but used in mesotherapy to increase local circulation), and isoproterenol (approved to treat heart conditions, but used in mesotherapy to stimulate insulin release which helps break down fat cells). But considering the level of acceptance of this practice within the medical community (and by and large in the courts), why should it matter that mesotherapy so heavily relies on the use of approved drugs for off-label purposes?

Granted, off-label use by physicians is considered the practice of medicine and therefore does not violate any rules promulgated by the FDA. Also, the courts have consistently held that off-label use by itself does not constitute negligence or medical malpractice. In fact, some courts have stated that doctors may prescribe or use any approved drug for any purpose, provided they do so in the exercise of their professional medical judgment. Nevertheless, despite this high level of deference to the discretion of the treating physician, there remain limits to the extent to which drugs may be used for off-label purposes.

The most obvious example of improper off-label use is when a physician uses or prescribes a medication for a use contraindicated on the drug label, and the patient suffers injury; this will presumably lead to a finding of negligence. Likewise, where

it can be proven that the off-label use constituted experimentation by the physician, this can also lead to legal liability. Beyond these two cut-and-dry instances, the law places additional constraints on the practice of off-label use, albeit far less clearly than contraindicated use or experimental use.

The question of whether off-label use constitutes negligence or medical malpractice ultimately boils down to the standard of care. Although the question seems simple and straightforward, its answer in a given circumstance can be more complex. For example, some commentators have noted that in the proper situation, meeting the standard of care can only be accomplished by using an approved drug for an off-label purpose. This observation takes into account the rapidly changing state-of-the-art in the practice of medicine coupled with the slow pace of the FDA approval process. In such a case, an off-label use may become so established as the standard of care for a given indication that the lack of FDA approval for that particular use does not diminish the physician's obligation to employ the off-label use. But this situation will not likely arise in the context of elective medical procedures such as mesotherapy. So the question remains: What establishes the standard of care for off-label use?

A review of court decisions on this issue shows the reluctance of the courts to establish a standard of care test or a framework of analysis for off-label use. Yet, as stated by a Tennessee court in 2000, it remains clear that "[p]hysicians may be found negligent if their decision to use a drug off-label is sufficiently careless, imprudent, or unprofessional." (*Richardson v. Miller*, 44 S.W.3d 1, 20, Tenn. Ct. of App. 2000). That decision actually went on to list ways in which off-label use may become established as a standard of care when it stated that a physician must obtain reliable and up-to-date information on such use from "sources [which] may include: (1) discussion with professional colleagues, (2) continuing

medical education programs, (3) case studies in professional journals, and (4) reports of the clinical results of the use of the drug in other countries.” (*Id.* at 15). Beyond this Tennessee state court decision, however, guidance from the courts on how to prove that a particular off-label use meets the standard of care is lacking.

The best strategy for establishing that a particular off-label use falls within the established standard of care, obviously, is reference to a peer-reviewed professional journal discussing that particular use. Short of this, however, court decisions remain unclear as to what establishes the standard of care outside of the FDA approved indications on the drug label. Perhaps this is intentional, to give the maximum deference to a physician’s professional medical decisions. Either way, it remains the physician’s professional and ethical, if not legal, responsibility to become as well-informed as possible before deciding to use a drug for an off-label purpose.

The informed consent doctrine is also relevant. Practicing physicians do not typically consider the drugs they plan to use or prescribe material to a patient’s decision to go forward with treatment, so they do not discuss this with the patient. Moreover, the courts to date overwhelmingly have agreed with the position that the informed consent does not require physicians to reveal that a recommended drug will be used for an off-label purpose. However, among the states, the trend is moving from the standard of a “reasonable physician” to a “reasonable patient” or even an “actual patient” (that is, mov-

ing from giving deference to a physician’s informed consent decision toward focusing on a patient’s perspective). This trend could cause a shift of viewpoint among the courts, at least in some states. The impact of these evolving informed consent standards on off-label drug use remains unclear.

The practice of mesotherapy inevitably leads to off-label use of certain drugs. And off-label use, although widely accepted as the practice of medicine and within the physician’s professional discretion, inevitably opens the door to potential liability for negligence or malpractice, at least more so than strict adherence to approved indications on the label. The most prudent way to protect against this potential liability involves two steps. First, physicians should take all possible measures to ensure they make an informed decision to use a drug for off-label purposes. Second, although full disclosure would obviously provide the most protection against an informed consent argument, physicians should at least consider the option of discussing off-label uses with their patients and make a case-by-case decision on how to proceed.

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