Manage Liability Risk When Referring for CAM

Five recommended strategies include conservative documentation guidelines and continued follow-up.

BY DOUG BRUNK
San Diego Bureau

LA JOLLA, CALIF. — When physicians refer patients to providers of complementary and alternative medicine, they should keep in mind five liability management strategies, David M. Eisenberg, M.D., advised at a meeting on natural supplements in evidence-based practice sponsored by the Scripps Clinic.

The strategies, which he developed in collaboration with Michael H. Cohen, J.D., (Ann. Intern. Med. 2002;136:596-603) include the following:

1 Determine the clinical risk level. Physicians should decide whether to:

▶ Recommend, yet continue to monitor, the therapy.

▶ Tolerate, provide caution, and closely monitor safety.

▶ Avoid and actively discourage use of the therapy.

2 Document the literature supporting the therapeutic choice.

"It's very important to put this in the chart," said Dr. Eisenberg, an internist who directs the division for research and education in complementary and integrative medical therapies for the Osher Institute at Harvard Medical School in Boston.

"By the way, that is also true when we're using a novel or experimental drug with an inpatient. This is the same approach," he said.

If treatment with a certain herb is recommended, "document the choice of herb, any recommendation regarding product or brand, and any discussion regarding therapeutic dose, and associated uncertainties regarding use of the herb," he said.

He also makes it a practice to keep a backup file of articles supporting the discussion or recommendation.

"You could say this is a bit too conservative, like having suspenders and a belt," he commented at the meeting, which was cosponsored by the University of California, San Diego. "But I think this is the best advice."

3 Continue conventional monitoring. "A lot of times we recommend something or accept that a patient is going to do something, and then we don't monitor or follow up," Dr. Eisenberg said. "Undue reliance on CAM may lead to a charge that the patient was dissuaded from necessary conventional medical care."

He added that maintaining conventional treatment "helps demonstrate that the physician has followed the standard of care, even if CAM is included."

4 Provide adequate informed consent. Describe the risks and benefits of using the CAM therapy and of delaying or deferring the conventional therapy, and spell out potential adverse interactions.

That is a lot to consider, but such information would be helpful "in the eyes of the law if something went wrong," he said. "You have to ask yourself, could I really defend this action or recommendation?"

Also, clear communication with the patient has been shown to reduce the physician's risk of being sued for malpractice.

"Inadequate informed consent is also a theory for malpractice liability in and of itself," Dr. Eisenberg said.

5 Familiarize yourself with the providers to whom you refer. Physicians should ask themselves if they would refer a friend to this person. "If the answer is 'I'm not sure,' then get some help in making the correct referral," he advised.

'From a conservative legal standpoint, referring to somebody who does not own a license to treat a patient is risky business. Don't do it.'

Understand any regulations regarding the use of CAM therapies by the relevant state regulatory board. "You have to check the regulations and scope of practice," he said.

"From a conservative legal standpoint, referring to somebody who does not own a license to treat a patient is risky business. Don't do it," Dr. Eisenberg said.

He pointed out that, in general, a physician is not liable merely for making a referral to a specialist. But he cited three exceptions to the general rule:

▶ The referral led to delay or deferral of necessary medical treatment. "Do your day job first," he said.

▶ The referring provider knew or should have known that the referred-to provider was incompetent.

▶ The referred-to provider is considered to be the physician's agent, either because state law requires supervision or an extended form of consultation or because there is a "joint treatment" agreement between the physician and the CAM provider.

Dr. Eisenberg also discussed the notion of a "legal catch-22" when referring a patient for CAM.

For example, if a physician seeks a distant, independent contractor type of relationship with a CAM provider, "there is probably less shared liability risk, but there is probably more risk of harm to the patient because you're referring to a stranger," he noted.

"Conversely, there is higher risk of shared liability if you refer to CAM providers you know or have an ongoing professional relationship with, but there's probably less chance of harm [to the patient] because you're involved," he said. ■

Patients Seeking CAM Therapy Can Use Physicians' Advice

BY DOUG BRUNK
San Diego Bureau

LA JOLLA, CALIF. — The first step in advising patients who may want to try complementary and alternative medicine therapies is to ask them a simple question: "Have you used, or considered using, any other therapy for your [chief complaint]?" David M. Eisenberg, M.D., said at a meeting on natural supplements in evidence-based practice sponsored by the Scripps Clinic.

If your patient responds, "I'm interested in therapies like [acupuncture, massage, etc.]," tell him or her, "I have the time."

Those four words "are rarely spoken in a doctor's office," said Dr. Eisenberg, an internist who directs the division for research and education in complementary and integrative medical therapies at the Osher Institute, Harvard Medical School, Boston.

"Those are the four most powerful words you can say if you want a direct answer. I challenge you to try it."

Some of the meeting attendees laughed out loud at the challenge.

"I'm not kidding," he countered. "When you do it, they will talk to you. If you don't, they may or may not. It's all about your body language."

Ask the patient to maintain a symptom diary. 'Make the patient the pilot and you become the copilot. It's their data with their symptoms.'

Before you offer specific advice, consider the following questions:

▶ Has the patient's conventional diagnostic work-up been complete?

▶ If so, what is the diagnosis?

▶ What are the conventional treatment options? Have they all been tried?

▶ What are the risks of the conventional treatment options?

▶ What are the risks of the CAM options?

Once you address these questions, identify a key symptom and ask the patient to keep a symptom diary on a scale of 0-10, with 0 meaning there is no symptom. (For more details on the symptom diary, see Ann. Intern. Med. 1997;127:61-9).

"I tell patients to put up a piece of paper where they brush their teeth at night and put a number down for how bad the symptom was that day, whether it's abdominal pain, headache, anxiety, you name it," Dr. Eisenberg said at the meeting, which was cosponsored by the University of California, San Diego.

Have the patient "keep the diary for a week or two, or a month if it's a monthly symptom. Then discuss with the patient the therapy that you're suggesting or they're asking about," he said.

Review the safety of the CAM therapy, formulate a plan, and ask the patient to maintain the symptom diary.

"Make the patient the pilot and you become the copilot," he said. "It's their data with their symptoms."

If you refer for CAM, see the patient after the initial visit to the CAM provider and review that person's recommendation. "This is the thumbs-up, thumbs-down conversation that we don't have with patients often enough," he said.

"Physicians who practice this way will be in much higher demand in the marketplace, because [patients] will be able to have an honest conversation with an educated clinician who does care about CAM and does understand the literature," he explained.

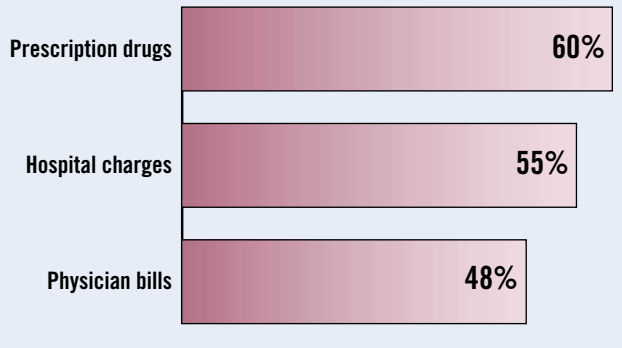
If the CAM therapy works, "then it feels like you participated with them in this exploratory journey," Dr. Eisenberg said.

"It's about shared decision making. The patient feels listened to [and] safe, and the patient-physician relationship is tested," he said.

If the CAM therapy fails, patients, "are still very grateful for the opportunity, and you can go back together to square one and ask, 'What can we try now?' " he said. ■

DATA WATCH

Many Americans Favor Federal Price Controls on Medical Costs



Note: Based on a nationwide survey of 1,012 adults conducted Aug. 10-15, 2004.
Source: Harris Interactive

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