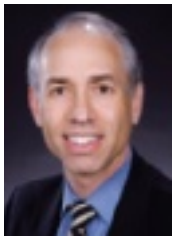
Smoking allowed: Is hospital policy a liability risk?



Douglas Mossman, MD

DO YOU HAVE A QUESTION ABOUT POSSIBLE LIABILITY?

- Submit your malpractice-related questions to Dr. Mossman at douglas.mossman@dowdenhealth.com.
- Include your name, address, and practice location. If your question is chosen for publication, your name can be withheld by request.
- All readers who submit questions will be included in quarterly drawings for a $50 gift certificate for Professional Risk Management Services, Inc's online marketplace of risk management publications and resources (www.prms.com).

Douglas Mossman, MD

Dear Dr. Mossman:

I work at a state mental hospital where all patients are adults who are court-committed, and at least 75% of them smoke. The hospital allows smoking in part of the only outdoor area where patients—smokers and nonsmokers —may go while in our most restrictive treatment phase. Patients come to us after spending at least 2 weeks in nonsmoking facilities where smokers receive nicotine replacement therapy. If patients want to smoke but have no money, in the past our hospital provided "unit cigarettes."

In my state, a court commitment means the patient lacks the capacity to make decisions about psychiatric care. Of course nicotine is a psychoactive drug. If a patient starts smoking while in our care, would the hospital be liable for health-related expenses the patient may later incur?

Submitted by "Dr. A"

Speaking as one colleague to another about malpractice liability, letting psychiatric patients smoke is not breaching the standard of care toward smoking patients. But you care for nonsmoking patients as well, and other types of liability besides malpractice exist.

Doctors have moral duties for lots of things we can't be sued for. Dr. A is right to be concerned. To explain, we'll look at:

- changes in attitudes about smoking
- the link between smoking and mental illness
- smoking bans in psychiatric facilities
- malpractice potential
- other issues Dr. A's hospital should consider, such as offering patients assistance with smoking cessation.

Changing attitudes about smoking

Thirty years ago, doctors smoked during medical meetings, and smoking on airplanes and in public was commonplace. I worked at an adolescent inpatient unit, and line staff carried lighters. We thought lighting kids' cigarettes was a legitimate way to establish rapport. Times and attitudes have changed. No hospital condones smoking these days, let alone smoking by minor patients. Since the Surgeon General first declared in 1964 that smoking was hazardous, U.S. adult smoking rates have dropped from 42% to under 20%.[1]

In the early 1990s, California issued the first statewide ban on smoking in workplaces, including bars and restaurants.[2] Nearly 3,000 state or local jurisdictions require workplaces and/or commercial establishments to be smoke-free.[3] Recently, the legislature in Virginia—a major tobacco-producing state—voted to prohibit smoking in restaurants,[4] and many other state governments are considering smoking bans. Smoking bans are intended to protect nonsmokers—especially children—from risks of secondhand smoke,[5] but they also discourage individuals from taking up the habit[6] and encourage smokers to quit.[7]

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Smoking and mental illness

Persons with serious psychiatric disorders have smoking rates 2 to 3 times higher than those of the general population.[8,9] As Dr. A notes, nicotine is a psychoactive drug. Smoking may be a genuine—although ultimately unhealthy—form of self-medication and may have positive psychological effects, such as antidepressant activity for many mentally ill persons.[10,11] The Joint Commission on Accreditation of Healthcare Organizations banned smoking in hospitals in 1992 but made an exception for psychiatric units. Out of sympathy for patients and concern about what could happen when they are deprived of a substance they intensely crave, many psychiatric wards continue to accommodate smokers.[12]

What some institutions have done

An increasing number of psychiatric facilities have instituted or are considering bans on smoking.[13] The first psychiatric smoking bans were implemented despite fears that patient violence would increase and opposition from hospital employees—a group that often includes smokers. Experience shows that although not all smoking bans are successful or problem-free,[14] they usually cause fewer problems than anticipated. We also know what factors help make smoke-free programs successful (***Table***).[15]

Aggression, seclusion, discharges against medical advice, and "prn" medication use do not increase after smoking bans,[5,16,17] and many patients experience health benefits.[18] After discharge, however, most patients resume tobacco use.[11,19,20]

Smoking bans have been opposed on grounds that they abridge psychiatric patients' rights and are unduly coercive.[21,22] In the United States and United Kingdom, however, legal actions to block smoking bans have not succeeded, and courts have not recognized a fundamental "right to smoke."[23-25]

Table

Smoke-free plans that work: How to clear the air

- **Take time**—more than 6 months—to plan smoke-free initiatives
- **Supply** patient and staff smokers with nicotine replacement therapy
- **Present** clear, consistent, visible leadership
- **Encourage** cohesive teamwork
- **Provide** extensive education and training for staff
- **Reduce** staff smoking rates
- **Offer** programs and education to promote smoking cessation among staff members
- **Enforce** nonsmoking policies

Source: Adapted from reference 15

Is allowing smoking malpractice?

Now that many psychiatric facilities have ended smoking, clinicians may worry—as does Dr. A—that we could incur malpractice liability if we let inpatients smoke. One of my University of Cincinnati law students, Amanda Smith, and I researched this topic and found no case report that said letting psychiatric inpatients smoke violated the standard of care.

This makes sense, because in the malpractice context, a practitioner is judged by what prudent, similarly situated physicians with similar training would do in similar circumstances. Many psychiatric facilities still permit smoking, so letting patients smoke does not breach the standard of care, even if it seems negligent.[26]

The ill effects of smoking accrue over years, not weeks or months. Almost all patients who smoke in hospitals also have smoked before hospitalization, and most smokers who are barred from smoking while inpatients resume soon after discharge. To succeed, a malpractice lawsuit must show that the defendant's actions caused damages. A jury might find it hard to conclude that a permissive hospital smoking policy was the primary cause of a long-term smoker's health problems.

continued

Clinical Point

Aggression, seclusion, discharges against medical advice, and 'prn' medication use do not increase after smoking bans

Clinical Point

Providing smoking-cessation programs might make claims that a hospital failed in its duties to care for patients less plausible

4 other concerns

Nonsmokers' rights. Arrangements at Dr. A's hospital expose nonsmokers to secondhand cigarette smoke, which raises the possibility of legal action by nonsmokers. In 1993, the U.S. Supreme Court held that a prison inmate's heavy exposure to secondhand smoke violated the Eighth Amendment ban on cruel and unusual punishment.[27] Involuntary hospitalization is not punishment, but suits such as this might be brought on other grounds, such as violation of patients' civil rights.[28]

Competence. In some states, civil commitment requires a finding that the respondent is not competent to make treatment decisions. Can persons who are not competent to make treatment decisions make good decisions about whether to smoke? Shouldn't the hospital deal with patients' nicotine dependence more therapeutically—and paternalistically—by providing nicotine replacement and encouraging smoking cessation? Shouldn't the hospital also discourage patients who don't smoke from starting?

Protecting patients. Dr. A's hospital provides cigarettes to patients. Though compassion may be the motive, is the hospital failing to protect its incompetent patients and abetting their self-injurious behavior?

Helping smokers quit. Does the hospital offer treatment to help smokers quit?

Related Resources

- Maryland Hospital Association. Smoke-free hospital campus tool-kit. www.mdhospitals.org/mha/Community_Health_Resources/Smoke_Free_Hospital_Campuses.shtml.
- National Association of State Mental Health Program Directors. Tobacco-free living in psychiatric settings: a best-practices toolkit promoting wellness and recovery. www.nasmhpd.org/general_files/publications/NASMHPD.toolkitfinalupdated90707.pdf.

Although the problems that lead to civil commitment are immediate and serious, addressing long-term health issues is consistent with treating acute psychiatric crises. Many hospitals that permit smoking also encourage participation in smoking-cessation programs. Having these available to patients might make claims that the hospital failed in its duties to care for patients less plausible.

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Bottom Line

Letting psychiatric inpatients smoke may not violate the standard of care, but many hospitals are adopting no-smoking policies. As the U.S. Surgeon General's office notes, psychiatric facilities "often present such policies not only as a way to protect patients and staff from secondhand smoke exposure ... but also as projecting a positive, healthy image; sending a consistent message; and encouraging and supporting tobacco use cessation among both patients and staff."[5]

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