



The Essentials of Malpractice Law and Risk Management

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Disclosures

Neither I nor my spouse/partner has a relevant financial relationship with a commercial interest to disclose.

Goals

- Explain the Standard of Care required for the practice of psychiatry
- Present the common practice pitfalls which expose practitioners to increased risk and potential liability
 - Failure to properly diagnose and treat
 - Failure to maintain confidentiality
 - Failure to obtain informed consent

The Frame: Legal Risk

Discuss Today:

- Negligence Law
- Malpractice Risk in Psychiatry

Discuss Someday:

- Constitutional Law Violations
- Administrative Board Sanctions
- Criminal Charges

Psychiatric Malpractice: The Odds

How often are Physicians Sued (1991-2005)?

- Annually 7.4% of all physicians face a malpractice claim

Ranked By Specialty (NEJM 2011)

- | | |
|--------------------------|-------|
| • Neurosurgery | 19.1% |
| • Cardiothoracic Surgery | 18.9% |
| • General Surgery | 15.3% |
| • Family Medicine | 5.2% |
| • Pediatrics | 3.1% |
| • Psychiatry | 2.6% |

What are the Outcomes? 78% of claims result in no payments.

Psychiatric Malpractice Suits by Type of Claim

1. Suicide
2. Boundary Violations
3. Split Treatment Dislocations
4. Unavailability/Abandonment
5. Failure to Protect Third Parties
6. Mismanagement of Medications
7. Failure to Obtain Informed Consent

What is Malpractice?

Where does Malpractice sit in the legal landscape:

1. A “tort” or non-criminal harm
2. Within torts, a “negligent tort”
3. Within negligent torts, a negligent tort committed by a professional.

The 4 D's

What must a plaintiff in a malpractice action assert to have a valid claim?

Duty

Dereliction

Directly

Damages

#1 : Duty

The plaintiff must show that he or she was your patient....that a duty of care existed.

- When is this in dispute?
 - Curbside Consultations
 - Supervision of Residents
 - Consultation to Teams
 - Good Samaritan Contexts

#2 Dereliction

A Professional Negligence Tort means that a professional failed to live up to the “Standard of Care”

“Psychiatrists have the duty to possess that degree of skill and learning ordinarily possessed and used by members of the profession in good standing, and who are engaged in the prescribing, dispensing and administering of medications in the same or similar circumstances.”

#2 Dereliction continued

What lives up to the standard of care?

1. Reasonable care, not extraordinary or perfect care
2. Based on the sub-specialty which you purport to offer
3. Proved by a preponderance of the evidence

#3 Directly

Directly captures the concept of direct legal causation.

- But for link between physician conduct and bad outcome
- Proximate or legal cause
- Without intervening acts or omissions

#4 Damages

The dereliction of your professional duty must have directly caused Damages:

1. Measureable physical damage
2. Measureable psychological damage
3. Measurable social/occupational/reputational damage

Dereliction: Breaching the Standard of Care:

The Duty to Treat Properly:

Negligent Diagnosis

Suicidality

Homicidality

Treatable Conditions

Generally Negligent or Poor Care

Failure to offer indicated medications

Failure to treat with adequate doses

Failure to hospitalize when indicated

Failure to Report Abuse or Neglect

Failure to Protect Third Parties

Failure to Provide Coverage/Abandonment

Suicidality

Liability for Suicidal Acts

Failure to offer proper treatment

Failure to offer appropriate safety

Where should you turn?

Professional Practice Guidelines

Hospital Risk Management Guidelines

Authoritative Texts

Dereliction: Breaching the Standard of Care:

Negligent Use of Somatic Treatments

- Poor Record Keeping
- Fragmented Care
- Failure to Monitor Side Effects
- Disregard of Treatment Guidelines

Failure to Maintain Boundaries

- Models of Boundary Violations
- A well known progression with disastrous results:
 - Erosion of therapist neutrality
 - Therapy as a social hour
 - The patient is treated as special
 - The therapist talks about other patients
 - The therapist talks about herself
 - Extra-therapeutic contact
 - Extended therapy sessions
 - Evening therapy sessions
 - Therapist stops billing
 - Therapist patient romantic/sexual contact

The Legal Consequences of Boundary Violations

Civil Law Suits

Negligence

Intentional Torts

Loss of Consortium

Breach of Contract

Ethical Sanctions

Loss of License

Criminal Charges

Breach of Confidentiality

“You must keep confidential the communications of your patients made in the course of treatment”

Says Who?

State Common Law

State Statutes

Federal Law

Ethical Principles

Exceptions Include

1. The Duty to Protect (Tarasoff)
2. Commitment/Emergency
3. Mandatory Reporting Statutes
4. Sex Offender Registries
5. Information to Third Party Payers
6. Information to State Agencies
7. Litigation Raising Mental State

Who Can You Tell?

Paul Appelbaum and the Circle of Knowing

Inside

The Patient

The Treatment Team

Some Consultants

Nursing / Caregivers

Custodial Parents

Guardians

Outside

Attorneys

Referring Therapists

Previous Treaters

Emancipated Minor Parents

Police

Breach of the Duty to Obtain Informed Consent

“Patients have the right to full disclosure concerning a proposed treatment, including a description of risks and benefits of the treatment, side effects and sequelae, and alternative treatments”

What Makes Consent Informed?

The Three Elements of Informed Consent

1. KNOWING
2. VOLUNTARY
3. INTELLIGENT

The Three Elements of Informed Consent:

Knowing

Knowing: What Does That Mean?

A Materiality Standard

What a reasonable patient would need to know to make the decision

- Diagnosis
- Specifics of Treatment
- Consequences with/without treatment
- Alternative Treatment Modalities

Three Elements of Informed Consent:

Voluntary

Voluntary: What Does That Mean?

The treatment decision was made by the patient voluntarily without coercion

- No physician coercion
- No environmental coercion
- Family persuasion is not usually your problem with caveats

Three Elements of Informed Consent:

Intelligent

Intelligent: What Does That Mean?

A decision must be made intelligently or competently:

- The ability to **express** a choice
- The ability to **understand** presented information
- The ability to **appreciate** the significance
- The ability to **reason logically** about rx options

Failures of Documentation:

The Most Common Pitfalls

1. If you didn't write it down, it didn't happen
2. What should you document?
 1. *The service provided, when and by whom*
 2. *The informed consent process*
 3. *Your own reasoning about the decision*
 4. *Whom you consulted and who approved*
3. Never ever change a record.

The Bottom Line:

The best way to avoid liability is to practice up to the highest standards, obtain consultation where indicated, document process and reasoning, and maintain respectful boundaries and patient confidentiality.

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