



Legal Issues in Treating Individuals with ADHD and Related Disorders: Selected Topics

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Disclosures

- Neither I nor my spouse have a relevant financial relationship with a commercial interest to disclose

ADHD and the Law: Multiple Issues

- Civil issues
 - Treatment
 - Disability
 - Constitutional
 - Child abuse/Custody
- Criminal issues
 - ADHD and criminal behavior
 - Competency to stand trial and criminal responsibility

Treatment Issues: Informed Consent

- Definition: A process by which one individual agrees to allow another individual to intrude upon his bodily integrity or other rights where the agreeing party is competent to consent and the consent is given voluntarily and with a reasonable degree of knowledge of the situation.

Elements of Informed Consent

- Information
- Voluntary
- Competence

Information

- Professional (Physician-based) standard, e.g. New York
- Materiality (Patient-based) standard, e.g. Massachusetts
 - Objective/Reasonable patient
 - Subjective/This patient

Information

General Requirements: Harnish v. Children's Hospital (Mass. 1982)

- Nature of condition and procedures
- Nature and probability of material risks
- Reasonably expected benefits
- Inability to predict results
- Potential irreversibility of the procedure
- Likely results, risks, & benefits of no treatment and alternative treatments

Voluntary

- Free of coercion by the treater.
- What about “persuasion” by parents/guardian?
- Special issues with children and adolescents
 - Assent vs. consent
 - What basis for treatment refusal?
 - Clinical impact of parental coercion

Competent

- When is the child competent to decide?
- General rules:
 - Minors are incompetent; parents or guardians decide
 - Minors may decide if
 - Emancipated minors
 - Mature minors
 - Specifically allowed by statute

Are the Parents Competent?

Incompetence constitutes a status of the individual that is defined by functional deficits (due to mental illness, mental retardation, or other mental conditions) judged to be sufficiently great that the person currently cannot meet the demands of a specific decision-making situation, weighed in light of its potential consequences.

Exceptions to Informed Consent

- Emergency
- Implied waiver
- Waiver
- Therapeutic privilege, e.g. New York



Off-Label Use of Medications

FDA Approval

- Approval given to marketing information based on research-proven efficacy and safety
- Not intended to interfere with doctor/patient decisions regarding use of medication

Physician May Use Professional Judgment

- Lack of FDA approval not a material risk
- Use of professional judgment provides basis for malpractice claim
- Protection from claims = documented studies of safe use + similar practice in community
- Black Box Warnings:
 - Pay attention
 - Not necessarily a major change in the approach to informed consent

HIPAA: Health Insurance Portability and Accountability Act

- Primary purposes
 - Ensure portability of health insurance when changing employers
 - Facilitate the exchange of medical information to improve the efficiency of care
 - Prevent unauthorized disclosures of medical information (i.e., confidentiality/privacy of medical information)

HIPAA: Health Insurance Portability and Accountability Act

- Does not override state privacy laws
- Minimum necessary rule applies in all cases
- Enforced by office of Civil Rights of DHHS; no private right of action.
- Multiple exceptions that allow disclosure of PHI in the public interest without patient consent



"It's a baby. Federal regulations prohibit our mentioning its race, age, or gender."

Reducing Malpractice Risk

Role of the Therapeutic Alliance

Malpractice = bad outcome + bad feeling

Role of the Therapeutic Alliance: Russell's Rule

$$\text{Probability of suit} \propto \frac{\text{Physician's arrogance}}{\text{Physician's competence}}$$

Informed Consent and the Therapeutic Alliance

- Sharing uncertainty: what we know and don't know
- Includes uncertainty about the future and long term effect of new medications
- Shared decision making as the model

Informed Consent and the Therapeutic Alliance

- Example: the off-label use issue
 - Approved for other uses
 - Safe under these circumstances
 - Rationale for using in this way
 - Risks of use, including future risks not yet known
 - Questions
 - Choice

ADHD and Disability

Disability Protection in Education

- Education of the Handicapped Act (1982)
Protection of those with disabilities in the educational system.
- Individuals with Disabilities Education Act (1975;Amended 1995)
 - Ensures “free appropriate public education”
 - Individualized Education Plan (IEP)
 - Education in the least restrictive setting

Behavioral Problems Under IDEA

- ADHD is covered; what about ODD? (Yes, but.)
- IEP meeting must be held prior to removal for more than 10 days
 - Court can enter TRO
 - Disruptive child may be returned pending IEP
 - Services while suspended?
- Relationship between rules violation and disability must be considered when determining punishment
- School authorities may make decisions on a case by case basis

Behavioral Problems Under IDEA

- School authorities may remove students who have “inflicted serious bodily injury upon another person while at school, on school premises, or at a school function”, as well as those who carry or possess a weapon or knowingly possess or use illegal drugs or sell or solicit the sale of a controlled substance
- Courts split on whether services have to be provided after a child is suspended

Behavioral Problems Under IDEA

- Regulatory changes in 1999
 - Unilateral short suspensions up to 10 days
 - Expanded ability to remove for drugs/weapons
 - Codifies procedures for removal
 - Services provided after child expelled

The Americans with Disabilities Act

- Protection against discrimination based on disability in employment (Title I) and public accommodations (Title II and III)

Qualified Individual with a Disability

- An individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the job or partake of the public accommodation.

The ADA and School

- Axelrod v. Phillips Andover Academy
(D. Mass. 1999)
 - Student with ADHD asked by school to withdraw in 3rd trimester of senior year
 - Court found disability
 - Student failed to request reasonable accommodation
 - Even with reasonable accommodation, student was not otherwise qualified, i.e. could not prove he could meet all the academic requirements in spite of handicap

Constitutional Issues: Forced Medication of School Children

- State interest in maintaining classroom order vs. right of parental control
- Less restrictive alternatives
- Violation of right to privacy
- Violation of Due Process and Equal Protection clauses

Other Civil Issues

- Mandatory reporting of abuse and neglect
 - Risk of abuse/neglect in ADHD
 - Failure to provide necessary treatment
- Shared custody: Who decides?
 - Legal custody generally controls
 - Parent with physical custody can make immediate decisions
 - Resolve these issues beforehand

Criminal Issues

- ADHD and criminal behavior
 - Prevalence of antisocial behavior in children with ADHD
 - Disinhibitory psychopathology: substance use, ODD/conduct disorder, adult APD
 - High comorbidity
 - Share *externalizing*:
 - Heritable personality trait
 - Low constraint
 - Impulsivity
 - Negative emotionality
 - Predisposed to excessive reward seeking and risk-taking, hostility, poor impulse control

ADHD as a Criminal Defense

- Diminished Capacity
 - Altered mental state which falls short of qualifying for an insanity verdict, but which provides evidence of diminished capacity to understand wrongfulness or conform conduct
 - Can result in reduction to next lower charge

The Insanity Defense

- A person is not responsible for criminal conduct if, at the time of such conduct as a result of mental disease or defect, they lack appreciation of the nature and quality of the act or its wrongfulness or (in some jurisdictions) lack substantial capacity to conform his behavior to the requirements of the law
- Must be a link between behavior and illness
- Rarely successful

ADHD and Competency to Stand Trial

- Whether the defendant “has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and whether he has a rational as well as a factual understanding of the proceedings against him.” Dusky v. US (US 1960)
- Fifth Amendment/self incrimination issues

The Clinician as Expert Dilemma

- A continuum from “return to work/disability” to risk of violence and criminal responsibility
- As you move along the continuum, it becomes a worse idea.
 - Lack of objective data
 - Danger to the relationship
 - Bias
- Beware the Siren’s call

Conclusion

- Lots of legal issues with ADHD
- Good clinical care is good risk management, and vice versa
- Potential impact in criminal matters may lead to the treating clinician being drawn into the legal process

General Resource

