Legal Issues and ADHD: Selected Topics

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Disclosures

• Neither I nor my spouse/partner has a relevant financial relationship with a commercial interest to disclose
ADHD and the Law: Multiple Issues

• Civil issues
  – Treatment
  – Disability
  – Constitutional
  – Child abuse/Custody
  – Fitness for duty

• 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 parents/guardian?

• Special issues with children and adolescents
  – Assent vs. consent
  – What basis for treatment refusal?
  – Clinical impact of parental coercion
When is the child competent to decide?

General rules:

- Minors are incompetent; parents or guardians decide
- Minors may decide if
  - Emancipated minors
  - Mature minors
  - 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
  • Insure portability of health insurance when changing employers
  • Prevent unauthorized disclosures of medical information
  • Facilitate the exchange of medical information to improve the efficiency of care
HIPAA: Health Insurance Portability and Accountability Act

- Applies to most clinicians
  - Bill electronically or affiliated with an organization that uses electronic billing
  - Even if not applicable, will likely set the standard for confidentiality/privacy

- Numerous requirements, but
  - Fundamental concepts of confidentiality are unchanged
  - Disclosure without consent, for the public good, allowed in 13 situations, including
    - Risk of harm to self or others
    - Child abuse and other mandated reporting
    - Public health reporting
    - Judicial proceedings
    - Law enforcement needs
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.”
Risk Management and Malpractice
Elements of a Malpractice Claim

• Elements of Proof: The Four Ds
  – Dereliction of a
  – Duty which
  – Directly causes
  – Damages
The Four Ds

• Dereliction
  – Improper departure from accepted practice, or
  – Inept application of accepted practice
The Four Ds

• Duty
  – To possess and employ such reasonable skill and care as are commonly had and exercised by respectable, average clinicians in the same or similar community
  – Specialists held to higher standard
  – The School Rule
  – Duty to consult
  – To whom is the duty owed?
    • Tarasoff
The Four Ds

• Direct or proximate causation
  – Causation in fact: The But For Test
  – Proximate or legal causation = foreseeability of harm
  – *Res ipsa loquitur*: The thing speaks for itself
The Four Ds

• Damages
  – Must be proven
  – Types
    • Physical
    • Emotional
    • Economic
Reducing Malpractice Risk
Role of the Therapeutic Alliance

Malpractice = bad outcome + bad feeling
Role of the Therapeutic Alliance: Russell’s Rule

Probability of suit $\propto$ Physician’s arrogance

Physician’s competence
Informed Consent and the Therapeutic Alliance

• Sharing uncertainty: what we know and don’t know
• Includes uncertainty about the future
• 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
Prevention Plus Defense

• Bipolar Diathesis as an example:
  – Assessment:
  – Consultation
  – Documentation

• Don’t make promises you can’t keep

• The role of apologies and apology statutes
  • Impact on the relationship
  • Reduces payout by an average of $32,000
  • Most value: obstetrics & anesthesia, cases involving infants, improper management, and missed diagnoses
ADHD and Disability
Education of the Handicapped Act, 1982

- Protection of those with disabilities in the educational system.
- Minimal brain dysfunction is covered.
- Embodies Constitutional Due Process and Equal Protection provisions
Individuals with Disabilities Education Act, Amended 1995

- Originally passed in 1975
- Designed to ensure that children with disabilities get free appropriate public education
- IEP: Individualized Education Plan
- Education in least restrictive setting
- Procedural safeguards
- Attorney’s fees to prevailing party in Federal Court
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)
The Americans with Disabilities Act

• No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.
The Americans with Disabilities Act

• No individual shall be discriminated against on the basis of disability in the full and equal employment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation.
Qualified Individual with a Disability

- An individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the job.
- Consideration given to employer’s judgment regarding essential elements
- Written job description in existence before job advertised or hire serves as evidence of essential elements.
The ADA and School

  - 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
Adult ADHD and the ADA

• Does ADHD explain/excuse poor performance?
• Work rules apply to everyone, regardless of disability status
• Wright v. CompUSA (1st Cir. 2003): Ee whose treatment for ADHD had been successful and whose symptoms were exacerbated by a new supervisor’s management style did not present sufficient evidence that he was substantially limited in major life activities. Must prove:
  – Suffers from a disability
  – Nevertheless able to perform essential functions
  – Er took adverse action because of the disability
Disability Insurance

- ADHD and requests for disability
  - Short and long term
  - Any occupation vs. own occupation
- “New onset” ADHD in adults: Suddenly discovered/developed disorder or alternative explanation for other problems?
- SSDI
- Clear connection between ADHD and disability, see: Gjervan at al. J. Attention Disorders (16)7:544-552 (2012)
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

• Fitness for duty: blue and white collar jobs
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: Model Penal Code

- A person is not responsible for criminal conduct if, at the time of such conduct as a result of mental disease or defect, he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his behavior to the requirements of the law.
- Must be a link between behavior and illness.
The Insanity Defense: Federal Standard

- It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts.
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 in to the legal process