

ETHICAL ISSUES IN REPRESENTING CLIENTS WITH MENTAL ILLNESS

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RECOGNITION OF MENTAL ILLNESS

■ Major Depressive Disorder

- ◆ Depressed mood
- ◆ Anhedonia
- ◆ Helplessness/Hopelessness
- ◆ Tearfulness
- ◆ Changes in sleep/appetite
- ◆ Suicidal ideation

RECOGNITION OF MENTAL ILLNESS

■ Bipolar Disorder

- ◆ Alternating mood swings
- ◆ Mania
 - ◆ Euphoria
 - ◆ Grandiosity
 - ◆ Impulsivity
 - ◆ Increased energy/decreased sleep
 - ◆ Racing thoughts/pressured speech
- ◆ Mixed

RECOGNITION OF MENTAL ILLNESS

- Psychosis
 - ◆ Hallucinations
 - ◆ Delusions
 - ◆ Thought Disorder
- Schizophrenia
- Schizoaffective Disorder

RECOGNITION OF MENTAL RETARDATION

- IQ and Adaptive Functioning
- “Cover” --under-recognized
- Co-occurring mental illness and mental retardation

WORKING WITH MENTAL HEALTH CLIENTS

- Medication Issues
- Communication Strategies
- Mental Health Service System

DECISION MAKING CAPACITY

- Specific Capacity v. Total Incapacity
- Assessing Capacity

ABA Model Rules of Professional Responsibility

1.14 “When a client’s capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.”

ABA Model Rules of Professional Responsibility

1.14 However, if the impairment is such that the “lawyer reasonably believes that the client has become diminished capacity, is at risk of ...harm unless action is taken and cannot adequately act in the client’s own interest...the lawyer may take reasonably necessary protective action...”

Texas Disciplinary Rules of Professional Conduct

1.02: “A lawyer should take reasonable action to secure appointment of a guardian or...seek other protective orders with respect to a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client.”

Essentially Four Choices

(Paul R. Tremblay)

- Treat the client as if fully competent, and accept instructions
- Treat the client as if fully competent, but actively try to persuade to make a “better choice”
- Act as a “de facto” guardian for the client and make decisions, perhaps informed by the insight of others
- Seek appointment of a surrogate decision maker

SCENARIO

Susan is a 54 year old woman with a long history of Schizoaffective Disorder. One of the key components of her illness is a persistent paranoid delusional system surrounding her mother, who was her primary caretaker. She eventually killed her mother and is awaiting trial for murder. Despite being informed by her attorney, and her attorney's expert that her case did not meet the legal definition of insanity, she instructed her attorney to reject an offer of 20 years, opting instead to proceed with the insanity defense without expert testimony.

Seeking Guardianship

- Guardianship in Texas
- Impact of Full Guardianship
- Utility of Limited Guardianship

SCENARIO

Adult Protective Services received a referral from a neighbor about Joe. Joe is a 45 year old veteran who has not uttered a word to anyone since returning from the VN war. He lives alone, in relative squalor, but his living situation is not dangerous. His hair is waist length and matted, and he rarely bathes or changes clothes. Every day he gets up, eats breakfast and then begins walking the neighborhood. He walks until nightfall and then goes to bed. He has caused no harm or danger in the community. He has no benefits because he will not ride with anyone to the necessary offices or sign paperwork. He currently lives by sharing his mother's SS benefit, but her health is failing.

Confidentiality of Client Information

ABA Model Rules 1.16: “A lawyer may reveal information related to the representation of a client to the extent the lawyer reasonably believes necessary...to prevent reasonably certain death or substantial bodily harm...”

Confidentiality of Client Information

Texas Disciplinary Rules of Professional Conduct: 1.05 Comment 17

Lawyer seeking legal representative or other orders for client under a disability is authorized to reveal court confidential information reasonably necessary to secure the orders

SCENARIO

After her conviction and sentencing, Susan became very despondent. She was socially withdrawn, exhibited poor eye contact and was not sleeping. She told one of the correctional officers that she just wanted to die. She told her attorney that she was willing to live with the outcome of her case, and instructed him not to file an appeal. She refused to allow her attorney to contact prison medical staff or her family about her condition.

Confidentiality of Client Information

ABA Informal Opinion 89-1530:

“A lawyer may discuss a client’s condition with his physician even without the client’s consent when necessary to the representation of the client.”

Family Issues

- Family members can be essential in working with clients with mental illness
- Caution: Not always the same interests as the client

Withdrawal From Representation

ABA Model Rule 1.16:

“...a lawyer may withdraw...if withdrawal can be accomplished without material adverse effect on the interests of the client...”

Discharge from Representation

ABA Model Rules 1.16, Comment 6:

“If the client has severely diminished capacity, the client may lack the legal capacity to discharge a lawyer, and in any event the discharge may be seriously adverse to the client’s interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action...”

SCENARIO

Z.M. is a 50 year old man on trial for his involvement in a conspiracy to commit a terrorist act. He is potentially facing the death penalty. His mental status varies widely from clarity, to rambling nonsensical thought processes. He has had three sets of defense attorneys, all of whom he has fired because they will not follow his instructions. He appears to you to be severely mentally ill. Over your objection, he insisted on testifying, and in his testimony he presented evidence directly contradictory to your defense strategy.

Using Mental Health Experts

- Helping you relate to your client
- Determination of capacity/Guardianship
- Competency/NGRI
- Plea negotiations
- Jury/witness selection
- Client testimony
- Evaluations/treatment

Qualifications of Experts

- Psychiatrist: Dx, Tx, Meds, NGRI, competency; board certification in forensic psychiatry
- Psychologist: Intellectual, cognitive, behavioral, family dynamics, competency and insanity, testing, forensic specialists
- Court Room Experience

What Your Expert Should Do

- Interview/mental status exam
- Review of old records
- Talk with treatment providers
- Talk with jail personnel
- Collateral/family information

How You Can Help Your Expert

- Obtain medical records/mental health history
- Give background history
- Be present during interview