



Working With Young Adults Exhibiting Psychiatric Symptoms: The Mental Health Forensic Consultant Role

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Most people who suffer from mental illness during their lifetime first experience symptoms as young adults. Recent studies show that first episode treatment is singularly effective in reducing the long-term impact of psychotic illness; however, young adults also have the lowest rates of treatment compliance. For many, this period can be the start of a years or even life-time cycle of deterioration comprising a repeated, revolving-door of hospitalizations, decompensation, criminal activity, homelessness, and other dangerous activities.

This article explores the forensic concept of informed consent. It also explores the law related to surrogates, guardians, and health care agents and how these constructs can serve as tools for forensic clinicians in navigating effective work with these vulnerable young individuals facing mental health struggles.

INTRODUCTION

Tragically, young adulthood is a time when many patients begin to exhibit symptoms of previously dormant or new mental illness (Kessler, Amminger, et al., 2007). This allows parents little

time to prepare before their children are legally deemed adults and are granted the legal presumption of capacity. Early treatment and intervention into mental health issues is critical. Scientific research has shown that the longer individuals delay or avoid treatment

for psychiatric symptoms (Rosenbaum, 2016b), the worse their overall prognosis (Rosenbaum, 2016b). Recent studies have shown that first-episode treatment of mental health disorders may be singularly effective (Kane, John, Robinson, Delbert, Schooler, Nina, Mueser,

Penn, Rosenheck & Addington, 2016; Rosenbaum 2016).

Our government and mental health care systems are limited in their ability to protect these vulnerable youth (Rosenbaum, 2016b; Interdepartmental Serious Mental Illness Coordinating Committee, 2017). In December 2017, a federal committee reported on the treatment of mental illness in America (Interdepartmental Serious Mental Illness Coordinating Committee, 2017). Its findings were tragic: the committee reported, “Too many people with serious mental illness (SMI) and serious emotional disturbances (SED) do not get the treatment and support they need. Fragmented systems provide incomplete services that do not draw on available evidence. The result is needless suffering for individuals and families and increased risk of incarceration, homelessness, disability, poor physical and mental health outcomes and early death” (Interdepartmental Serious Mental Illness Coordinating Committee, 2017 at 1).

This lack of adequate government support places the onus on parents and loved ones to take proactive steps, including retaining mental health attorneys and forensic consultants, to assist in bringing these young adults to appropriate treatment.

This article provides a framework for a forensic consultant to consider. The first section will discuss the threshold tests forensic consultants may best use to determine whether an individual patient can provide “informed consent” in Massachusetts. The second and third section will discuss Health Care Proxies and Surrogates. The fourth section will discuss Guardianship in Massachusetts and is further broken into subsections: (A) the clinical standard for Guardianship, (B) the qualifications forensic consultants need to provide the clinical support necessary for Guardianship, (C) the privacy implications involved

in a forensic consultant providing the support for Guardianship. Finally, the concluding section will explore the role of mental health forensic consultant in assisting families by bridging some inadequacies of the legal and medical systems.

CAN THE PATIENT PROVIDE INFORMED CONSENT TO RECEIVE TREATMENT?

Medical professionals must receive informed consent from a patient prior to providing treatment (Harnish v. Children’s Hospital Medical Center, 1982). This requires full disclosure to the patient and as a result that the patient understand the risks and benefits, side effects, and possible outcomes of treatment choices (Harnish v. Children’s Hospital Medical Center, 1982). It is not always possible to get this informed consent from the patient directly, as sometimes, the patient lacks the capacity to provide such consent.

The lack of capacity to provide informed consent typically arises in two contexts: when the patient is a minor (and the law presumes incapacity) and when the patient is an adult but has diminished capacity that effects the ability to provide informed consent.

A minor child is legally incapable of providing informed consent to receive treatment. The law generally attributes legal custody to the minor child’s mother and father, permitting them to speak for their children.

Once a child becomes an adult at age 18, another rule kicks in: adults are legally presumed to have capacity to undertake any legal act, unless specifically found to lack such capacity (American Bar Association Commission on Law and Aging and the American Psychological Association, 2005). Determining whether an individual has the capacity to make a specific decision depends on the action in question (American Bar

Association Commission on Law and Aging and the American Psychological Association, 2005). Capacity to make a health care decision requires that the person’s consent be competent, voluntary and informed (American Bar Association Commission on Law and Aging and the American Psychological Association, 2005).

A physician has a duty to disclose to his patient all significant medical information that a physician possesses or reasonably should possess that is material to the patient’s making an informed judgment (Harnish v. Children’s Hospital Medical Center, 1982). The patient must then provide informed consent to such treatment after a full disclosure of the benefits, risks, side effects and possible outcomes of the treatment choices (Harnish v. Children’s Hospital Medical Center, 1982; Superintendent of Belchertown State School vs. Saikewicz, 1977). Courts have noted “the privilege does not accept the paternalistic notion that the physician may remain silent simply because divulgence might prompt the patient to forego therapy the physician feels the patient really needs” (Harnish v. Children’s Hospital Medical Center, 1982 at citing Canterbury v. Spence, 1972 at 789).

Clinicians must remember that the evaluation of an individual’s capacity to provide informed consent is specific to the particular treatment sought. For example, a patient with schizophrenia and delusions may be capable of understanding treatment for a heart attack, but incapable of determining treatment for his mental health condition (Ahmed, 2001). Some have estimated that between 40 to 50 percent of people with serious untreated mental illness have anosognosia, a deficit of self-awareness in which a person with a disability seems unaware of its existence.

(Rosenbaum, 2016, citing What is Anosognosia, Backgrounder).

IF AN ADULT CANNOT PROVIDE INFORMED CONSENT: HEALTH CARE PROXY

If an individual over 18 has diminished capacity, a forensic consultant may first evaluate whether the patient can be assisted in understanding the medical decision with supports, or whether the patient has capacity to voluntarily sign a health care proxy (HCP). The capacity to sign a HCP is interpreted under the standard for contractual capacity (American Bar Association Commission on Law and Aging and the American Psychological Association, 2005). Contractual capacity is the ability to understand “the nature and quality of the transaction, together with an understanding of its significance and consequences” (Farnum v. Silvano, 1989 at 204).

A patient must understand both the general nature of the health care decisions he or she is delegating, and also trust the nominated Health Care Agent (Agent) to decide on his behalf (American Bar Association Commission

on Law and Aging and the American Psychological Association, 2005). This is very different than the standard required to provide informed consent to make medical decisions.

This divergence opens several planning opportunities when working with adults without capacity to make an underlying medical decision, but do have capacity to execute a HCP appointing an Agent. In those cases, the patient may execute a HCP, appointing an Agent who may later act on the patient’s behalf in making medical decisions. The HCP includes the authority to make medical decisions other than those specifically excluded (MGL Ch.201D Section 5). An Agent may use the HCP only after it is activated by a provider who indicates that the patient cannot make or communicate medical decisions (MGL ch.201 D Section 6).

A patient may revoke the HCP at any time if he or she has sufficient capacity to do so (MGL ch.201 D Section 7). If an Agent takes an action contrary to a patient’s expressed wishes, that action

shall be deemed a revocation of a HCP (MGL ch. 201 D Section 7). However, if an individual attempts to revoke the authority, either through action or expression, an Agent maintains standing to file a special legal action seeking a court determination that the patient lacks capacity to revoke the HCP and therefore that it remains in full force and effect over patient’s objection (MGL 201D Section 17). See Chart 1: Comparing Massachusetts Guardianships with Health Care Proxies with Conservatorships.

IF AN ADULT CANNOT PROVIDE CONSENT: SURROGATES

Some states also recognize the ability of a different surrogate decision maker, such as the patient’s spouse or close family member, to make medical decisions if the patient is not competent and no guardian or conservator has been appointed. Massachusetts is one of only four states that does not have a statute authorizing a surrogate procedure under

Chart 1: Comparing Massachusetts Guardianships with Health Care Proxies with Conservatorships.

	Guardianship	Health Care Proxy	Conservatorship
Does not require Court action to create		X	
Requires Court action to create	X		X
May override patient’s expressed wishes	X (limitations in the community on enforcement)	Only with Court “affirmation”	X
Includes authority to admit/commit to mental health institution	No longer allowed in Guardianship (requires Commitment action)	X (unless excluded from authority included)	No. Only over finances
Includes authority to admit to a nursing home	X (With extraordinary finding that such placement is in the person’s “best interest”)	X (unless excluded from authority included)	No. Only over finances
Includes authority to make decisions over antipsychotic medication	Only with annual review and extraordinary court authority	X (unless excluded from authority included)	No. Only over finances
Requires reporting to Court	X (Care plan for all guardianships. Roger’s Monitor Report (if guardianship excludes extraordinary authority to monitor treatment with antipsychotic medication.)	None	X (Inventory, annual accounts, and in some cases a Financial Plan)

any circumstances (DeMartino, Erin, Dudzinski, Doyle, Sperry, Gregory, Siegler, Sulmasy, Mueller, Kramer, & DeMartino, 2017). However, there has been pending legislation in Massachusetts, which could create a framework for surrogate decision making. Of the states that have surrogacy statutes, 35 create a hierarchy of relatives, partners, and friends (DeMartino, 2017). All such 35 states grant a spouse the highest priority (DeMartino, 2017). However, they differ on what other priorities exist involving others such as parents, children, siblings, friends and domestic partners (DeMartino, 2017). Even in states that do not formally recognize surrogate decision makers, many hospitals have internal policies governing priorities for surrogate decision makers (DeMartino, 2017). The appropriateness and suitability of surrogate decision makers is critical to ensuring the patient is protected and well-cared for; however, there are limitations to the ability to receive full information to discern the suitability of the surrogate under current surrogacy statutes (DeMartino, 2017).

IF AN ADULT CANNOT PROVIDE CONSENT: GUARDIANSHIP

Forensic consultants should also evaluate the possibility of a guardianship by a third party to whom the court grants authority to make personal decisions in those specific areas the individual is found to lack the decision-making capacity to decide for him or herself.

Massachusetts adopted Article V of the Uniform Probate Code in 2008. Massachusetts Guardianship law is based upon the 1997 version of a Uniform Guardianship Act promulgated by the National Conference of Commissioners on Uniform State Laws (Uniform Law Commission, The National Conference for State Law, 2018). An estimated 16 jurisdictions have enacted state statutes tracking either the 1982 or 1997

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version of the Uniform Law related to Guardianship (Uniform Law Commission, The National Conference for State Law, 2018). In 2018, Maine enacted a new version of the uniform law retitled as the “Uniform Guardianship, Conservatorship, and other protective Arrangements Act” (Uniform Law Commission, The National Conference for State Law, 2018). (See Map, States that have adopted some version of Uniform Probate Code)

CLINICAL STANDARD FOR GUARDIANSHIP IN MASSACHUSETTS

Under the Massachusetts version of Article V of the Uniform Probate Code, a Guardian may be appointed if a moving party can show by a preponderance of the evidence that a three-prong test is satisfied: (1) the person for whom a guardian is sought is an “incapacitated person”; (2) the appointment is necessary or desirable to provide continuing care and supervision of the person; and (3) that person’s needs cannot be met by less restrictive means, including use of appropriate technological assistance (MGL Ch. 190B Sec. 5-306 (6)-(8)).

The Massachusetts Probate Code defines an “incapacitated person” as an individual who has a clinically diagnosed condition that results in an inability to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for

physical health, safety, or self-care, even with appropriate technological assistance (See MGL Ch. 190B Sec. 5-101(9)).

APPLYING THE STANDARD FOR GUARDIANSHIP TO THE PATIENT’S SITUATION.

Clinicians vary widely on their application of guardianship law to their patients for many reasons. Prior clinicians may not have had the benefit of thorough review of the facts and law. Treating clinicians work under the constraints of short term hospitalizations and in crowded settings with multiple patient responsibilities (Rosenbaum, 2016a). One study found treating physicians are highly biased in favor of finding their patients have the capacity to make a medical decision (Rosenbaum, 2016A; Raymont, 2004). There are many ethical issues that arise for the treating clinician that may sway him or her one way (Rosenbaum, 2016a; Rosenbaum, 2016b). Biases inevitably come into play.

Mental health forensic assessment requires subjective assessments of the law as applied to the specific patient (Rosenbaum, 2016a). It is important for the forensic consultant to thoroughly consider each case presentation, including extrinsic information, closely and to not be unduly predisposed by prior statements by prior treating clinicians or third parties who may be biased, not have received as comprehensive historical information, spent sufficient time, or have equivalent forensic education.

FORENSIC CONSULTANT QUALIFICATIONS TO PROVIDE CLINICAL SUPPORT FOR GUARDIANSHIP IN MASSACHUSETTS

In Massachusetts, a guardianship may be supported by medical testimony or certificate signed by a registered physician, certified psychiatric nurse clinical specialist, a licensed psychologist or a nurse practitioner, “professionally competent to complete a medical certificate” (MGL Ch. 190B Section 5-303 (12)c; Massachusetts Uniform Probate Court Practice XXII). If the guardianship also includes a request for treatment with antipsychotic medication, the court shall also consider the testimony or affidavit of such other person so authorized by law to prescribe antipsychotic medication (MGL 190B section 5-306A (a); Standing Orders of the Massachusetts Probate and Family Court, Standing order 4-11 – section 1). See Chart 2, Clinician Qualifications to Support Guardianship in Massachusetts.

PRIVACY IMPLICATIONS

Relevant privacy rules and regulations are detailed in several sources including: the psychotherapist-patient privilege, the Health Insurance Portability and Accountability Act of 1996 (HIPAA), and doctor/patient confidentiality rules.

Patients, their appointed fiduciaries, or their agents may authorize a doctor to

disclose medical records or information under these unless specifically limited to exclude that authority. However, the more complicated situation exists when there is no one to authorize disclosure. Each of the privacy rules have exceptions to disclosure when danger is present.

In Massachusetts, physicians have a duty to not make out-of-court disclosures of medical information without a patient’s consent, unless disclosure is necessary to meet a serious danger to the patient or others (Supreme Judicial Court Advisory Committee on Massachusetts Evidence Law, 2018, citing *Alberts v. Devine*, 1985). There is an exception to the Massachusetts psychotherapist-patient privilege when disclosure is necessary to establish need for hospitalization or imminently dangerous activity (Supreme Judicial Court Advisory Committee on Massachusetts Evidence Law, 2018). HIPAA also allows for exceptions, safe harbor provisions for when disclosure is “in the best interests of the individual” if the disclosure is to family and close friends involved in care, or even generally to prevent serious and imminent threats to a patient’s health and safety (U.S. Department of Health and Human Services, Office for Civil Rights, n.d.; 45 CFR 164.501 (b)(1)I(i), 164.510 (3), and 164.512(j)(1)(i)).

A clinician seeking authorization to provide medical support in a guard-

ianship or conservatorship hearing may warn a patient that the results of an examination may be used against the person and will not be privileged (*Commonwealth v. Lamb*, 1974). The Legislature has provided that the Massachusetts social worker patient privilege and psychotherapist patient privilege do “not prohibit the filing of reports or affidavits, or the giving of testimony . . . for the purposes of obtaining treatment of a person alleged to be incapacitated provided however, that such person has been informed prior to making such a communication that they may be used for such purpose and has waived the privilege (MGL Ch. 190 B section 5-306A). This exception allows forensic consultants a safe harbor if they provide an appropriate warning. See Chart 3, outlining safe harbors forensic clinicians may use in these situations.

BRIDGING THE INADEQUACIES OF OUR CURRENT LEGAL AND MEDICAL SYSTEMS.

The first onset of mental disorders usually occurs in childhood or adolescence (Kessler, 2007). This population in the transition age years of 16-25 is the least likely to receive treatment for a mental health disorder. (Kessler, 2007; Zajac, Sheidow, Ashili, & Davis 2015; Kim-Cohen, Caspi, Moffitt, Harrington, Milne, Poulton & Prior, 2003). These years are critical, presenting life-altering choices and challenges as young individuals make decisions that will affect long-term career paths and independent living arrangements (Zajac, 2015, The National Academies Press, 2014). The longer psychosis is left untreated, the worse the long-term effects from the illness:

- + decline of neurocognitive functions
 - IQ
 - problem solving
 - planning
 - concentration

Chart 2: Clinician Qualifications to Support Guardianship in Massachusetts

May Support Guardianship by Medical Testimony or signed Medical Certificate	May support extraordinary treatment with Antipsychotic medication
Registered Physician	any such person authorized by law to prescribe antipsychotic medication.
Certified Psychiatric Nurse Clinical Specialist	
Licensed Psychologist	
Nurse Practitioner	

Chart 3: Safe Harbors for Forensic Clinicians To Support Guardianship without Violating Privacy Rules and Regulations

Safe harbors for Forensic Clinicians to support Guardianship without violating privacy rules and regulations

1. permission from patient presently serving Health Care Proxy or Guardian
2. providing patient with a sufficient Lamb style warning prior to examination that examination results may be used in court
3. use is "to prevent serious and imminent threats to a patient's health and safety"

- ♦ increase of psychiatric symptoms
 - hallucinations
 - delusions
 - paranoia
 - social withdrawal
 - irritability
 - lack of insight

These symptoms all worsen the longer the patient goes without treatment, and many can then become irreversible (Rosenbaum, Lisa, 2016b). This can be the start of an extensive cycle of deterioration that involves poor life choices and repeated revolving-door type hospitalizations, joblessness, victimization, substance abuse, decompensation, criminal activity, homelessness, or even death. Of the 9.8 million U.S. adults with serious mental illness, about forty percent receive no treatment in any year (Rosenbaum, 2016b).

State law authorizes treatment for patients that are a serious danger to themselves or others (MGL Ch.123). However, as soon as the immediate danger is resolved (or is perceived to be resolved), the patient is often discharged to the same insufficient setting with written directions to follow up with outpatient treatment. It is dangerously commonplace for persons with serious psychiatric disorders to repeatedly cycle through the disjointed components of the mental health and criminal systems, with hospitals and clinicians seeing patients only during and in the immediate resolution of crisis situations and not assisting with

maintenance. These individuals routinely fail to follow up with outpatient treatment. Make no mistake, individuals with serious mental illness and, who are not receiving any treatment, are suffering (Rosenbaum, 2016b). State law provides for surrogates, health care proxies, and guardians to assist persons with diminished capacity.

The breakdown of our local, state and national governments to manage and assist individuals with psychiatric disorders effectively places an imperative on family members to assist in getting their

children and loved ones to the most appropriate treatment at the earliest possible time. These family members require the competent and passionate assistance of mental health attorneys and forensic consultants to assist them in getting their loved one support and assistance. Forensic consultants must closely review the details within the framework of the law and medicine, to assist this vulnerable population in escaping this cycle of deterioration.

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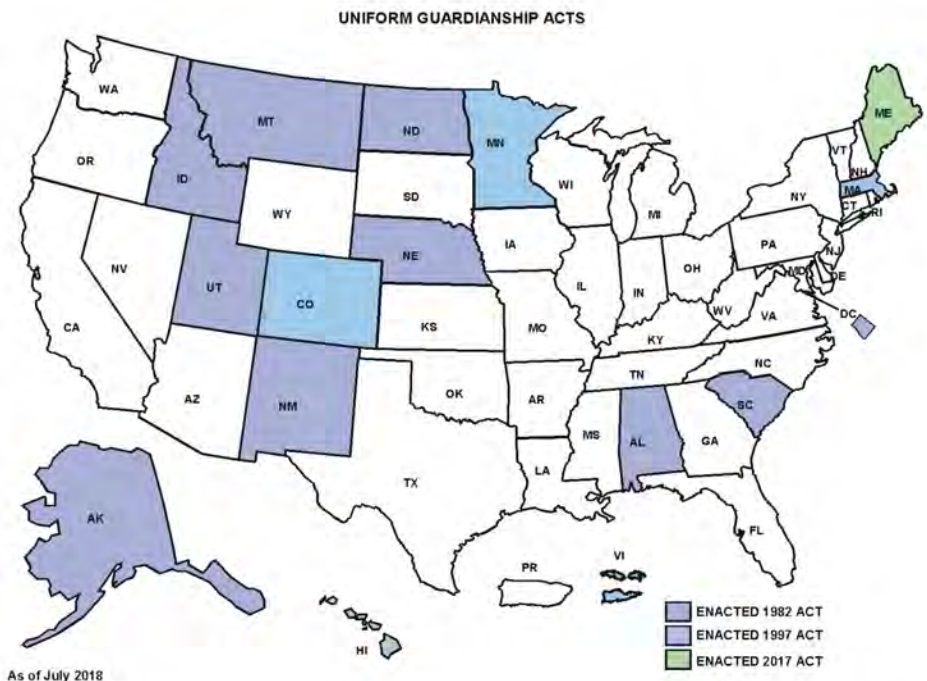
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