Ethical Considerations in Psychologists’ Management of Patients with Questionable Decision-Making Capacity

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Goals

• Understanding the definition of capacity and how it differs from competency
• Being alert to detecting when a patient may be impaired
• What to do when suspect that a patient may be impaired
Capacity vs. Competency

• Capacity ≠ Competency
• **Capacity** is a clinical term encompassing a patient’s ability to communicate a choice, understand relevant information, and appreciate the medical consequences of their decision.
• **Competence** is a legal term that can only be determined through formal legal proceedings.
• Therefore, a judgment regarding capacity may not be synonymous with the patient’s legal competency status.
Historically, health care providers employed paternalistic decision making.

Movement towards establishing an ethical code and involving a patient in the medical decision-making began in the 1940s after the Nuremberg trials.

1970s physicians began consistently disclosing health information to patients.

Today, patients cannot be treated without informed consent.
  • Autonomy- patients have the right to freely make choices, have responsibility for their behavior, and the right to choose their actions.

• Competence is assumed, no one is incompetent unless legally declared incompetent

Beauchamp & Childress, 2001
Informed Consent

• Ethically and legally, treatment is initiated only after informed consent has been obtained.
  • Therefore determining competence to adequately give informed consent is an integral part of the process.
• Incompetence is presumed in certain populations.
• Mental capacity is not always clear-cut.
  • Various impairments may pose a threat to obtaining appropriate consent.
Ethical principles in psychology and health care

- The APA has distributed the Ethical Principles of Psychologists and Code of Conduct.
- When faced with the ethical dilemma of determining action in relation to a patient who presents as legally competent but has displayed impaired decision-making capacity, all of the ethical principles need to be considered.
  - Principal A: Beneficence and nonmaleficence
  - Principal B: Fidelity and Responsibility
  - Principal C: Integrity
  - Principal D: Justice
  - **Principle E: Respect for People’s Rights and Dignity**

American Psychological Association, 2002, 2010
Ethical principles in psychology and health care

- Beauchamp and Childress (2001) developed five ethical principles.
  - Autonomy
  - Beneficence
  - Nonmaleficence
  - Justice
  - Fidelity
Autonomy

• What is it?
  • Patients have the basic right to freely to make their own decisions and, in turn, are responsible for their behavior.

• What is our responsibility?
  • To promote informed decision-making BUT ultimately respecting the patient’s decision.
Beneficence

• What is it?
  • Promoting the well being of others

• What is our responsibility?
  • To provide care that benefits/has a positive impact on our patients.
Nonmaleficence

• What is it?
  • Do no harm to patients (Hippocratic Oath)

• What is our responsibility?
  • Providers are required to choose the best treatment option available to their patients and avoid using techniques that are known to be harmful in a particular disorder

Example: Treating trauma
Justice

• What is it?
  • Fair treatment of all patients

• What is our responsibility?
  • Providers should distribute goods and services fairly and are required to treat equal cases equally.
Fidelity

• What is it?
  • The obligation to keep promises made to patients and place the patient’s interests first.

• What is our responsibility?
  • It is the obligation of a treatment provider to place the patient’s interests first and keep promises made to that patients.
Obtaining valid informed consent

• Cognitive functioning has been shown as the strongest correlate to impaired capacity. Moser et al., 2002

• During the informed consent process, be mindful of capacity issues.

• Psychologists should discuss plans with the patient and do so in a way that breaks down the information into meaningful language for that particular patient.
Potentially at risk populations

- There is always the potential for a patient of any age to present with capacity issues!
  - Cognitive deficits
  - Developmental disabilities
  - Intoxication
  - Psychiatric illness
Obtaining valid informed consent

• Grisso and Applebaum (1998) outlined five “maxims” for legal competence to consent to treatment.
  • Legal incompetence is related to, but not the same as, impaired mental status
  • Legal incompetence refers to functional deficits
  • Legal incompetence depends on functional demands
  • Legal incompetence depends on consequences
  • Legal incompetence can change

• In 2016, Palmer and Harmell expressed concerns that this model has too strong an emphasis on cognitive functioning while failing to address other important issues.
Legal incompetence is related to, but not the same as, impaired mental status

• A person’s autonomy should not be compromised just because they have a condition that impairs mental status.

• Although some form of mental illness or cognitive impairment must be present to impair insight, not everyone with such a condition will be unable to consent to treatment.
Legal incompetence refers to functional deficits

1. Patients must be able to understand the information that is disclosed in regard to their condition.
   - How do you know?
     - Have them repeat back the information in their own words.

2. Patients must appreciate the information regarding their circumstances.
Legal incompetence refers to functional deficits

3. Patients must be able to reason with the information and make a choice.
   • How do you know?
     • Do they make comparisons between treatment options?

4. Patients must be able to express their treatment choices.
   • Even if incompetence is determined with one of these standards, they may still maintain competence to appoint someone to make treatment decisions.
Legal incompetence depends on functional demands

- Providers should consider the demands of the task and the person’s ability to meet those demands.

- A person can be incompetent for one task, but not for another.
Legal incompetence depends on consequences

- Adjustments to determining competency need to be made based on the potential degree of harm.

Example: Previous suicide attempt by overdose
Legal incompetence can change

- Competence decisions are based on a patient’s *current* functioning.

- Competency evaluation should be a process, as it should be regularly assessed and monitored for changes.

Example: Psychosis
Recap

1. Do they have impaired mental status?
2. Are they capable of understanding the information you are providing them?
3. Do they appreciate that information?
4. Can they apply reason to that information and come to a thoughtful decision?
5. Can they express that decision to you?
Recap

• Make adjustments to the competency threshold based on:
  • Functional demands
  • Consequences

• Capacity can change so monitor and reassess

• Other considerations
  • SES
  • Culture
  • Language
  • Education level
Ethical management of suspected incompetency

• It is unfortunately not possible to seek legal consultation every time competency is questionable.
  Abram, Ballantine, & Punlop, 1982

• This fact does not excuse psychologists ethically or legally from obtaining valid informed consent.
Assessments of decisional capacity

- At a minimum, a psychologist should monitor a patient’s mental status at every visit.
- If concern about capacity arises, monitor more closely, consider increasing frequency of visits or phone contact.
- If concern continues and you have skills to perform a brief cognitive screening, measures are available and can provide data regarding the patient’s general cognitive functioning:
  - Mini Mental State Exam
  - Montreal Cognitive Assessment (MoCA) [http://www.mocatest.org/](http://www.mocatest.org/)
  - Cognistat Cognitive Assessment
- Performance on a comprehensive neuropsychological test battery can inform clinicians regarding the patient’s performance within the domains that are predictive of decisional capacity:
  - Executive function, memory, and language

Palmer & Harmell, 2016
Assessments of decisional capacity

- There are at times questions about specific competencies
  - Standing trial
  - Medical decision-making
  - Making a will, deed, or other legal document
  - Entering into contracts or marriages
  - Managing finances without assistance
  - Driving

Appelbaum & Gutheil, 2007
Challenges associated with diminished capacity

• Clinicians are not always sure how to manage competency decisions

  Braun, Gurrera, Karel, Armesto, & Moye, 2009

• Capacity should be assessed on a continuum, with impairment representing only individuals at the very bottom of the curve.

• Per the APA ethics code we must “protect the rights and welfare of persons... whose vulnerabilities impair autonomous decision making.”

• False negatives and false positives are problematic.
Recommendations

• If there impairment is suspected, do an informal assessment.

• Consult with colleagues.

• Consider utilizing decision making models in addition to the APA ethical code.

• Case studies.
Case Example #1

Consider a situation in which a patient in their first therapy session is in emotional turmoil and has strong thoughts of suicide or homicide. Immediate action from the psychologist is necessary to avoid nonmaleficence. However, the psychologist is not able to first obtain informed consent, which threatens the patient’s autonomy.
Case Example #1

In this situation, APA Ethics Code 10.01 indicates informed consent must be obtained “as early as is feasible in the therapeutic relationship.” As such, the informed consent process can be delayed until immediate danger is lessened, and then cover the topics of informed consent (e.g. confidentiality), though the practitioner will need to document this decision in the record.
Case Example #2

An adolescent is brought to therapy but does not want to engage in treatment.
Case Example #2

A common practice is the “three strikes you’re out rule,” which can be applied here. The premise is that treatment is discontinued if after the third session the patient does not see the benefit. APA Ethics Code 3.10b indicates psychologists must seek assent from patients who cannot legally give consent, provide an appropriate explanation, and consider the person’s best interests. This allows the psychologist to respect the patient’s autonomy using the assent/explanation process while maintaining beneficence.
Example #3

As a child psychologist, your patients are regularly dropped off for session while their parents run errands. This has never been a problem in the past, however, during a particularly emotional session, one of your patients out of your office and their parent is no where in the vicinity.
Example #3

• Plan for these types of situations ahead of time.
  • Have parents stay for at least the first few sessions.
  • Have emergency contact numbers.
  • Have situations like this outlined in your informed consent form.
References


References


