

The Law and Medical Ethics:
Highlights from the ASBH
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Navigating the Law

- The McDonalds Case
 - Superficial interpretation – litigious, no patient responsibility, runaway jury awards
 - Legally Literate Interpretation: legal system trying to remedy the power imbalance between individuals and large corporations who threaten their safety, and the media spinning a story for maximum impact in a way that sacrifices accuracy.

McDonalds Case

- What you didn't hear:
 - 93 year old woman suffers 3rd degree burns from coffee. She writes to McD asking for \$10,000 which covers her copay. McD has made a business decision to keep coffee at 190 so pot lasts longer. They have also settled approx 700 similar cases before this came to trial. Jury awards \$200,000 for med expenses plus 2 mill punitive which amounts to 2 days profit from coffee sales alone!

Ethics Teaching and the Law

Expectations

- Basic Legal Literacy
- Advanced Legal Literacy
- Being a Lawyer
- Medical Students
- Ethics Teachers
- Ethics consultants
- Ethics Students
- Lawyers

The Primary Goal of the Legal System

- Non violent conflict resolution
- Arguments are made out loud and it gets messy sometimes.
- Provides a process for working through a problem.



Goal of Advanced Legal Literacy

- Relationship between law and ethics
- Consideration of enforcement
- Making meaning of the absence of law
- Interpreting a case
- Awareness of underlying power issues
- Knowledge of pattern and context.

Strength of a case

- Legislative/Executive: Federal and state:
 - Statute: there is a law governing what you should do.
 - Regulation: the rules derived from the statute. These are interpretations of the statute.
- Judicial
 - Case Law: Cases interpreting the statutes etc,
 - Cases in which the legislature hasn't spoken.
 - you have to find a case like yours.

Jurisdiction

- Jurisdiction matters:
- Probate court is usually the court that oversees Wills and cases of medical dispute
- Probate Court findings are sealed and not discoverable unless there is an appeal.
- Juvenile Court deals with issues regarding minor children, including Who is an emancipated minor.
- A principle here is that parents have the right to make martyrs of themselves, if they want, but NOT their Children.

Juvenile court

- Emancipated Minor is a child under 18 who:
 - Is married
 - Is a parent
 - Is pregnant
 - Has the consent of his or her parent or legal guardian
 - Is referred for services by a physician, clergy, or case worker
 - As to whom the failure to provide such services would create a serious health hazard.

Understanding Legal Findings

- Is there a statute or case that speaks to this situation?
 - If it's a statute, has it been applied in our jurisdiction? How does it apply in our case?
 - If it's a case, is it in our jurisdiction? Are the facts similar? What did the court Hold?
- If no, what leads you to the conclusion we can or can't do something?

Ohio Jurisdiction

- Sixth Circuit Court of Appeals
 - Includes Ohio, Michigan, Kentucky, Tennessee.
- A lot of medical briefs come out of New Jersey, Third Circuit court, and California, the Ninth Circuit court.

Precedent

- Binding Precedent – a case with the same problem which has previously been ruled upon in your jurisdiction.
- Non-binding precedent – a case with similar problem in a different jurisdiction.
- Persuasive precedent – a case with a clear and forceful argument. May not be Binding, but it pretty well settles the issue.

Court Lingo

- Holding – the courts decision.
- Dictum – other thoughts about the case beside the Holding. Some is Concurrent, some is Dissenting. May suggest exceptions or ways the case could have turned out differently. May suggest a way to correct an unconstitutional statute.

Circumstantial Evidence

- Evidence that applies even if the crime was not witnessed. Good or Bad?
- If you didn't see it rain, but heard the sound of drops on the roof, and saw the streets are wet, can you still conclude it rained?

Framing the Question.

- How does the court frame the question they are about to answer?
 - Is this an appeal, and what is being appealed?
 - What are the basic facts of the case
 - What is the question before the court?
 - What's the legal standard to be applied?
 - What's the Holding?
 - What's the legal reasoning/application of standard to the facts?

Ethics Committee History

- Dialysis is a new life saving treatment in about 1960. It is expensive so hospitals have to have a way to decide who gets the machine. IF you are not picked, you die.
- Hospitals with Dialysis set up Dialysis committees to review cases and rank the patients.

Ethics Committee History

- In 1976, the Karen Ann Quinlan case is decided. The NJ Supreme Court recommends that hospitals and Nursing Homes develop Institutional ethics Committees to try to make decisions about care at the local level, so the courts won't be overwhelmed with cases.
- Withdrawal/refusal of life saving treatment is addressed by almost every state court from 1976-1990.
- Medicare coverage of dialysis begins in 1976, so..
- The dialysis committee evolves into Ethics committee.

Physician Assisted Suicide

- 1994: Oregon passes the Death with Dignity Act (PAS)
- Washington v Glucksberg 1997. Liberty interest created by the 4th amendment does not include a “right to die”. Regulation about PAS is up to the States.
- Gonzalez v Oregon 2006. PAS is up to the state. DEA directive that drugs for PAS violate the Controlled Substances Act exceeded the agency’s authority.

Abortion Law

- Roe v Wade 1973.
 - One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitude toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion. ***Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection.*** We seek earnestly to do this, and, because we do, we have inquired into, and in this opinion place some emphasis upon, medical and medical legal history and what that history reveals about man's attitudes toward the abortion procedure over the centuries.

Abortion Law

- Roe v Wade 1973
 - The decision vindicates the right of the physician to administer medical treatment according to his professional judgment. [Until 3rd trimester] the abortion decision in all its aspects is inherently and primarily a medical decision, and basic responsibility for it must rest with the physician. If an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intra-professional, are available.

Abortion Law

- Once viability is reached, the State has an interest in the care and survival of the fetus.
- This interest may not trump the mother's right to consent or refuse to consent to any medical treatment, or it may depending on state law.

Legal Websites

- OYEZ.org (Oyez, oyez = hear ye, hear ye)