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Protecting Clients who Have Dementia and Memory Loss

A Bibliography for Elder Law Attorneys

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Massachusetts requires nursing homes to get consent from a resident, or Health Care Agent or Guardian, before administering psychotropic medication. The nursing home must disclose (i) the purpose for administering a psychotropic drug, (ii) dosage, and (iii) effects or side effects of the medication. This law is codified as Mass. Gen. Laws ch. 111, §72BB, but it is up to family members to be aware of the needs of demential patients, and the alternatives to antipsychotic medications.

Questions Family Members Can Ask about Erratic Behavior


Dr. Helen Kyomen

Dr. Helen Kyomen, a geriatric psychiatrist suggests asking questions when an elder show signs of agitation. Examples:

Is there Overstimulation?

Does the patient have a roommate who intrudes into the patient's personal space excessively?
Is the patient's space overly noisy because of equipment (such as oxygen concentrators or ventilators) or individuals who call out incessantly?
Are staff members rushing in and out of the patient's area as they change shifts?

Understimulation?

Is the patient occupied with appropriately challenging tasks that encourage interest and a sense of mastery?
Is the patient exposed to adequate amounts of sensorimotor stimulation?

Are the day programming, activities, and structure appropriate to the patient's functional capabilities?

Do people or objects trigger stressful memories, drives, or feelings?
Does the patient believe that a family member is responsible for the patient's placement in an extended-care facility?
Does the patient think that a friend who comes to visit at the hospital is able to take him or her home?
Is the patient troubled by a roll belt or other safety restraint?

Are there unmet needs?
Is the patient hungry or thirsty?
Does the patient need to b oriented to the facilities or be toileted?
Does the patient need glasses, hearing aids, or similar sensory enhancers?

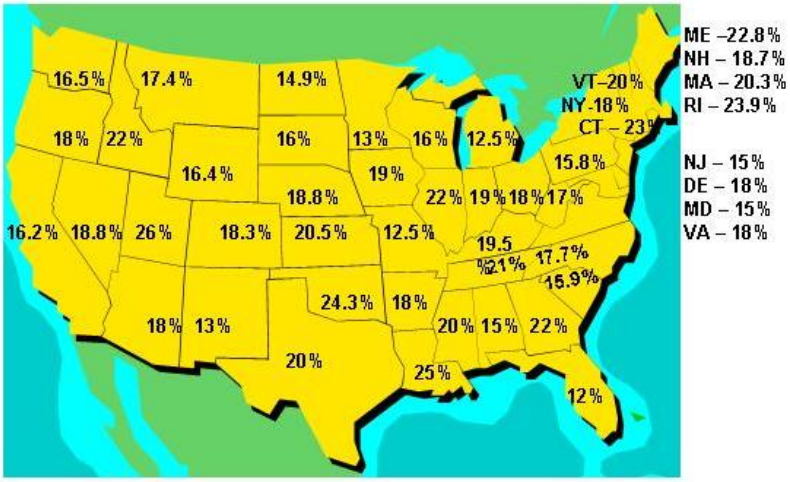
Helen H. Kyomen, MD, MS and Theodore H. Whitfield, ScD, ***Agitation in Older Adults***, Psychiatric Times (2008)

Paul Raia, Ph.D. of the Alzheimer's Association MA/NH Chapter explains how a behavior plan can be developed to identify triggers for agitation and anxiety in dementia patients, in an article entitled Habilitation Therapy in Dementia Care.
http://www.sahp.vcu.edu/vcoa/newsletter/ageaction/agefall11.pdf

Habilitation therapy is not rehabilitation therapy. Dr. Raia explains how Habilitation Therapy focuses on the remaining capacity of a dementia patient, to connect with the person emotionally, access the inner world of the person with dementia, and gain more understanding of their needs. Dr. Raia has found that Alzheimer's patients develop great skill in reading body language and emotions. Time spent with the patient by companions, to supplement the care provided by the nursing home, may reduce the need for chemical restraints. While no behavior plan will take care of behavior 100% of the time, it may be possible to reassure anxiety and redirect behaviors, so that chemical restraints can be reduced and quality of life improved.

American Psychiatric Association: Five Things Physicians and Patients Should Question

The Extent of the Problem



Medicare surveys show that in many states 20% of nursing residents who are on antipsychotic meds have NOT been diagnosed with a psychotic condition. Statistics for April-June 2010 at MDS Quality Measure/Indicator Report on Psychotropic Drug Use. *Nursing home drug use puts many at risk*. Boston Globe, March 8, 2010

Government Efforts to Solve the Problem

In 2005 the FDA began requiring manufacturers of atypical antipsychotics (including Seroquel, Risperdal, and Zyprexa) to include black box warnings of increased mortality risk for older patients with dementia. In 2008 the FDA extended the requirement to conventional antipsychotic drugs. The Center for Medicare Advocacy points out how Nursing Home Reform Laws have strong restrictions on the use of antipsychotic drugs, but protections required by the law are undercut by lack of enforcement.

The Problem Wastes Millions in Medicare Payments

An inspector for the U.S. Department of Health and Human Services says that Medicare should begin penalizing nursing homes that inappropriately prescribe antipsychotics. The Office of Inspector General found that more than half of Medicare claims for atypical antipsychotic drugs given to nursing home patients were erroneous, amounting to $161 million in waste during a six month period in 2007. Download Report 1.3 MG.

The Government filed suit against the makers of Risperdol for allegedly "paying millions of dollars in kickbacks" for dispensing drugs to nursing home patients. The Boston Globe reported that Massachusetts joined the lawsuit in March, 2010. The manufacturer defended the rebates it dispenses to risperdol prescribers.

Alternative Care Can Prevent Inappropriate Use of Medication

An editorial in the February, 2009 Lancet concluded that: "The risks and benefits of prescribing antipsychotics to patients with dementia need to be carefully balanced and these drugs should be used only if alternative strategies do not work. To protect the health and dignity of people with

dementia and reduce the use of antipsychotic drugs, approaches that make the needs of patients central to decisions about care should be promoted."

A nursing home in Minnesota has had remarkable success finding behavioral, rather than pharmacological, solutions that wean residents off antipsychotic medications. The New York Times reported on the "Awakenings program," and the resident who was freed from three psychotropic drugs: Ativan, Risperdal and an antidepressant. The staff was trained to calm and reassure residents, using activities, music, massage, aromatherapy and “redirecting” conversations.

The February 2011 *New York Times* article, "*Clearing the Fog in Nursing Homes,*" tells the story of a nursing home patient, a woman in her 90s, who was given a "potent cocktail" of three psychotropic drugs, including Risperdal. The nursing home began a program to wean its residents off antipsychotic medications. After the woman's medications had been reduced, she was able to communicate. It was discovered that pain from a nerve condition was the cause of her earlier wordless cries. After the nerve condition was treated, the psychotropic medications were discontinued. (http://newoldage.blogs.nytimes.com/2011/02/15/clearing-the-fog-in-nursing-homes/?_r=0
See also: *Lifting the Fog: The Problem of Antipsychotic Drug Use in Nursing Facilities*, http://dash.harvard.edu/bitstream/handle/1/8822193/LevinF%26Dpaper.pdf?sequence=1

In *The Coin's Other Side: A Positive Look at Dementia (*excerpts available on youtube.com), Mary Sharp explains positive approaches to caregiving. These approaches can assist in cases where chemical restraints are prescribed.
https://www.youtube.com/watch?v=V4sCN83RG04&list=PLA6137EE47DFF1E5F

Memory Loss Patients are Protected by Federal Law and Regulations, and by Massachusetts Court Cases

Under Federal law, patients have the right to be free from:

any physical or chemical restraints imposed for purposes of discipline or convenience and not required to treat the resident’s medical symptoms.

Restraints may only be imposed—
(I) to ensure the physical safety of the resident or other residents, and
(II) only upon the written order of a physician that **specifies the duration and circumstances under which the restraints are to be used**.”
42 U.S.C. § 1395i-3(c)(1)(A)(ii) and 42 U.S.C. § 1396r(c)(1)(A)(ii).

Guidance issued to Surveyors for Long Term Care Facilities by the Centers for Medicare & Medicaid Services lists the serious conditions that justify antipsychotic use, and the inadequate indications for administering antipsychotic medications:
They should not be used if the only indication is one or more of the following:
1) wandering;
2) poor self-care;
3) restlessness;
4) impaired memory;
5) mild anxiety;
6) insomnia;

7) unsociability;
8) inattention or indifference to surroundings;
9) fidgeting;
10) nervousness;
11) uncooperativeness; or
12) verbal expressions or behavior that are not due to the conditions listed under "Indications" and do not represent a danger to the resident or others. Guidance issued by the Centers for Medicare & Medicaid Services, State Operations Manual, Appendix PP at 387 [PDF document page 434]. When antipsychotics are used without monitoring they may be considered unnecessary medications because of inadequate monitoring. Id. at 389.

Convenience of a facility staff is not an acceptable reason for using restraints. *Rogers v. Commissioner*, 390 Mass. 489, 508 - 509, 458 N.E.2d 308, 320 (1983). *Guardianship of Roe*, 383 Mass. 415, 443-448, 412 N.E.2d 40, 52, 62 (1981) (few medical procedures are more intrusive than injection of antipsychotic medications).

Law Review Articles that Have Addressed the Problem

To read any law review article cited below, open another browser on your computer to the Massachusetts Trial Court Library, and enter the library's portal to the Hein Online section, then enter your library card number into the box provided on the portal. Leave the browser open, and you will be able to open any law review article by pressing CNTRL while right-clicking your cursor over the Law Review article title in this Bibliography:

The requirements set out in ***Rogers*** were intended to provide patients in Massachusetts with even greater protection than the protections afforded under Federal laws and regulations. See: Smith, ***"Just Say No!" The Right to Refuse Psychotropic Medication in Long-Term Care Facilities*** 13 **Annals Health L** 1, 17 – 18 (2004).

Companion services, also known as "sitters," can serve many functions that benefit a nursing home resident:

> In addition to assisting the resident in the performance of menial tasks, such as eating and getting dressed, the mere presence of the sitter may serve as a source of companionship and comfort for the resident. The overall effect on the resident, therefore, may be on an emotional and psychological level, but there is also the possibility that there can be a correlation between sitters and physical restraint use. For example, if reasons for restraint use include a resident's confusion, discomfort, or desire to do something for which there is no available assistance, it seems reasonable that the presence of a sitter could reduce the need for restraint use. The increased presence of a companion could serve as a way for the resident to communicate his discomfort or desires. And even if the resident could not effectively communicate his discomfort, the sitter is more likely to become cognizant of the discomfort by [the companion's] consistent observations than would a nurse assistant who may see the resident much less frequently.

Meyers, ***Physical Restraints in Nursing Homes: An Analysis of Quality Care and Legal Liability*** **10 Elder L. J.** 217, 253 - 52 (2002).

The use of physical restraints:

> worsens deconditioning, gait, and balance abnormalities, thereby increasing a nursing home resident's fall and injury risk. Other complications of prolonged immobilization include joint contractures; chronic constipation; incontinence; pressure sores; cardiopulmonary deconditioning; increased agitation and confusion; loss of autonomy and dignity; an increased likelihood of contusions, neurovascular compromise, and nosocomial infection; serious biochemical and physiologic effects; abnormal changes in body chemistry, basal metabolic rate and blood volume; orthostatic hypotension; lower extremity edema; bone demineralization; overgrowth of opportunistic organisms; and EEG changes.

Braun & Capezuti, ***The Legal and Medical Aspects of Physical Restraints and Bed Siderails and Their Relationship to Falls and Fall-Related Injuries in Nursing Homes***, 4 **DePaul J. Health Care Law**, 1, 28 (2000-2001) (citing Federal Register, clinical and geriatric journals).

Using both physical *and* chemical restraints can cause additional problems "If a patient becomes agitated while physically restrained, it may become necessary to sedate the patient; conversely, if a patient is sedated, the patient may need to be restrained because of the patient's decreased physical and cognitive ability." Note: ***Use of Restraints in the Hospital Setting***, **22 U. Dayton L. Rev.** 149, 152 (1996 – 1997).

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