

LEGAL ISSUES



IU ECHO OUD
FIRST RESPONDERS'
TRACT
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Echo Legal Disclaimers

- NOT LEGAL ADVICE
- Meant to be “quick-hitters” on variety of topics
 - Scratch the surface only - issues—too complex for short didactic

Overview

- OUD in Pregnancy Issues/Goals
- Best Interests of the Child concept
- Pregnancy in the Criminal Justice System
- IDOC's W.O.N. program
- Family Law/DCS Issues
- Discrimination/Civil Rights
- Drug Courts/Criminal Justice
- Social Security Disability
- Advance Directives
- HIPAA
- DEA, IN Atty General/PLA Investigations

STIGMA REDUCTION

1. WHAT ARE WE DEALING WITH HERE?

- Free Speech (remember, even if ugly – especially if ugly?)
- Ignorance (what we work on constantly in ECHO)?
- Harmful/Detrimental?

STIGMA REDUCTION

Let's talk about actionable harmful speech!

DEFAMATION

(Black's Law Dictionary)

- The taking from one's reputation.
- The offense of injuring a person's character, fame, or reputation by false and malicious statements
- Defamation is a TORT not a CRIME!

STIGMA
REDUCTION

2 types

DEFAMATION (Black's Law Dictionary)

TWO TYPES of DEFAMATION

- Libel
- Slander

STIGMA REDUCTION

LIBEL

- Type of defamation that is **PRINTED** or **FIXED**
- and **PUBLISHED**
 - Text
 - Pictures
 - Both

SLANDER

- Type of defamation when one person:
 - **VERBALLY** makes a defamatory statement
 - Words or physical actions (hand gestures, facial expressions) *must* somehow undermine the reputation of the accused

STIGMA REDUCTION

Defamation Difficulties

- **Extremely difficult to prevail**
- **Offender must KNOW that they are presenting false information**
- **TRUTH is an absolute defense to defamation**
- **BOP falls on Plaintiff**
 - **Liability**
 - **Damages**
- **Internet/Social Media have muddied**

STIGMA
REDUCTION

Liability
intentional

Defamation Difficulties

- Have to prove statement was an *intentional* misrepresentation
- Or a flat out LIE
- On SLANDER, even trickier
 - Have to prove the spoken statement was done so
 - WITH ACTUAL MALICE!
- An untrue statement, to be considered defamatory, needs to:
 - Be said with the *intentional* misrepresentation of facts
 - With the *intention* to cause plaintiff harm
 - i.e. – the person must be knowingly lying while knowing that lie will cause the plaintiff harm

STIGMA
REDUCTION

Liability
publication

Defamation Difficulties

- Have to prove PUBLICATION!
- If you are the only one that knows about the lie, that is not slander, libel, or defamation at all.
- (not blackmail – the threat of releasing)
- Done in a way that *other* people heard, saw, read, or otherwise came across this harmful lie about you

STIGMA
REDUCTION

Liability
unprivileged

Defamation Difficulties

1st Amendment & Privilege

- **Lawmakers**
- **Lawyers in Trial**
- **False testimony**

STIGMA
REDUCTION

damages

Defamation Difficulties

- Proving defamation is just part one – now must prove DAMAGES
- Most challenging part of a defamation case
- Key difference is POTENTIAL versus ACTUAL harm

- Damages only occur if
 - The statement HAS CAUSED YOU HARM ALREADY
 - Not that it has the potential to cause you harm
 - Courts cannot act on something that *MIGHT* happen
 - Have to prove that statement has essentially ruined your reputation
 - Example – a business owner has to prove the defamatory statement HAS had a devastating impact on her business

CHILDREN IN PREGNANCY LEGAL ISSUES

Goal of the US legal system, in any phase, related to children is to **PROTECT THE BEST INTERESTS OF THE CHILD(REN)**.

Key question: What is in the infant's best interests?

This question guides Courts in deciding:

- a. What type of services are needed?
- b. What type of action/intervention is needed?
- c. What order(s) would best effectuate the child's best interests?

"Best Interests" of children in the legal context is defined as:

Determination made considering a number of facts related to the child's circumstances and the parent or caregiver's circumstances and capacity to parent, all with the child's ultimate safety and well-being the paramount concern.

INDIANA LAW ON BESTS INTERESTS OF THE CHILD

Indiana Code on BI § 31-34-19-6

- Consistent with the safety of the community and the best interests of the child, the court *shall* enter a dispositional decree that:
 - Is in the least restrictive (most family-like) and most appropriate setting available.
 - Is close to the parents' home, consistent with the best interests and special needs of the child.
 - Interferes least with family autonomy.
 - Is least disruptive of family life.
 - Imposes the least restraint on the freedom of the child and parents, guardian, custodian.
 - Provides a reasonable opportunity for participation by the child's parent, guardian, custodian.



Civil Rights Issues

SUD is a protected “disability” under civil rights laws (ADA/FHA). Protects employment and housing.

Two elements:

1. The person is in active treatment AND
2. “not currently engaging in illegal use of drugs”

NOTES:

What “currently” means is unclear.

Employers/landlords (and many others) cannot take adverse actions on the basis of the disability.

Protection provided:

1. Discrimination against adverse treatment because of protected class, including disability
2. Employer has a duty to make reasonable accommodations

Civil Rights Issues

If Individual is engaged in illegal drug use, they are NOT an “individual with a disability.”

This does NOT include a person with a *history* of drug addiction, but is not *currently* using. This person qualify for protection.

An employer MAY prohibit the illegal drug use *and* use of alcohol in the workplace.

An employer MAY test employees for illegal use of drugs.

An employer MAY discharge or deny employment for illegal use of drugs.

An employer MAY require disabled employees to meet the same standards of performance as other employees.

Source: United States Commission on Civil Rights

Civil Rights Issues

Can an employer require disclosure of prescriptions/medical treatment?

- Before job offer? No. Unless it is directly related to job duties.
- After job offer, but before employment starts? Yes, as long as the same inquiries are made of all employees.
- After employment starts? No, as long as the request is job-related and “consistent with business necessity.”

Civil Rights Issues

FMLA applies to substance abuse treatment, but be careful of pretextual adverse actions

Specific MAT issues:

- Reasonable Accommodation from Employer to participate in therapy.
- Recovery Homes prohibiting MAT
 - Unwilling vs. not-equipped
- Professional Licenses (including those in the medical field)
 - MAT is disfavored.
 - Outright rule banning probably violates ADA, but Indiana's licensing boards generally do NOT allow MAT patients to obtain/maintain license
 - Area for advocacy/policy change
 - Other licenses vary (EX: CDL license holders cannot be on methadone).

In general with discrimination claims—major proof/evidence issues

- Indiana is an “at will” state.

Drug Courts/Criminal Justice

Drug Courts have proliferated as a means to be less punitive and encourage treatment.

Some Drug Courts offer additional benefit of withholding, or rescinding, convictions.

Drug Courts are focused on “highest risk” individuals, with goal of diverting from prison.

In practice, options and management are largely dependent on program, Judge, and Prosecutor.

Best practice: “Sanction schedule” (Graduated sanctions for missing treatment or failed drug test, eventually resulting in jail time)

Best practice: “wrap around services” with a focus on more than drug testing, including employment, health care, and social issues.

Most serious issues for individuals: failing to appear for court dates

Drug Courts/Criminal Justice

DUI with MAT

- Methadone: Yes, but it is a defense if drug was prescribed and administered for legitimate medical purpose.
- Buprenorphine/Naltrexone: No

Providers are strongly encouraged to educate and participate with local drug courts

Social Security Disability

Basic Eligibility: disability substantially impairs you from working

Addictions are not considered in this context

To get disability with addictions, must show that, even if there was no addiction, other disabilities would prevent work

Really important role for providers to explain interactions between addictions and other medical conditions, especially co-occurring mental illness

Medical records usually aren't enough (need provider participation)

Expungements

Variance between what is really a “Sealing” of a conviction versus a true “Expungement.”

Time limitations:

- 8 years for felony.
- 5 years for misdemeanor.
- Can receive permission to “file early” with prosecutor’s consent.

One time only

Effect: person is treated (outside of the legal system) as if the conviction or arrest never occurred:

- Employment
- Licensure (including professional)
- Can still be utilized if arrested in future of bail and enhancement purposes.

Specialized Driving Privileges

- For any reason, including multiple OWIs, HTV, Child Support, Failure to provide insurance, etc.
- Relatively recent (2015) provision that dramatically permitted people to obtain driving privileges
- Applies to:
 - Suspensions related to criminal convictions.
 - Suspensions related to administrative (i.e. BMV) issues such as unpaid reinstatement fees.
 - Suspensions related to child support.
 - Suspensions related to arrest.
- Two basic types (not necessarily mutually exclusive):
 - “time/place/manner” (certain hours, locations, etc.)
 - Prior restraint (Ignition interlock, mandatory treatment etc.).
- Completely up to the court.
- Insurance is a hurdle, and some courts require proof of prepayment and/or SR-22.
- ONLY EXCEPTION: Refusal to take chemical test.

Advanced Directives

WHAT

- Written directive by individual instructing healthcare providers on wishes relative to medical treatment in event of incapacitation

Doesn't need to be overly-formal

- Part I Appointment of Healthcare Surrogate / POA
- Part II Indiana Declaration
 - Living Will Declaration
 - Life-prolonging Procedures Declaration
- Part III Signatures (witnessed by two *independent* adults) (if granting POA – **notarized** as well)

Can attach organ donation instructions, formal form

Can be revoked orally or in writing

Advance Directives (Cont'd.)

Psychiatric Advance Directives

Instructive PAD: gives instructions about specific mental health treatment a person wants should he or she experience a mental health crisis

- Wishes can be overridden for health or practical reasons (Ulysses Clause)
Proxy PAD: names a healthcare proxy or agent to make treatment decision

Advance directives for substance use

Not codified anywhere

Being studied by some states

Could be a useful tool, some ideas for provisions:

Proxies

Individuals that hinder or negatively impact recovery

Temporary custody of children, pets

Brand new area—open for examination and creativity

HIPAA

First and foremost, of the love of all things great and small....

- SPELL IT CORRECTLY (2 A's!!!)

Way too broad to really scratch the surface

No private cause of action for violation of HIPAA

BUT

- Understand how serious it is
- licensure issues
- employment issues

Walgreen Co. v. Hinchy, 21 N.E.3d 99 (Ind. Ct. App. 2014)

- PLEASE DON'T BE A WITHERS!

DEA Investigations

DEA is *ESPECIALLY* aggressive in investigating both prescribers and dispensers of opioids, methadone, buprenorphine

Common, sneaky DEA tactic is to scare you into signing a surrender of prescribing/dispensing *for cause* certificate (DEA-104) but "don't worry, you can get it back in 6 months...."

- WRONG, incredibly difficult to regain a certificate to prescribe/dispense controls.
- Immediate right to counsel – exercise it
- Don't sign ANYTHING

Attorney General Investigations/Complaints

WHO

- PATIENTS/CLIENTS, DISGRUNTLED EMPLOYEES, YOUR LICENSING BOARD

WHAT

- The "small c" complaint

WHEN

- 20-days from date of complaint letter to you
- Usually extended 30-days

HOW

- Strongly encouraged to get legal counsel involved
- Very high number of complaints dismissed at the "small c" stage
- Make sure your address is always up to date with the IN PLA

Attorney General Investigations/Complaints

Formal Complaint (if AG decides to pursue sanctions after investigation)

Administrative trial before the applicable licensing board

Sanctions

- Permanent revocation of license
- Suspension
- Letter of Reprimand

Settlement strongly encouraged

- Usually can negotiate minimal sanctions for first time licensees

Questions?

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