Navigating Compliance with EMTALA and State Laws During Mental Health Emergencies

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Agenda
• Quick refresher on EMTALA
• Mental health emergencies as an emergency medical condition
• Overview of Wisconsin’s emergency detention statute
• Exploring the interaction between EMTALA and Wisconsin’s emergency detention statute
• Case discussion
• Practical tips
• EMTALA settlements/cases
• Questions

Statistics
• 1 in 8 (nearly 12 million) ED visits in the U.S. in 2007 were due to mental health and/or substance use problems in adults
• Among ER visits involving mental health and substance use disorders:
  – 42.7% were for mood disorders
  – 26.1% for anxiety disorders
  – 22.9% for alcohol-related conditions
• Between 2006-2011, the rate of ED visits for substance-related disorders (not including alcohol) increased 48% and visits for alcohol-related disorders increased 34%
  
Source: Agency for Healthcare Research and Quality
Quick EMTALA Refresher

Basic EMTALA Rule
- Any patient who “comes to the emergency department”
- Requesting “examination or treatment for a medical condition”
- Must be provided with “an appropriate medical screening examination” (MSE)
- To determine if the patient has an “emergency medical condition” (EMC)
  - If the patient has an EMC, then the hospital is obligated to either (1) provide the patient with treatment until the patient is stable; or (2) to transfer the patient to another hospital in accordance with the specified regulatory safeguards.

Medical Screening Exam (MSE)
- EMTALA requires the hospital to perform an:
  - Appropriate Medical Screening Exam (MSE)
  - Within the capability of the hospital’s ED
  - Including ancillary services routinely available to ED
  - To determine whether or not an EMC exists
- MSE must be conducted by qualified medical personnel (QMP)
What Constitutes “Appropriate MSE”?

- No definition provided by law or statute
- The examination must be sufficient to permit the hospital to decide whether or not the individual has an EMC
  - This does not mean that all EMTALA screenings must be equally extensive. Depends on the patient's complaints and symptoms.
- MSE is not an isolated event but an ongoing process involving monitoring of the patient’s condition

Emergency Medical Condition (EMC)

- Definition - A medical condition manifesting itself by acute symptoms of sufficient severity when absence of immediate medical attention could result in:
  - Placing health of a person (or unborn child) in serious jeopardy
  - Serious impairment to bodily function
  - Serious dysfunction of part of the body
  - Severe pain
  - Mental health conditions count – much more on this to come
- No EMC found?
  - Hospital has no further legal obligation to treat

So… What to do if EMC Exists?

- If EMC does exist, the hospital must provide either:
  - Further medical examination and treatment as required to stabilize the medical condition, or
  - Transfer to another medical facility in accordance with the very detailed requirements of EMTALA
- If any doubt as to EMC, follow EMTALA
Refusal of Transfer/Treatment

• If EMC exists, hospital must offer appropriate treatment or transfer
• If patient refuses, EMTALA duties end; BUT
• EMTALA has specific requirements on how to document a patient's refusal to accept transfer or treatment

Refusal of Transfer/Treatment

• The patient’s refusal to consent is effective only if the following three requirements are met:
  (1) MD describes the risks and benefits of treatment/transfer;
  (2) Hospital takes all reasonable steps to secure the patient’s written, signed informed refusal; and
  (3) The patient’s medical record describes the refused treatment or transfer
• Patient’s legal representative can sign for patient
• Refusal form should be placed in patient’s medical record

Mental Health Emergencies as an EMC
Mental Health Emergencies

- The same ETMALA process applies to patients who come to the emergency department with a mental health emergency
- Just a lot more complicated…

Mental Health Emergencies

- Variety of symptoms could mean there is a mental health emergency:
  - Suicide attempt/ideation
  - Agitation, violent, or disruptive behavior
  - Psychosis leading to dangerous behavioral/thoughts
  - Mania
  - Intoxication states
  - Anxiety
- Note that withdrawal with can be a dangerous EMC

Mental Health MSE

- CMS has stated that for individuals with psychiatric symptoms, the medical records should indicate an assessment of suicide or homicide attempt or risk, orientation, or assaultive behavior that indicates danger to self or others
- Some patients may have a mental health emergency, along with a other physical symptoms. MUST BE SURE TO ASSESS BOTH PHYSICAL AND PSYCHIATRIC SYMPTOMS DURING THE MSE
Performing Mental Health MSE

- MSE must be administered within the capabilities of the hospital’s ED, including ancillary services routinely available to the ED.
- If hospital doesn’t have qualified mental health professionals on staff, courts have supported the use of county departments to assist with mental health MSE.
- Be careful not to direct patients to other facilities without first conducting an MSE and complying with applicable EMTALA requirements.

Stabilizing Mental Health EMCs

- Can be more difficult to “stabilize” and for health care providers to know when the condition is “stabilized.”
  - Generally no blood test or other lab to prove the condition is stabilized.
- Patients must be protected and prevented from injuring or harming him/herself or others.

Use of Restraints

- Administration of chemical or physical restraints for purposes of transferring an individual from one facility to another may stabilize a psychiatric patient for a period of time and remove the immediate EMC but the underlying medical condition may persist and if not treated for longevity the patient may experience exacerbation of the EMC.
- CMS warns practitioners should use great care when determining if the medical condition is in fact stable after administering chemical or physical restraints.
- Make sure to follow restraint and seclusion policies and State Operations Manual.
Patients with Mental Health EMC Refusing Treatment

- Remember, hospital will have met EMTALA obligations if it followed the steps required for individuals refusing treatment or transfer
- But, hospital should consider other obligations that may coexist with EMTALA obligations, such as:
  - Emergency Detention
  - Duty to warn

**Emergency Detention**
(Wis. Stat. § 51.15)

Purpose

- There may be times when a patient is unable or unwilling to cooperate with voluntary treatment and is a danger to him/herself or others
- In those situations, in addition to meeting EMTALA obligations, you must also consider whether the patient meets the standard for emergency detention
Legal Standard

- Law enforcement may take a person into custody if the officer has cause to believe all of the following:
  1. The person is mentally ill, drug dependent, or developmentally disabled;
  2. Taking the person into custody is the least restrictive alternative appropriate to the individual’s needs; AND
  3. The individual is a danger to self or others, meeting at least one of the following criteria (see next slides)

- Hospitals provide information but law enforcement and Crisis make the ultimate determination of whether legal standard is met

Harm/Dangerousness Standard

1. A substantial probability of physical harm to self as manifested by evidence of recent threats or attempts at suicide or serious bodily harm
2. A substantial probability of physical harm to others as manifested by evidence of recent homicidal or other violent behavioral, or evidence that others are in reasonable fear of violent behavioral/serious physical harm, as evidenced by a recent overt act, attempt, or threat to do serious physical harm

Harm/Dangerousness Standard (continued)

3. A substantial probability of physical impairment or injury to self or others due to impaired judgment, as manifested by recent act or omission
4. Behavior manifested by a recent act or omission that, due to mental illness, the individual is not able to satisfy basic needs for nourishment, medical care, shelter, or safety without prompt and adequate treatment so that there is a substantial probability that death or serious physical injury will imminently ensure unless the individual receives prompt and adequate treatment for the mental illness
   - Not “substantial” under (3) or (4) if reasonable provision for individual’s protection is available in the community and there is a reasonable probability the individual will use those resources
Basis for Law Enforcement's Belief

- Law enforcement's belief must be based on any of the following:
  1. A specific recent overt act or attempt or threat to act or omission by the individual which is observed by the officer
  2. A specific recent overt act or attempt or threat to act or omission by the individual which is reliably reported to law enforcement by any other person

Conferring with Crisis

- If law enforcement determines the standard is met:
  - Law enforcement will confer with Crisis to determine if Crisis approves the need for emergency detention
    - Crisis can approve only if reasonably believe the individual will not voluntarily consent to necessary treatment
  - If Crisis determines standard is met, law enforcement will transport the individual for treatment (or cause the individual to be transported for treatment) to an approved facility

Emergency Detention an “Appropriate Transfer”? 

- There may be times when a patient requires emergency detention but EMTALA still applies because the patient is not stabilized
- In those situations, must walk through the process to determine whether to do an “appropriate transfer”
  - Has patient refused treatment/transfer in a way that would end EMTALA obligations?
  - Is there a way to “stabilize” the patient?
  - Is there a way to meet the elements of an appropriate transfer as part of the emergency detention transfer process?
  - Is law enforcement able to refuse the appropriate transfer to end EMTALA obligations?
  - Is there another interpretation?
2015 WI AG Opinion

• Request for WI Attorney General to provide clarifying guidance regarding emergency detention/EMTALA regarding:
  1. The right of an individual to make his/her own health care decisions
  2. The authority of a law enforcement officer to make health care decisions of an individual in the officer’s custody
  3. The hospital’s duty to the individual and the public if the police do not proceed with emergency detention


• Individual has right to make decisions regarding individual’s own health care
  – Even when individual is in law enforcement custody because emergency detention was initiated
• Wisconsin law presumes a person’s right to informed consent absent a statutory provision to the contrary

2015 WI AG Opinion: Law Enforcement Cannot Make Healthcare Decisions

• Law enforcement does not have the right to make health care decisions for an individual in custody
• Law enforcement is not the individual’s health care agent and is not “a person acting on the individual’s behalf” for health care decisions
  – Law enforcement’s role in emergency detention = transport only
• “Even if an [EMC] prevents the individual from exercising his or her right of informed consent, an officer still does not have authority to make healthcare decisions for the individual.”
2015 WI AG Opinion:
Hospital's Duty When Police/Crisis Refuse to Initiate ED

Typical Scenario:
1. Health care provider believes individual evidences substantial probability of meeting standard for emergency detention
2. Individual will not voluntarily agree to treatment
3. Law enforcement declines to take individual into custody and/or Crisis does not approve need for emergency detention

2015 WI AG Opinion:
Hospital's Duty When Police/Crisis Refuse to Initiate ED

• Lots of gray – varying interpretations

• Per AG Opinion: Healthcare provider has duty to take “whatever steps are reasonably necessary to prevent harm to a patient’s individual self and others.”

Duty to Warn?

• Schuster v. Allenberg – may have a duty to warn based on the following factors:
  – Threat of harm by the individual
  – Foresurable that the individual may harm self and/or another individual (does not need to be a readily identifiable target)
  – Threat is imminent, i.e., there is an immediacy to the threat
  – Individual has a genuine intent to inflict harm
  – Individual has the ability and opportunity to carry out the threat
  – Serious risk of harm if the threat is carried out
  – Provider has a good faith belief that warning someone is necessary to prevent or lessen the threat
  – Person(s) notified of the threat are reasonably able to prevent or lessen the threat
Duty to Warn (continued)

- Provider must make this determination
- Often a tough decision

Other Options?

- AG opinion offers other options to consider:
  - Physically restraining or isolating the individual without consent in an emergency situation
  - Administering medications or treatment without consent when necessary to prevent serious physical harm to individual or others
- Notify family or friends? Need to assess carefully due to confidentiality restrictions for patients with mental health conditions (absent a duty to warn)

Liability for Healthcare Provider

- Good faith immunity exception under emergency detention statute BUT NOT ABSOLUTE
- May be liable for:
  - Failing to consider emergency detention
  - Actions not taken in good faith
  - Anything that happens after law enforcement/Crisis decline emergency detention
Case Discussion

Patient comes to ED after car accident. Patient has significant cut on forehead and is agitated and paranoid. Patient allows stitches but progressively becomes more combative and indicates that he crashed his car to harm himself. Patient’s chart indicates history of manic depression.

Patient is not cooperating with mental health exam and threatens to leave.

Hospital does not have the capabilities to provide psychiatric treatment.

Hypothetical

- Patient comes to ED after car accident. Patient has significant cut on forehead and is agitated and paranoid. Patient allows stitches but progressively becomes more combative and indicates that he crashed his car to harm himself. Patient’s chart indicates history of manic depression.
- Patient is not cooperating with mental health exam and threatens to leave.
- Hospital does not have the capabilities to provide psychiatric treatment.

Case Analysis

- EMTALA applies: patient has mental health EMC that is not stabilized and patient requires transfer. What do we do?
  - Are there steps that can be taken to stabilize the patient?
  - Patient threatening to leave – is this a “refusal” for treatment/transfer under EMTALA?
  - Does the patient meet the criteria for emergency detention?
  - How should transfer occur if EMTALA obligations have not ended?
- If law enforcement/Crisis do not initiate detention, what other steps should the hospital consider?
Practical Tips

• Reminder: conduct a full assessment of physical and mental health conditions in MSE (if symptoms indicate)
• Cannot admit for treatment just to escape EMTALA
• Remind law enforcement of obligation to stay with patients in custody
• Appropriate training of hospital security

Practical Tips (continued)

• Document, document, document
• Policies should clearly address process for mental health EMCs and make sure staff is trained on the policies
• Consider creating workflow process for emergency detention (keeping EMTALA obligations in mind)
EMTALA Enforcement

Enforcement

- CMS brings administrative actions against hospitals/responsible physician
- Typically triggered by patients who feel they have been wronged, or receiving hospital
- Failure to correct could (in uncorrected egregious circumstances) result in Medicare participation termination
- Physicians face fines but excluded only if violation is “gross and flagrant” or repeated

Civil Monetary Penalties

- OIG brings action to collect fines against hospitals and responsible physicians
- $50,000 fine for hospitals per incident
  - $25,000 if the hospital has less than 100 beds
- $50,000 fine for “responsible physician”
  - Failure to screen/treat
  - False or no certification for transfer
  - Failure to respond when on-call
Recent OIG Settlements

- June 2014: $40,000 settlement with Trinity Medical Center in Iowa
  - Reason: Alleged failure to provide appropriate MSE or stabilizing treatment to a patient with emergency psychiatric condition
- September 2014: $50,000 settlement with Springfield Hospital in Vermont
  - Reason: Alleged failure to provide treatment to stabilize the emergency psychiatric condition of one patient and failure to conduct appropriate MSE on second patient. Instead, patients were criminally charged and transferred to jail.

Civil Lawsuits

- Study showed 1/3 of civil lawsuits for alleged EMTALA violations involved psych patients
- About half resulted in verdicts for the defense (i.e., hospital or provider)
- Cases typically involved patients who had an established psychiatric diagnosis and "were not evaluated by a psychiatrist and eventually committed or attempted suicide"
- Most successful defense: MSE completed which did not reveal EMC


Questions?

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