Ethical Challenges in Responding to Child Abuse:

Ann S. Botash, MD

June 9, 2010

Objectives

- Identify reporting challenges such as those due to inconsistencies in interpretation of "reasonable cause to suspect" and breaches of confidentiality.
- Analyze the rights of parents when the medical professional is faced with a child abuse issue.
- Recognize key facets of the thin line between dual roles as healer and investigator.

Definitions

- Conforming to accepted professional standards of conduct.
- Being in accordance with the accepted principles of right and wrong that govern the conduct of a profession.

Applying the Definition

What is the accepted professional conduct in reporting abuse with respect to:

- The definition of *reasonable cause to suspect*?
- Instances when the law requires a breach of confidentiality?

Social Services Law

1. (a) The following persons and officials are required to report or cause a report to be made in accordance with this title when they have *reasonable cause to suspect* that a child coming before them in their professional or official capacity is an abused or maltreated child, or when they have reasonable cause to suspect that a child is an abused or maltreated child where the parent, guardian, custodian or other person legally responsible for such child comes before them in their professional or official capacity and states from personal knowledge facts, conditions or circumstances which, if correct, would render the child an abused or maltreated child….

http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=@LLSOS+&LIST=LAW+&BROWSER=BROWSER+&TOKEN=28498600+&TARGET=VIEW

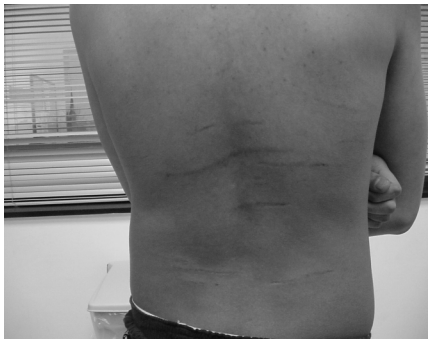
Reporting Child Abuse

- "Reasonable cause to suspect"
- What is reasonable?
- By what criteria?
- Medical diagnosis is not the same as suspicion
- Time frame

Injuries—General Principles

- Is the history consistent with the mechanism of trauma?
- Is the child developmentally able to self-inflict this injury?
- Is there any other medical explanation for the injury or finding? ie illness, genetic condition?
- Is there corroborative information?

CASE with *reasonable cause*?

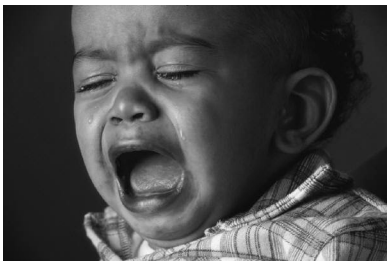


Source: Ann S. Botash, MD

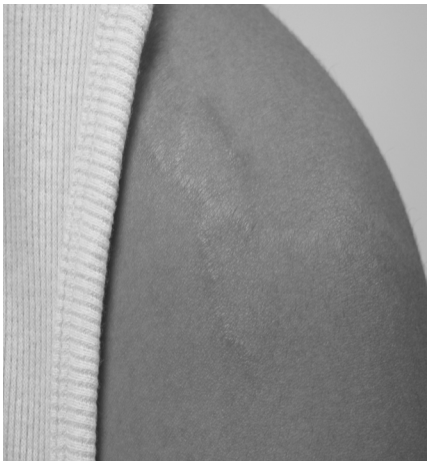
- A 15 year old male presents with this finding on his skin. It is identified during the confidential part of the exam while the mother has left the room and with a nurse and provider present.
- The patient does not know how he got this.
- The physician leaves the room and reports the finding to CPS.

Did the provider have reasonable cause to suspect abuse?

- Yes
- No
- Not sure



Question



Source: Ann S. Botash, MD

Which of the following statements is true regarding these marks?

A. Rapid growth during or prior to adolescence is common prior to development of this finding.
B. Obesity is a risk factor.
C. Use of weights for bodybuilding is associated with this finding.
D. All of the above.

What was missing from this case?

- No history taken from parent---RESPECT!
- Lack of knowledge regarding finding.
- Patient was old enough to disclose; no disclosure.
- No other risk factors.
- Report based on physical exam alone.

Injuries—General Principles

- Is the history consistent with the mechanism of trauma?
- Is the child developmentally able to self-inflict this injury?
- *Is there any other medical explanation for the injury or finding? ie illness, genetic condition?*
- Is there corroborative information?

Causes for Suspicious Findings

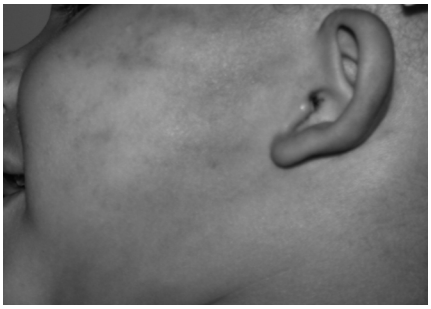
- Normal
- Medical etiology
- Self inflicted
- Accidental
- Neglectful
- Inflicted
  - By legally responsible adult caregiver (parent)
  - By non-legally responsible adult

"Accidental" Causes of Injuries

- Accident?
- Poor parenting?
- Intentional neglect?

Hymel KP and the Committee on Child Abuse and Neglect. When is lack of supervision neglect? *Pediatrics.* Vol. 118 No. 3 September 2006, pp. 1296-1298.

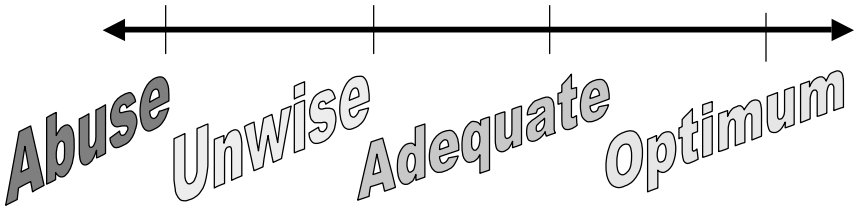
At what point is the injury suspicious?



Source: Ann S. Botash, MD

- "Pathognomonic" or "classic"
- Disclosure from a child
- History does not fit with mechanism of trauma
- Truly no history
- Does intent play a role?
- What effect is there due to the social context of the reporter?

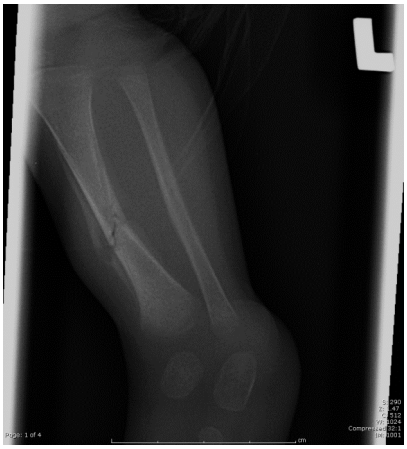
Spectrum of Parenting



Suspicions of abuse vary between physicians, based on their social values…

Adapted from James Garbarino

Controversies



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What do we really know?

- Biomechanics (how MUCH force?)
- Rebleed theories
- Vitamin D deficiency
- Examination findings in sexual abuse cases
- More

Reporting Laws

- Reporter is “protected” from legal liability if report is made in good faith
- Reporter is subject to misdemeanor arrest and loss of license for failure to report

Opinion

NEWS-LEADER Monday September 15, 2003 5A

"It's a privilege to live in the Ozarks"

OUR VIEW

Dismissal of case will bring clarity

Abuse-reporting law needs high court view.

Greene County Circuit Court Judge Calvin Holden's finding last week that Missouri's mandatory child abuse reporter statute is unconstitutional provided needed clarity on the 28-year-old and nearly never-enforced law.

When Cox South emergency room nurse Leslie Ann Brown was charged in February for failing to report fingertip-size bruises along 2-year-old Dominic Isners' spine, she became the first person known to be charged under the statute. If convicted, Brown, a veteran nurse and mother of three, would have faced up to two years in prison and $2,000 in fines.

Brown's employer, CoxHealth, rightly and admirably stood behind her, along with legions of area nurses who came to her defense and condemned the law for being used against her arbitrarily.

Also in Brown's corner were defense attorneys Dee Wampler and Joe Passanise, who argued in April before Holden that the statutes being employed by Greene County Prosecutor Darrell Moore against the nurse were vague and indefinite, and therefore unconstitutional.

Leslie Ann Brown and her attorney read over trial saying her case has been thrown out.

The law requires that a mandated reporter—such as a nurse or teacher—report to the state if they have "reasonable cause to suspect" a child is being abused.

At the time, former state Sen. Emory Melton, who voted in favor of the statute when serving in the legislature, testified that as written, it was impossible for a defendant to really know what they were being charged with. Under questioning by the prosecution, Melton said, "You know it will be challenged in the courts."

Melton proved to be right on both counts: Holden made the same judgement about the statute's constitutionality, dismissing the charges against Brown, and in so doing all but assured the question will be settled by the Missouri Supreme Court.

A Supreme Court ruling is exactly what is needed. In his four-page order, Judge Holden pointed out that despite the longevity of the law, and thousands of hotline calls that have been made and undoubtedly out-made by mandated reporters, only one person – Brown – had to the court's knowledge ever been charged for failing to call in suspected child abuse. (A Nixa woman was charged under the same statute shortly after Brown. That case is on hold.)

The judge went on to say the statute does not require a mandated reporter report every suspicion of abuse, only when there is "reasonable cause," a decision involving a person's "professional judgment." That, Holden wrote, "does not set out the explicit standards necessary to avoid arbitrary or discriminatory applications." How, Holden asked, could a person be advised of what is required to be in compliance with the law?

There are valid concerns that deserve consideration by the state's highest court. The intention of the mandated reporter law is to help stop child abuse. But there is little sense in a law that is seeking to do good, is unconstitutional. Let's get a final opinion, and if need be, fix the statute.

Physician's Decisions about Reporting

Guided by:

- injury circumstances and history
- knowledge of and experiences with the family
- consultation with others
- previous experiences with child protective services.

Jones R, Flaherty EG, Binns HJ, et al. Clinicians' description of factors influencing their reporting of suspected child abuse: report of the Child Abuse Reporting Experience Study Research Group.*Pediatrics*. 2008 Aug;122(2):259-66.

Why don't physician's report?

- 327 clinicians indicating some suspicion of child abuse for 1683 injuries were analyzed.
- Clinicians reported 95 (6%) of the 1683 patients to child protective services.
- Clinicians did not report 27% of injuries considered likely or very likely caused by child abuse and 76% of injuries considered possibly caused by child abuse.
- Reporting rates were increased if the clinician perceived the injury to be inconsistent with the history and if the patient was referred to the clinician for suspected abuse.

Flaherty EG, Sege RD, Griffith J, et al & PROS network; NMAPedsNet. From suspicion of physical child abuse to reporting: primary care clinician decision-making.*Pediatrics*. 2008 Sep;122(3):611-9. Epub 2008 Aug 1.

Why don't physician's report?

- Denial---belief in the parent
- Diagnosis training
- Pattern of abuse not understood (i.e. *sentinel injuries)*
- Bad experiences with CPS
- Plan to "follow-up"

Applying the Definition

What is the accepted professional conduct in reporting abuse with respect to

- The definition of *reasonable cause to suspect*?
- *Instances when the law requires a breach of confidentiality?*
- *Instances when a breach in confidentiality seems ethically appropriate but is against the law!!*

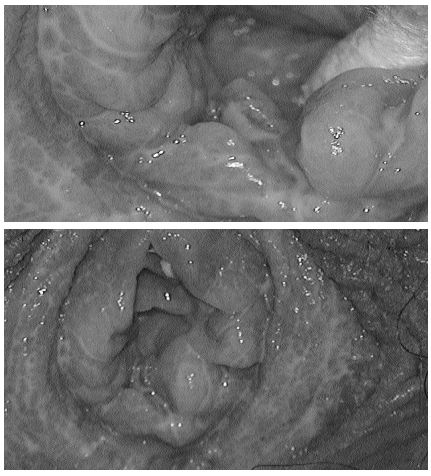
HIPAA

- When abuse or neglect is suspected, the physician must report and may disclose a child's protected health information to the CPS (and /or law enforcement) agency without parent authorization.
- When child abuse has already been reported and is being investigated, it is permissible to disclose information to the appropriate investigative agencies without parent notification or authorization.
- Committee on Child Abuse and Neglect. Policy statement-- Child abuse, confidentiality, and the health insurance portability and accountability act. *Pediatrics*. 2010 Jan;125(1):197-201. Epub 2009 Dec 21.

CASE of Sexual Abuse

- 14 year old female
- Had been sneaking out at night with "17" year old who turned out to be in his mid-twenties. They had sexual intercourse on last encounter (24 hrs).
- Condom used, last period one month ago
- Disclosed at school when she found out he was older and had other girlfriends; principal contacted the police.
- Dad hit her when he found out.
- Girl discloses slap when in the ED.

CASE 4 - Vesicle Identified



Source: Ann S. Botash, MD

- Parent upset because he was left out of discussion in ED due to CPS concerns.
- Patient seen in follow-up clinic.
- Patient recalled to clinic due to positive herpes culture.
- Confidential discussion regarding STD needed.

What are the issues?

- Minor “consented” to sexual activity.
- The teen presented for medical care and parent was under investigation.
- A CRIME occurred but teen did not want to disclose identifying information about perpetrator.
- Risk of STI, HIV, pregnancy, etc.
- Risk taking behavior on the part of the teen (sneaking around, etc.)
- Knowing predation by adult male (over age 17yrs)

How much autonomy?

Types of Consent

- Consent to sexual relationship.
- Consent for health care.
- Consent for notification of police.
- Consent for collection of forensic evidence.
- Consent for release of the evidence.

Statutory Rape

Under 17 years of age

- If the victim is under 11, this constitutes a 1st degree sexual offense
- If the victim is under 14 and the perpetrator is over 18, this constitutes a 2nd degree sexual offense
- If the victim is under 17 and the perpetrator is any age, this constitutes a misdemeanor sexual offense.

Confidentiality

- The medical provider is required by NYS law to provide confidential treatment regarding any issues related to sexually transmitted diseases (reproductive health) to the mature minor.
- Members of several professions are bound by confidentiality laws.
  - Medical
  - Pharmacy
  - Psychology
  - Social work
  - Ophthalmology
  - Dieticians
  - others

Minors

Certain categories can access health care without parent consent:

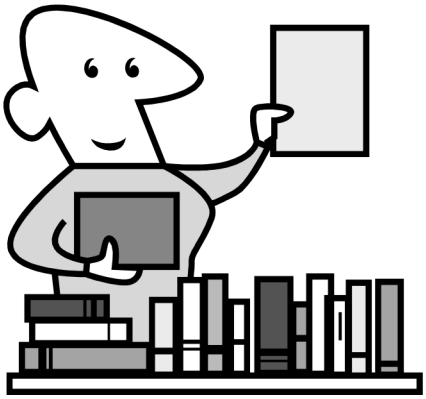
- Married
- Parenting teens
- Pregnant teens
- Mature minors (sometimes)
- Emancipated minors

Minors can access without parental consent

- Family Planning services
- Abortion
- Pregnancy Counseling, prenatal care, labor and delivery services
- STI Testing and Treatment
  - Includes HIV testing
  - Rape Crisis Counseling
  - Rape Kit evidence collection
  - Mental Health care for above

Peter L. Havens and Committee on Pediatric AIDS (1 Jun 2003) Postexposure Prophylaxis in Children and Adolescents for Nonoccupational Exposure to Human Immunodeficiency Virus. *Pediatrics* 111 (6) : 1475-1489.

Consent



Must be able to understand

- His or her condition
- The nature and purpose of proposed and alternative treatments
- The predictable risks and benefits of the treatments, including the option of no treatment at all.

Important considerations that factor into reporting decisions:

- The age of the sexually active adolescent.
- The degree to which the adolescent understands the consequences and responsibility of sexual activity.
- The discrepancy in years between the age of the adolescent and his or her partner.
- Other risk taking behaviors of the teen.
- Other risks facing the teen.
- Is a legally responsible adult a perpetrator or knowingly allowed the abuse to occur?

Factors affecting parental notification

- The treatment is an emergency; no notification is required
- Determination that the adolescent is able to understand the nature and consequences of treatment decisions
- Determination that the adolescent is able to follow through with necessary medical recommendations if parents are not notified
- Possibility of imminent danger to the adolescent if the parents are notified
- The assault was the result of intra-familial abuse and protection of the adolescent requires that no information be given to the parents until law enforcement can investigate
- Notification may prevent the adolescent's suicide or other harmful acts

Can we call the police?

- Only with consent of the "victim."
- There is no mandate to call the police in our jurisdiction in NYS.
- If CPS is called, they will contact the police if a crime is suspected to have occurred.

Compromises to Confidentiality

- Child Abuse reporting
- Reporting of STIs and HIV, Contact Tracing
- Preventing Harm
- Court Proceedings
- Insurance/Billing

Duty to Warn v Confidentiality

Tarasoff California Supreme Court Case (1976)

- "When a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger."
- How far should the physician go in "warning" others?

http://www.stanford.edu/group/psylawseminar/Tarasoff.Greene.htm

Payment for Treatment

- Crime Victims Board—Forensic Payment Act
- Family Planning Benefits Program
  - Covers birth control, etc. ages 10-64
  - Minors who live at home can apply on their own
  - Can waive payment by current insurance, even if already covered by parents
  - Teen may give alternative contact info

Syracuse Study

Percentage of teens with any refusal	**6.2% (4/65)**
Refused police notification	**4.6 % (3/65)**
Refused examination	**1.5 % (1/65)**
Refused evidence collection*	**3.6 % (1/28)**
Refused notification of legally responsible adult	**1.5 % (1/65)**
Refused HIV PEP* or any STD treatment	**0**

Potential Ethical Challenges

Teen denies use of force	**21.5 % (14/65)**
Teen denies any sexual activity, but responsible adult is suspicious	**3.1 % (2/65)**
Notification of authorities/parent would cause harm to teen	**1.5 % (1/65)**
Legally responsible adult not available for exam	**4.6% (3/65)**

Objectives

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- *Analyze the rights of parents when the medical professional is faced with a child abuse issue.*
- Recognize key facets of the thin line between dual roles as healer and investigator.

CASE of Sexual Abuse

- Was striking the 14 year old within the parent's rights?
- Should the parent be informed when their teen is at risk for a disease such as HIV?
- Can the parent request an exam for their child/teen?
- Framing the question: How can I best help this adolescent?
- What about the non-custodial parent?

Social Services Law

Social Service Law Article 6, Title 6:416.

… Any person or official required to report cases of suspected child abuse and maltreatment may take or cause to be taken at public expense photographs of the areas of trauma visible on a child who is subject to a report and, *if medically indicated, cause to be performed a radiological examination on the child.*

Parent's Rights

Van Emrik v. Chemung County Department of Social Services, 911 F.2d 863 (2d Cir. 1990)

- X-rays without the parents' consent or a court order violated the plaintiffs' procedural due-process rights
- X-rays were not "medically indicated."
- The purpose of the x-rays "was not to provide medical treatment to the child, but to provide investigative assistance to the caseworker."
- X-rays of the child may not be undertaken for investigative purposes at the behest of state officials (w/o parental consent) unless a judicial officer has determined, upon notice to the parents and an opportunity to be heard, that grounds…exist and that the administration of the procedure is reasonable...

Parent's Rights

Tenenbaum vs. CWA

- "Plaintiffs have established, as a matter of law, that their procedural due process rights were violated by the manner in which Sarah was subjected to a medical examination on January 9, 1990."
- ***"… doctors were told that she was a suspected victim of sexual abuse by her father. … the gynecological exam that ensued was undertaken for the purpose of determining whether such abuse had occurred. While the purpose was investigative, the method by which the doctors conducted the investigation was to examine Sarah for injuries consistent with abuse. "***

http://www.parentsinaction.net/english/Legal/Tenenbaum%20v_%20Williams.htm

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Physician Testimony

- Hearsay (Federal Rule 802)
  - Exception---statements for purposes of medical diagnosis or treatment
- Crawford v. Washington
  - Any statement deemed testimonial is not admissible
  - Statements made where an objective witness would reasonably believe that the statement would be available for use at a later trial

http://www.law.cornell.edu/supct/html/02-9410.ZO.html

Potentially Harmful Cultural/Religious Practices

- Committee on Bioethics, Davis DS. Ritual genital cutting of female minors. *Pediatrics*. 2010 May;125(5):1088-93. Epub 2010 Apr 26.
- American Academy of Pediatrics Committee on Bioethics: Religious Objections to Medical Care. Pediatrics. *Pediatrics*.1997;99(2):279–281.
- S. M. Asser and R. Swan. Child Fatalities From Religion-motivated Medical Neglect. *Pediatrics*, April 1, 1998; 101(4): 625 - 629.

Parental Rights and Homicide

- American Academy of Pediatrics. Committee on Child Abuse and Neglect and Committee on Bioethics. Foregoing life-sustaining medical treatment in abused children. *Pediatrics*. 2000 Nov;106(5):1151-3.
- Gladsjo JA, Breding J, Sine D, Wells R, Kalemkiarian S, Oak J, Vieira AS, Friedlander SF. Termination of life support after severe child abuse: the role of a guardian ad litem. *Pediatrics*. 2004 Feb;113(2):e141-5.

Summary

- Criteria for *reasonable cause to suspect* child abuse is based on the cultural and educational background of the physician as well as the physician's experiences with the family and child protective services.
- Failure to report is not uncommon.
- Liability issues for "NOT" reporting are likely not a major factor in whether a report is made.
- The factor that may be most susceptible to change is improved education regarding child abuse findings and mimics.

Summary

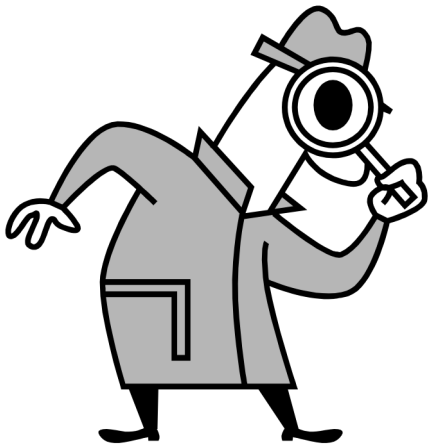
- Determination of adolescent autonomy in situations involving the need for reproductive services is often left to the discretion of the physician.
- The need for multiple types of consent often present in cases in of adolescent sexual assault.
- Refusals for services, treatment or law enforcement involvement can result in an ethical dilemma.
- Breaches of confidentiality may occur due to reporting requirements, STI tracing, payment issues or other concerns.
- Mandated reporting to law enforcement is not (yet) a legal requirement for the provider.

Summary

- Parental rights should be considered in all cases.
- Adolescents may choose to keep information confidential under certain circumstances.
- Informing the parents of potential tests (and documenting this), even if the parent is a suspected abuser, is often the best approach.

Summary

- There is a thin line between dual roles as healer and investigator.
- Utilizing an evidence based protocol for suspected child abuse will help to avoid issues of need for “due process.”



Other Resources

- ChildAbuseMD
- Http://www.childabusemd.com/law/law-resources.shtml