
RISK MANAGEMENT PRACTICAL POINTERS FOR PSYCHIATRIC FORENSIC PRACTICE

The following forensic psychiatry risk management tips are applicable when a psychiatrist is acting as an independent evaluator or an expert witness in civil, administrative or criminal proceedings where the primary goal is to evaluate not to treat. The evaluation may include an independent medical examination or a review of medical records and other written materials, or both. The most frequent areas of forensic psychiatry practice include: providing an expert psychiatric opinion in a civil trial on behalf of the plaintiff or the defendant, performing independent medical examinations (IMEs), reviewing medical records for insurance companies, performing court-ordered child custody evaluations, and evaluating defendants in criminal cases. The following information does not constitute legal advice and is meant only to provide risk management guidance.

Assignment

It is very important for the hiring party to clearly define the psychiatrist's role and the type of evaluation being requested. In criminal cases the forensic evaluation may include an opinion about competency to stand trial or competency to confess. In civil cases the evaluation may include child custody and divorce issues, assessing emotional injury secondary to physical injury, or the applicable psychiatric standard of care. It is preferable that assignments be in writing. However, since the written request may be subject to discovery, many attorneys will send only a cursory retention letter. If necessary get the information needed verbally.

Make certain the hiring party supplies you with the resources needed to conduct a careful and reasoned assessment. At a minimum, ask for the prior medical records including any hospital admissions, previous medical/psychiatric treatment, school reports if appropriate, and psychological raw data when needed. If you are asked to perform an evaluation and the hiring party does not want you to have prior information, you should consider not accepting the assignment because it may adversely affect the quality of the evaluation.

Clarify, upon accepting an assignment, who will own and have access to any reports, notes, or records of the evaluation once the assignment is complete.

Do not accept an assignment where the individual who is retaining you attempts to influence the objectivity of your evaluation. All communication regarding the assignment should occur through the attorney or organization that hired you.

Generally, there is no psychiatrist-patient relationship between the forensic psychiatrist evaluator and the evaluatee, however, do not assume that means you cannot be sued or reported to the state medical board. If harm is alleged as a result of an examination, state law may allow you to be sued on the theory of ordinary negligence or medical malpractice. To avoid the appearance that a psychiatrist-patient relationship has been established, do not accept an assignment directly from an evaluatee.

In general, the treating psychiatrist should not agree to be an expert or to perform an evaluation for legal purposes. It may adversely affect the therapeutic relationship and objectivity can be questioned. Conflicting obligations increase the risk of clinical, ethical, and even legal problems. For more information, see *Ethics Primer of the American Psychiatric Association* (Washington, DC, American Psychiatric Association, 2001, p. 69).

Fees

Do not provide forensic psychiatry services for an attorney who wants you to accept a contingency fee. It could appear to a jury that your objectivity has been compromised at the prospect of financial gain.

If you provide trial or deposition testimony you will be cross-examined about fees. Your fees should be reasonable and in line with the community standard for forensic psychiatry services. Exorbitant fees will compromise your credibility as an objective medical expert.

The Evaluation or Consultation

Performing a forensic examination in a state where you are not licensed to practice may be a violation of the state's licensing laws. Confirm that you, as an out of state physician not licensed in the state where the evaluation is to take place, can legally perform a forensic examination.

Consider obtaining a license in the state where the evaluation is to take place. Alternatively, consider obtaining a court order for the evaluation or an opinion on the need for a local license from an attorney in the state where the evaluation is to take place.

Clarify your role with the evaluatee and document it. The person being examined must clearly understand that you are not his or her "doctor" and that you have been retained solely to evaluate and give an opinion. In nearly all cases you will not continue to follow the person evaluated, and that fact must be made clear to all parties. In rare cases you will be asked to perform a second or follow-up evaluation.

Have the evaluatee sign a written consent for the evaluation, regardless of whether or not written consent is legally required.

The evaluatee should sign a release, prior to the examination, waiving confidentiality for specific purposes. The release should include permission to disseminate the report to the appropriate parties, to have your deposition taken and provide testimony at trial. The release should be prepared by an attorney familiar with the state law pertaining to psychiatrist-patient privilege and confidentiality in the state where the evaluation is performed. The release should also comply with all federal confidentiality laws, including HIPAA's Privacy Rule.

If the evaluation is court ordered and the evaluatee refuses to participate, prepare your report advising of the failure to participate. It may not be possible for you to provide a diagnostic opinion in this instance, even with review of prior medical records. In such cases you have the option of stating that you reached no conclusions due to the failure to appear.

If the evaluation is conducted on the evaluatee while he or she is a patient in the hospital, do not write "orders" in the medical records or give verbal orders to the nurses.

Be certain that you know who has legal authority to consent to the evaluation of a child before performing an evaluation and rendering an opinion about which parent or legal guardian should have custody. Make sure that the legally authorized party gives written consent for a custody evaluation.

Report

Your written report is often a pivotal piece of information in a forensic case. When preparing a report include at least the following:

- Identify who requested the examination/evaluation
- Reasons for your consultation.
- Issues that you have been asked to address or questions you have been asked to answer
- List all material that has been reviewed as part of your evaluation and opinion, including the parties' records, medical journals and professional literature
- Document all elements of the examination that are relevant to the issues
- Identify the party responsible for follow-up and treatment
- Prepare a clear, succinct conclusion

Deposition/Testimony

If your deposition is requested, prepare for it. The attorneys will question your conclusions, sometimes quite vigorously. Review the transcribed deposition for accuracy. This task may seem burdensome, but it will avoid some embarrassing moments.

When being deposed, consider similar cases you have consulted on and whether your testimony is consistent with those cases. If not, be very clear on the distinctions. The attorneys will often have transcripts from testimony in prior cases, and your prior testimony can be used to attack your credibility.

Some forensic testimony will involve issues of legal capacity or competency to perform a particular task. When working in the legal setting, the accuracy and reliability of psychiatric diagnosis is critical. Be certain you are clear when asked capacity questions. Are you being asked about past capacity, present capacity, or future capacity? Have you reviewed or do you already understand the legal definitions you will be asked to use?

Often legal terms have special meanings and you must understand the meaning of the terms in the state where you are working. For example, there are at least three legal standards used to define "insanity".

Attention to current medical literature is critical. You need to know what your peers are thinking and advising because in some cases you will be asked about the standard of care.

Avoid discussions with the press about any case where you have been retained to provide a forensic evaluation or consultation. If it is a high profile case, you may find yourself under scrutiny, and "no comment" is the appropriate response.

Expert testimony may be subject to peer review. Accordingly, know and follow all applicable standards governing forensic practice, such as documenting your examinations, identifying personal opinions as such, identifying material you relied on in reaching your conclusions, etc.

Remember that you have been retained to render a medical opinion and not a legal opinion.

Additional Resources:

From the American Academy of Psychiatry and the Law (AAPL):

- *Ethical Guidelines for the Practice of Forensic Psychiatry*, available at www.aapl.org/ethics.htm
- *Practice Guidelines for the Forensic Evaluation of Psychiatric Disability*, available at www.jaapl.org

Compliments of:



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