CORRECTIONAL PSYCHIATRY: A UNIQUE PATIENT POPULATION AND PROFESSIONAL LIABILITY RISK

Psychiatrists working in a correctional setting, or those considering doing so, may wonder if practicing correctional psychiatry can increase their professional liability exposure. While the answer is "yes," it is important to keep in mind that the increased risk can be managed.

Unless specified, this article will use the term Correctional Facility to refer to both jails generally for inmates awaiting trial or serving a short sentence and operated by a local municipality) and prisons (generally for inmates serving longer sentences and operated by a state or the federal government).

THE LIABILITY RISKS

Four Unique Characteristics of Correctional Psychiatry That May Increase Liability

 # 1 – Because Inmates Have a Constitutional Right to Treatment, Correctional Psychiatrists Can Face Civil Rights Liability in Addition to Medical Malpractice Liability

The constitutional right to treatment: The first additional liability risk is based on the fact that inmates have a constitutional right to receive medical treatment. So, correctional psychiatrists face not only medical malpractice exposure, but also a significant risk of being named in a civil rights violation claim. While inmates right to treatment does not appear in the constitution itself, this right to treatment has been acknowledged by the courts under the Eight Amendment, which addresses criminal punishment and reads as follows: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

In 1976, the U.S. Supreme Court, in *Estelle v. Gamble*,[1] established "the government's obligation to provide medical care for those whom it is punishing by incarceration," and stated "deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain, prescribed by the Eighth amendment." The court made it clear that not every claim by an inmate that he has not received adequate medical treatment violates the 8th amendment by noting "a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner."

Inmates often assert deprivation of their Eighth Amendment rights by filing so- called "Section 1983 claims" against correctional psychiatrists alleging they were subject to cruel and unusual punishment, usually due to the delay or denial of medical treatment. 42 USC § 1983 is a federal civil rights statute from 1871 that imposes liability on government employees, or those linked to the government (such as private contractors), for deprivation or violation of a citizen's constitutional rights (such as the Eighth Amendment right to not have cruel and unusual punishment inflicted).

Courts addressing correctional providers' liability for civil rights violations have made the following points clear:

- "... deliberate indifference to serious medical needs of present and wants and infliction of pain by the 8th

amendment," which is actionable under § 1983.[1]

- "Serious medical needs" includes psychiatric care.
- The inmates' constitutional right to health care specifically means the following three rights:

    1. The right to access care,
    2. The right to a professional judgment, and
    3. The right to receive care ordered.

    If these three basic rights are not provided, a § 1983 claim is possible against the state and correctional facility officials, alleging violations of the Eight Amendment prohibition of cruel and unusual punishment.

- A Section 1983 claim is actionable regardless of whether the deliberate indifference to the serious needs of inmates is by correctional physicians, or by correctional staff in intentionally delaying or denying access to medical care, or intentionally interfering with treatment that has been ordered.

The impact of this constitutional right: It is very easy for inmates to file claims against correctional providers alleging inadequate treatment. Moreover, correctional providers are often named in these denial-of-medical-care claims, even when the provider never treated the inmate. In terms of professional liability exposure, the risk of a civil rights claim is HIGH FREQUENCY (correctional providers are usually named in complaints) because inmates can file these claims easily without the need for an attorney. But these claims are LOW SEVERITY and are often not pursued after being filed because the inmate must show the providers acted with deliberate indifference to the serious medical needs of the inmate in order to prove an Eight Amendment violation. Basically, the inmate must prove the correctional psychiatrist knew of the need for serious medical care and intentionally refused to provide that care to show deliberate indifference. However, even if an inmate cannot prove deliberate indifference, and therefore would not prevail in a civil rights claim, there is always the possibility of a medical malpractice action.

 # 2 – There is the possibility of class action exposure

The second source of increased liability risk also stems from the inmates constitutional rights. Advocacy groups may file class action litigation against the correctional facility for any number of alleged problems such as overcrowding, violence, and substandard health care. Correctional psychiatrists have been named-along with many others- in class action cases against correctional facilities.

 # 3 – Inmates have a very high rate of suicide

The third source of increased liability risk is related to the high incidence of suicides and suicide attempts in the inmate population. Most suicides result in a claim for medical malpractice and/or deliberate indifference (civil rights) claim against the correctional psychiatrist.

Unlike the general patient population (where suicide is a low-frequency event), in the correctional setting, suicide is a MEDIUM FREQUENCY, HIGH SEVERITY event.

 # 4 – Correctional psychiatrists lack control over the treatment

The 4th and final major source of increased professional liability risk is related to the correctional psychiatrist lack of control in this particular treatment environment. In addition to the correctional staff possibly having immunity (which could leave the psychiatrist as the sole defendant), there are several other implications such as:

Correctional psychiatrists may have to work harder to deliver good care: As examples, there may be formulary limitations, conflicts with the correction facility administration to have medication given on specific schedules (t.i.d. instead of once a day), it may be difficult to get inmates sent for outside studies or have consultations done, and discharge planning may be very difficult.

Correctional psychiatrists may have limited ability to get patients seen: Psychiatrists are dependent on non-clinical staff ـ corrections officers - who may be biased against the inmates medical complaints as manipulative. When the inmates file an inadequate treatment claim, the correctional provider is usually named, even though he/she had nothing to do with the inmate not being allowed to be seen; the corrections staff has control over when inmates are seen for medical

treatment. In one case, the inmate was scheduled to be seen by the psychiatrist, but the corrections staff had put the inmate in isolation instead for behavior issues. The patient suicided in isolation and the psychiatrist was named in the subsequent lawsuit.

Non-compliance issues: Non-adherence to the treatment plan may not be due to the, but rather due to the corrections staff or the correctional facilities policies and procedures period also comma correctional psychiatrists cannot terminate with a non-compliant inmate as can be done when appropriate in other treatment settings.

Bound by policies and procedures without having any input into their development: A correctional psychiatrist often has had no input into the development of the policies and procedures for delivering treatment within the correctional setting that he/she is responsible for following.

NON-UNIQUE LIABILITY RISKS FOR CORRECTIONAL PSYCHIATRISTS

In addition to the unique liability exposures associated with treating inmates, correctional psychiatrists are subject to the usual malpractice liability risks faced by psychiatrists in any treatment setting. Examples include risks related to supervision (including non-existent, but alleged, supervisory relationships) of other correctional health providers, and risks related to telemedicine.

THE STANDARD OF CARE FOR CORRECTIONAL PSYCHIATRY

As in any other treatment setting, the correctional psychiatrist must treat inmates consistent with the standard of care in order to defeat allegations of negligence. While the exact definition of standard of care varies by state, generally, it is the degree of skill, care, and diligence exercised by members of the same profession or specialty practicing in light of the present state of medical science. It is important to keep in mind that **the standard of care does not mean optimal care**, but includes a range of acceptable treatment options.

There are many factors that could be used as evidence of the applicable standard of care for a particular patient care issue. These factors that determine the applicable standard of care include, *but are not limited to*, the following:

- Statutes (federal and state)
- Regulations (federal and state) - examples could include regulations from the state licensing

board, the federal Department of Justice, and the state Department of Corrections

- Case law (federal and state)
- Other statements (such as guidance documents and policy statements) from federal and state regulatory agencies
- **Authoritative** clinical guidelines
- Treatises
- Journal articles
- Accreditation standards
- A facility's own policies and procedures
- Medication label / PDR

RISK MANAGEMENT ADVICE

Preliminary Questions

Getting answers to some questions before deciding to practice psychiatry in a correctional setting can help evaluate the potential liability risk:

1. Is the facility accredited?
2. Are you provided indemnification for claims brought against you for actions of others for whom you are not directly responsible? If you are contracting directly with the government, it may not be possible to obtain indemnification, but it is important to address.
3. Are you required to indemnify the government or an entity that has contracted with the government to provide healthcare services? If so, understand that many professional liability insurance policies exclude coverage for claims associated with an insured's contractual obligation to indemnify or hold harmless any other person or entity. Be sure to understand what your insurance policy's limitations are regarding indemnification.
4. Do you understand your professional liability insurance policy's other limitations, such as those related to coverage of intentional acts and violations of law?
5. Are you familiar with the national standards for delivery of correctional health care? For more on organizations that create standards for care, see Resources, below.
6. Are you familiar with and do you understand the applicable state laws, regulations, and rules related to rendering health care in correctional facilities?
7. Have you reviewed the facilities health care policies and procedures? Are you comfortable with the clinical appropriateness of the policies and procedures?

Three Risk Management Strategies to Reduce Your Professional Liability Risk:

 # 1 - Practice Good Medicine

Understand that you may have to work harder: As discussed above, you may have to work harder to render good clinical care. For example, all orders (such as for laboratory studies, consultations, hospital care, or prescriptions) and follow-up appointments should be tracked to ensure care is delivered to the inmates. Remember that one of the three basic rights inmates have is the right to receive ordered care. This may be difficult given the inmates are under the custody of the non-clinical correctional staff.

Be sure your care meets the standard of care: For instance, given the high propensity of inmates to suicide, psychiatrists must assess for suicidality as clinically necessary, and document the assessments. Also, be sure to be familiar with the facilities policies and procedures as they must be followed, or changed if they cannot be followed. The corrections setting is highly structured, with detailed procedures for intake mental health screening, mental health assessments, mental health evaluations and discharge planning. Psychiatrists need to understand what actions are required, as well as the time frames for those actions. An example of a required policy is a suicide prevention policy. There could be situations where the psychiatrist, who had no input into the policy, does not think the policy is clinically adequate.

Stay informed: As always, it is important for psychiatrists to stay informed about all aspects of patient care. This includes, but is not limited to, staying current with safety information about the medications prescribed, staying up to date with standard of care factors (such as laws, regulations, and clinical guidelines), and staying current with the patient's clinical status (performing ongoing suicide assessments, tracking orders and consults, etc.).

 # 2 - Communicate with Others

Communicate with the treatment team: In the corrections setting, psychiatrists will often work with, and communicate with, other clinical staff including nurses, psychologists, and social workers. If an inmate/patient is transferred to another correctional facility or to a hospital for treatment, clinical information may need to be provided to the receiving facility's providers. Also, if a patient is referred to an outside specialist for care, communication among providers should occur.

Communication with the corrections staff: The psychiatrist may need to communicate with corrections staff regarding those inmates with specific medical issues, such as a higher risk of suicidal behavior and those patients that require special accommodations.

 # 3 - Document Adequately

The high frequency of claims in the correctional setting underscores the importance of documentation. Others need to be able to determine - after the fact - what happened in treatment and why. As always, the good clinical care provided should be documented, including your clinical decision-making process. Particularly important in this treatment setting is documenting attempts to accomplish something, such as:

- obtaining past treatment records
- getting approval for a medication not on the formulary
- getting a consult
- patient's informed refusal
- etc.

[1] *Estelle v. Gamble, 429 US 97 (1976)*

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