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 expert witness in civil, administrative or criminal proceedings were 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 on 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 in the type of evaluation being requested. In criminal cases the forensic evaluation may include an opinion about competency to stand trial or competency to confessed. In several 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 were 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. If you are a covered entity under HIPAA, the evaluee does have the right to access for forensic report.

Do not accept an assignment or 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 evaluee, however, do not assume that means you cannot be sued or reported to the state licensing board. If harm is a legend 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 evaluee.

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.

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.

Clarify your role with the evaluee 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 evaluee sign a written consent for the valuation, regardless of whether or not written consent is legally required.

The evaluee 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.

Is the evaluation is court ordered and the evaluee 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 evaluate 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 how 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 your report include at least the following:

- Identify who requested the examinations/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 the 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 that 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.

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