Is Liability Possible for Forensic Psychiatrists?

Robert Weinstock, MD and Thomas Garrick, MD

Forensic psychiatrists are not as vulnerable to liability as general psychiatrists. The absence of a traditional physician-patient relationship and judicial and quasijudicial immunity are all protective against malpractice actions. Although the absence of a doctor-patient relationship removes an essential element of malpractice, other types of liability such as defamation and ordinary negligence are possible and may not be covered by malpractice insurance. A model is proposed for forensic psychiatry of a partial secondary doctor-patient relationship outweighed in most circumstances by duties to truth and/or the hiring attorney. Such a model seems most consistent with conflicting duties currently forced on all psychiatrists. This model has advantages of a duty, a violation of which is likely to be covered by malpractice insurance. Rather than deemphasizing partial secondary physician-patient responsibilities, it is advised to stress the important protection provided by judicial and quasijudicial immunity.

Forensic psychiatrists are not as vulnerable to medicolegal liability as general psychiatrists. They usually do not have a traditional doctor-patient relationship with their clients, a necessary and critical criterion for a medical malpractice action. Their practice consists characteristically of non-treatment-oriented evaluations that do not entail customary legal fiduciary duties between doctor and patient. For this reason, forensic psychiatrists ordinarily are protected from malpractice liability. However, the absence of malpractice liability does not necessarily protect the forensic psychiatrist from all liability. Other types of legal liability still are possible in the absence of any specific immunity, and a false sense of invulnerability can be dangerous.

Absence of a Traditional Doctor-Patient Relationship

The absence of a doctor-patient relationship precludes malpractice liability. In the California case of *Keene v. Wiggins*,[1] the court clarified that a doctor examining a patient for an insurance company in a worker's compensation examination owed no legal duty to the person being examined. In this case, the plaintiff claimed to have relied, to his detriment, on the

This article is a revised version of a presentation at the 24th Annual Meeting of the American Academy of Psychiatry and the Law, October 21, 1993, San Antonio, TX. Dr. Weinstock is affiliated with the West Los Angeles Veterans Affairs Medical Center, Los Angeles, CA; Director, Forensic Psychiatric Training Program and clinical associate professor of psychiatry, University of California, Los Angeles. Dr. Garrick is Chief, General Hospital Psychiatry, West Los Angeles Veterans Affairs Medical Center and professor of psychiatry, University of California, Los Angeles. Address correspondence to: Dr. R. Weinstock, Psychiatry Service (116AC), West Los Angeles Veterans Affairs Medical Center, Wilshire and Sawtelle Blvds., Los Angeles, CA 90073.

report's medical recommendations in deciding not to have surgery or further treatment for arachnoiditis. The doctor was found to have no duty to the plaintiff other than to conduct the examination in a manner so as not to cause harm to the complainant. If the plaintiff had been harmed during the evaluation, liability for such harm still would be possible. The court also stated in dicta that he had a duty to the person employing him to use good standards of professional skill. Therefore, he still could have liability to the insurance company that hired him, even if not to the patient. Such liability likely would be based on ordinary negligence, because medical malpractice would not apply.

In New Jersey in *Ryans v. Lowell*,[2] a psychiatrist had reviewed the plaintiff's rehabilitation commission file records and recommended that benefits be terminated. Lack of a personal examination and misdiagnosis were claimed. The court found no duty to the plaintiff, but only a potential duty to the commission who was not suing the psychiatrist.

In many other cases in other jurisdictions, the absence of a traditional doctor-patient relationship provided a basis for rejecting malpractice liability. A Pennsylvania court, in *Ervin v. American Life Assurance Company*,[3] found that a surgeon evaluating a person at the request of an insurance company owed no duty to the insurance applicant to discover an abnormality or inform an applicant about an identified problem. In Colorado in *Anderson v. Glisman*[4] the court held that a psychiatrist appointed by the court solely to advise it about child custody after a marriage dissolution had no duty to the divorced husband in the absence of a doctor-patient relationship. In this case, it had been alleged that the psychiatrist had fraudulently represented that he would make an unbiased evaluation. Even though the husband had to pay for the evaluation, the court determined that there was no doctor-patient relationship between the husband and the psychiatrist that would sustain a possible malpractice action. The court even awarded attorney fees to the psychiatrist. Similarly, in California in *Felton v. Schaeffer*,[5] the court found that the absence of a doctor-patient relationship precluded a malpractice action. In this case, a preemployment report erroneously indicated the complainant was not taking his prescribed blood pressure medication regularly. This misinformation resulted in the plaintiff not being hired for the job. A divided California Supreme Court declined to review this case.

Even false court testimony in *Missouri v. Levine*[6] was considered irrelevant to removal of a medical license, because court testimony in this decision was not considered medical practice. The absence of a doctor-patient relationship thus again was protective.

The absence of traditional malpractice liability, however, should not be totally reassuring. There is a risk that in the absence of medical malpractice, malpractice insurance might not cover actions in which other bases of liability (see below) are used. Because most forensic psychiatrists have malpractice insurance, they may thus find themselves opposing their own insurers in such cases. The insurers may focus on eliminating their own expo-

sure, even if it jeopardizes the forensic psychiatrist to full unprotected liability risk (such as for defamation or simple negligence). Thus it might actually be to the insured forensic psychiatrist's advantage to emphasize the ways in which a doctor-patient relationship still applies, even if less important than in a therapeutic context.

Potential Tort Liabilities

Theories of liability for forensic physicians other than malpractice have been suggested. In West Virginia, in *Rand v. Miller*,[7] the court found that undertaking a review of a prospective employee's records for an employer did not create a sufficient professional relationship with the employee to support a malpractice action. The court stated, however, that a defamation action still would be possible. Some courts have disputed the special (limited) evaluative role of the forensic physician. A court in New York in *Twitchell v. McKay*[8] in 1980 found liability for damage caused during manipulation of a knee by an insurance company physician during an examination. They considered the treatment test too narrow, stating that medical practice did not necessarily need to be only treatment or for treatment purposes. The physician, according to the court, still "represented his skill to be such as ordinarily possessed by physicians in the community." In this case, the court found the treatment test too narrow and held that a doctor-patient relationship was present, however briefly, when a "physician is in the process of exercising his profession and utilizing the skills which he has been taught in examining, diagnosing, treating, or caring for another person."

On the other hand, in New York, in *Chiaserra v. Employer Mutual Liability Insurance*,[9] no malpractice duty was found in a similar case. Rather, an ordinary negligence duty not to injure an employee during the course of an examination was determined.

Later, in the New York case of *Ferguson v. Wolkin*,[10] liability was limited solely to the nonjudicial duty undertaken (i.e., the evaluation itself) but not for the opinion about disability or for any consequences arising from the opinion. In the California case of *Felton v. Schaeffer*[5] involving a preemployment examination, liability was not found because the examination was solely for the purpose of providing the employer with an opinion, and the only alleged harm from an erroneous report were losses resulting from failure to obtain the job. However, the court in dicta also stated liability could potentially be found for injuries sustained during the examination process itself, even though traditional malpractice was not present. The absence of a doctor-patient relationship can be undercut as a defense, however, if the forensic psychiatrist slips into a traditional role and attempts to give helpful advice. In *Licht v. Hohl Machine and Conveyor Company*,[11] a physician hired to examine a company employee in a workers' compensation case advised the examinee to stop taking anticoagulants, and phlebitis later developed. Because the physician had slipped into a treatment role, the appellate court decided that malpractice liability could exist.

Judicial Immunity

Judicial immunity is a legal theory that also provides protection for the forensic psychiatrist. Like the judge, all witnesses including forensic psychiatrists have immunity from civil liability designed to encourage witnesses to testify freely. Criminal prosecution for perjury still is possible for witnesses, even though such actions are rare. Judicial immunity is provided because otherwise courts could be overwhelmed by suits from unhappy litigants. One side almost always is unhappy with an expert. Frequent frivolous suits would discourage expert witnesses from participating or ordinary citizens from testifying. In addition to judicial immunity for court testimony and opinions, that immunity has been extended in at least one case (*Seibel v. Kemble*) to court-appointed psychiatrists serving on a sanity commission regarding a prisoner's release.[12] In this case, judicial immunity was found for the decision to release an inmate who subsequently killed someone, even though the psychiatrist also had been the patient's therapist. Sometimes this type of immunity has been called quasijudicial immunity.

Quasijudicial Immunity

Typically, forensic psychiatrists have been found to have immunity for opinions resulting from non-court-ordered evaluations if performed to reach an opinion on a legal issue as well as for evaluations performed at the request of an attorney regarding an issue that is before the court or a judiciallike body. These have been called quasijudicial evaluations, and the resultant immunity, quasijudicial immunity. Judicial and quasijudicial immunity thus are significant protections for the forensic psychiatrist with common law bases. Immunity for quasijudicial defamation has been extended by a number of legal decisions. In contrast, though, it recently has been limited in California.

In Massachusetts, in *LaLonde v. Eissner*,[13] a psychiatrist chosen by the probation department, and not by the court itself, to conduct a psychiatric evaluation nonetheless was found to be entitled to absolute immunity for the quasijudicial services. The immunity was not affected by the probate court judge ordering the father to be responsible for the costs for the psychiatrist's services. This case involved a dispute about visitation. It had been alleged by the mother that Dr. Eissner's negligent evaluation led to continued contact between father and child with resultant harm to the child. In New York, in *Davis v. Tirrell*,[14] quasijudicial immunity was found for a psychologist who determined in an evaluation for a school district that an infant was "emotionally handicapped" and testified to that effect before a hearing officer in a quasijudicial proceeding. Any potential harm such a designation might do to the child was determined by the court not to be actionable. Being hired by a party to the dispute did not change this quasijudicial immunity. The court also stated that there was no doctor-patient relationship. It noted in dicta, however, that potential liability could be present under a simple negligence theory if the psychologist had not exercised the requisite degree of skill in her examination of the infant. Also in New York, in *Tolisano v. Texon*,[15] a physi-

cian had determined that it would not be too stressful for a potential witness to testify. The person subsequently died of a heart attack while appealing the court order. The court held that the physician was entitled to quasijudicial immunity when consulting to a district attorney's office regarding the ability of the person to testify. Immunity similarly was found in *Deed v. Condrell.*[16] This case involved a psychologist appointed by the court to counsel parties to a dispute and to make recommendations to the court. The court found that the privilege of immunity applicable to judicial proceedings also extended to reports, recommendations, evaluations, treatment, and counseling rendered by the psychologist. Quasijudicial immunity also has been found in federal courts.[17, 18]

Nevertheless, forensic psychiatrists still potentially are at risk if they undertake functions for which judicial and quasijudicial immunity do not apply in the absence of a doctor-patient relationship.[19] If the psychiatrist is a state government official who under the color of state law deprives a defendant of rights secured to him by constitutional or federal law, a section 1983 civil rights action is possible. The Supreme Court has determined that a section 1983 liability action applies if perjured testimony by a state official infringes the constitutional rights of another in *Schever v. Rhodes.*[20]

In the California case of *Howard v. Drapkin,*[21] the court granted but also limited quasijudicial immunity in a child-custody dispute. A psychologist appointed by the court to evaluate a woman was accused of verbally abusing her during the session and thereby inflicting emotional distress. In addition, it was alleged by the woman that the psychologist omitted pertinent information in her report, and that she failed to disclose her lack of expertise in child and sexual abuse. It also was alleged that the psychologist failed to disclose that she was a close friend of the wife of one of the husband's law partners, and that she had a prior professional relationship with the husband. The court found that both common-law quasijudicial immunity and statutory judicial immunity protected the psychologist. However, in contrast to the New York case of *Davis v. Tirrell,*[14] the California court stated that the quasijudicial immunity was predicated on the psychologist being hired as a neutral third party and theoretically functioning as a nonadvocate. By implication the quasijudicial immunity would not apply to an expert hired by one of the sides. The impossibility of neutrality and impartiality for expert witnesses as enunciated by Diamond[22] apparently was ignored by the court. The American Academy of Psychiatry and the Law (AAPL) itself has replaced "impartiality" with "honesty and striving for objectivity" in its ethical guidelines.[23] However, the California court may consider only an expert hired by a "neutral" third party to be in a capacity analogous to a judge in the quasijudicial setting.

In a later case, the California Appellate Court in *Susan A v. County of Sonoma*[24] found potential liability for statements made to the press by a forensic psychologist who was hired by a public defender to examine a defendant for defense pur-

poses. The psychologist was misled into believing that the public defender wanted him to speak to the press and that the attorney had authorized the reporter's inquiries. Moreover, he received approval from the public defender's supervisor, who said that he could go ahead but should use his judgment. Quasijudicial immunity also did not apply according to the court, because the psychologist had been retained by the defense and not as a nonadvocate. The court also considered the applicability of a California statutory privilege for publication, but determined that it applies to any communication made in a judicial or quasijudicial proceeding by litigants or other participants authorized by law if the purpose is to achieve the objects of the litigation with some logical relation to the action. In this case, even though the press statements were made to obtain a litigation advantage for the child, privilege did not apply, because publication was to persons in no way connected with the proceeding. On appeal, the California Supreme Court declined to review the case.

Because quasijudicial immunity now is reserved solely for nonadvocates (at least in California), forensic psychiatrists hired by one of the sides can be liable for their *quasijudicial* evaluations, even though their testimony is still protected by *judicial immunity*. It is unclear whether forensic psychiatrists hired by an adversary in California to perform a quasijudicial evaluation can now also be held liable for their opinion itself exclusive of court testimony, or only for other actions relevant to an evaluation. It is hoped that California courts will continue to appreciate the crucial importance of immunity for an opinion in a quasijudicial determination, even if hired by one of the adversaries and not by the court. Any other ruling could open up the potential for many suits by the unhappy party and defeat the whole rationale for the immunity. In instances in which quasijudicial immunity is lacking, the absence of a traditional doctor-patient relationship still would be protective unless other theories of liability such as ordinary negligence or defamation were used. Additionally, judicial immunity still is applicable for court testimony.

It remains unclear whether the New York Court in *Davis v. Tirrell*[14] and *Tolisano v. Texon*[15] and the California Court in *Susan A v. County of Sonoma*[24] are in partial disagreement regarding quasijudicial immunity for an opinion on the legal issue. The New York cases involved the quasijudicial opinion itself, but the *Davis v. Tirrell*[14] court also stated that ordinary negligence was possible if the psychologist conducted her examination without the requisite skill. However, it did not clarify its parameters. In contrast, the *Tolisano v. Texon*[15] court said ordinary negligence was not possible. In California, the alleged defamation happened outside the court and was not as part of the quasijudicial evaluation itself. It thus remains unclear whether New York courts could find liability for actions apart from the quasijudicial opinion such as defamation action for talking to the press. It also remains unclear whether the California Courts will find immunity for the quasijudicial opinion itself. It might depend on which precedent was followed.

Civil Commitment

There is a jurisdictional specificity about what constitutes malpractice in civil commitment determinations. Most states have some degree of statutory immunity for commitment determinations. In Maine,[26] for example, absolute immunity was found for a civil commitment determination, even though the court stated that there may have been gross negligence in the assessment in this civil commitment case tantamount to legal malice. However, many states now also have statutory requirements for a personal evaluation for civil commitment determinations. In New York, in *Kleber v. Stevens*,[25] liability was found for a negligent evaluation in which no examination at all was performed. The American Psychiatric Association (APA)[27] ethical guidelines also require a personal examination. Violations of the latter subject a psychiatrist to APA sanctions for an ethical violation. Such ethical sanctions by professional organizations are possible, even if malpractice liability is legally precluded.

A Partial Secondary Doctor-Patient Relationship

The recognition of forensic psychiatry as a subspecialty of psychiatry by the APA and the American Board of Medical Specialties and the decision by AAPL to have ethics in forensic psychiatry enforced by the APA indicate an organizational recognition that medical ethics are relevant to forensic psychiatric practice. Such a view is consistent with the opinions of most forensic psychiatrists as demonstrated by recent surveys[28] indicating that most psychiatrists consider medical and psychiatric ethics relevant for forensic psychiatric practice. Because the doctor-patient relationship is a fundamental part of psychiatric ethics, enforcement by the APA implies acceptance of traditional medical ethics as having some role in the functioning of a forensic psychiatrist.[29] Claims that a doctor-patient relationship is totally irrelevant to forensic psychiatric practice would be inconsistent with relegating ethics enforcement to the APA, because they enforce ethical violations only when they go against their Principles and Annotations, and a doctor-patient relationship is a fundamental part of this framework. It is thus most reasonable in our opinion to consider a forensic psychiatrist to have some doctor-patient responsibilities, even if they may be secondary and lose priority to other responsibilities such as to an attorney or "truth",[30] and legally these responsibilities may be absent or more circumscribed. Psychiatric consultants to other systems retain some doctor-patient responsibilities, so there is no persuasive reason that forensic psychiatrists should be unique in having simple, unconflicted responsibilities. Even treating psychiatrists inevitably have conflicting duties, such as to protect potential victims of violence or to report child or elder abuse that can in some situations override their primary duty to their patients. In California, spousal abuse now must be reported by health care workers. Therapists can even be forced in California to testify against their patients in criminal trials at a death penalty phase[31–33] despite the presence of a psychotherapist patient privilege for criminal matters. Even therapists thus

have clearly conflicting responsibilities in these very serious situations. The psychiatrist hired by a patient as a therapist who is then forced to give an opinion in a judicial or quasijudicial setting without the patient's voluntary, uncoerced informed consent is a case of conflicting obligations in which the law requires a therapist to violate his or her otherwise clear ethical obligations to a patient. It therefore seems most consistent to consider the forensic psychiatrist as having a partial secondary physician-patient relationship and responsibilities that sometimes can be significant or, in extreme circumstances, even overriding.

There could be situations in which the doctor-patient responsibility might be considered primary ethically, even if not legally, and might override a duty to the hiring attorney. An example might be a duty not to reveal irrelevant embarrassing information that can be used by the opposing attorney to pressure a plaintiff to settle a case. Some death penalty roles also may be ethically inappropriate, such as helping the prosecution distort defense arguments to obtain a death penalty. Diamond[34] has gone even further and suggested that forensic psychiatrists have a fiducial responsibility to influence the law in ways consistent with medical values. Wexler[35] has suggested that there may be situations in which the law can be used in a therapeutic manner, a concept called "therapeutic jurisprudence."

In a situation analogous to a forensic evaluation (i.e., a preemployment evaluation) the American Medical Association (AMA)[36] has found ethical responsibilities to the person evaluated to maintain confidences and to reveal only information relevant to the employment context, even though an ordinary doctor-patient relationship is absent. Thus, ethical sanctions are possible even when legal liability does not exist. Forensic psychiatric ethics are determined by the psychiatric profession and not by the courts.[21] Recently local district branches of the APA (which enforce ethical requirements) have begun to consider cases in which competent medical service has not been performed, or the person being evaluated is not treated with respect for human dignity. Both are AMA and APA ethical requirements. The underlying rationale for some of the AAPL's ethical guidelines,[21] such as forbidding prearraignment forensic evaluations and the need not to mislead a person about the purpose of a forensic evaluation, implies some need for concern for a defendant's welfare as well as honesty and fairness.

Advantage of a Partial Secondary Doctor-Patient Relationship

The presence of at least some aspects of a doctor-patient relationship should not be ignored even if it might make forensic psychiatric malpractice possible. A secondary ethical requirement might not even create legal liability. If it did, it would at least ensure that malpractice insurance coverage was applicable. Malpractice insurance would be needed by forensic psychiatrists, and would at least provide legal counsel during the claim processing and financial payment if liability were found. If defamation or nonmalpractice (ordinary) negligence were found in the absence of malpractice, it is

unclear whether the forensic psychiatrist would be protected by malpractice insurers. To date, such cases are relatively rare. Perhaps forensic psychiatrists need to work with medical malpractice underwriters to provide specific coverage for forensic practice or to clarify that other types of negligence would be covered. Because judicial and quasijudicial immunity still limit liability, as does the absence of a traditional doctor-patient relationship or even its secondary nature, premiums should be low. Claiming a total absence of a doctor-patient relationship in forensic psychiatry, though, could be a double-edged sword, potentially allowing insurers to deny malpractice benefits to the psychiatrist. Courts, in the absence of immunities, then could find possible uncovered personal liability for a forensic psychiatrist.

It thus might be financially protective to identify the doctor-patient relationship as a factor in forensic psychiatry practice, though its primacy may be lost to other duties. Such a view would be most consistent with recent AAPL actions regarding ethics and with surveys of forensic psychiatrists. Claims about the total absence of any doctor-patient relationship in forensic psychiatry may be misguided because of the increased vulnerability to personal, uncovered liability that can be created. Emphasis on judicial and quasijudicial immunity for protection may be more appropriate.

Summary

How serious is the concern about liability? Forensic psychiatrists still have important protections not available to other psychiatrists. There are differences between the responsibilities of forensic and clinical psychiatrists to the person being evaluated.[29] Most significant, the absence of a traditional doctor-patient relationship can preclude a medical malpractice action. Moreover, judicial and quasijudicial immunity also are likely to apply and be protective.

However, California has limited quasijudicial immunity to situations in which the psychiatrist is hired by the court, restricting it if hired by one of the adversaries, which undermines an important protection. These protections are important, because the adversarial nature of forensic psychiatry means that one side is usually unhappy and might be inclined to file suit. In situations without immunity, the absence or secondary nature of a traditional doctor-patient relationship remains an important protection at least from malpractice liability.

Much as it might be wished otherwise, exceptions do exist to protections for forensic practice. Forensic psychiatrists need to be aware of these exceptions to make certain they not get into difficulty out of a false sense of invulnerability. Care is necessary in a forensic evaluation, and caution about statements should be shown. Claims that forensic psychiatrists have no doctor-patient relationship at all should be avoided. Not only are such claims inconsistent with other official actions by the profession and survey opinions of forensic psychiatrists, but if adopted by the courts they could lead to findings of liability for other types of negligence and a refusal of coverage by malpractice carriers for any resultant damages. Because some courts

already have found no traditional fiduciary duty for forensic psychiatric examinations, such courts also could find unprotected liability for which the forensic psychiatrist, despite malpractice coverage, could be personally liable.

We propose a model of conflicting duties for the forensic psychiatrist with a need to balance such responsibilities. This model would include a partial (albeit ever present) secondary doctor-patient responsibility ordinarily but not always outweighed by other duties.[37] Although it is ideal to attempt to avoid "double agent" conflicting responsibilities whenever possible, such conflicts are inevitably present at times in other evaluation/treatment situations. The forensic psychiatrist might best be seen as having a primary duty to truth and to the hiring attorney, but also as retaining a secondary duty to a patient. The primary duty could be overridden in extreme situations in which the welfare of an evaluated individual should not be completely ignored. Such a view may not only be most consistent with actual practice and the majority professional opinion, but also most financially protective for the forensic psychiatrist.

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