Do You Understand Your Risk? Liability and Third-Party Evaluations in Civil Litigation

Liza H. Gold, MD, and John E. Davidson, JD

Many psychiatrists believe that there is little or no liability associated with conducting examinations at the request of a third party or with providing testimony in civil litigation. Case law has demonstrated otherwise. Psychiatrists conducting independent medical examinations (IMEs) may be vulnerable to tort lawsuits by either the evaluee or the third party who commissions the IME. In addition, breaches of legal or ethical conduct can lead to disciplinary action by state medical boards and professional organizations. Although immunity for certain types of forensic activities is available, such immunity is qualified and may not be applicable to evaluations and related testimony conducted for third parties. Understanding the liability associated with third-party evaluations will assist psychiatrists in minimizing their exposure.

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Psychiatrists often believe that they are protected from liability when conducting third-party evaluations or providing testimony regarding such evaluations in civil litigation. This belief is based on the assumption that no physician-patient relationship is created when examinations are conducted at the request of a third party. The traditional legal view is that physicians typically owe no duty of care to an evaluee because no physician-patient relationship exists. Absent this relationship, an evaluee cannot hold the evaluating physician liable for alleged malpractice. Historically, many courts have upheld this view.[1–3] Nevertheless, as several courts have recently indicated, the nature of the physician-patient relationship in third-party evaluations and thus the liability associated with these evaluations and the related testimony are not quite as straightforward as the traditional legal view implies.[1]

Claims against psychiatrists for third-party evaluations are significantly less common than for clinical practice. However, such suits are no longer unusual or extremely rare.[4] The most common areas of risk for forensic psychiatrists are linked to practices associated with this growing subspecialty: performing independent medical examinations (IMEs), providing reports, and at times, testimony.[5] In addition, should a lawsuit rely on legal theories other than professional malpractice, professional liability insurance may not provide protection from damage awards, and the caps on damages that juries can award in malpractice cases enacted by some states may not apply.

An understanding of the liability associated with third-party evaluations and testimony in civil litigation can assist psychiatrists in minimizing their exposure. Specific cases involving psychiatric third-party evaluations have not been tested in the legal arena. Thus, only a handful of legal decisions regarding psychiatric and psychological third-party evaluations are available to provide guidance. A larger number of cases regarding third-party evaluations involve other types of medical evaluations. Decisions regarding any type of third-party medical evaluations are theoretically also applicable to claims against forensic psychiatrists. Therefore, the following discussion includes case law based on both psychiatric and nonpsychiatric third-party evaluations where these latter cases may be relevant to psychiatric practice.

Dr. Gold is Clinical Professor of Psychiatry, Georgetown University Medical Center, Washington, DC. Mr. Davidson is Lecturer in Law, University of Virginia School of Law, Charlottesville, VA, and is in private practice at Davidson & Kitzmann, PLC, Charlottesville, VA. Address correspondence to: Liza H. Gold, MD, 2501 North Glebe Road, Suite 204, Arlington, VA 22207. E-mail: lhgoldmd@yahoo.com

Negligence Claims in Third-Party Evaluations

Malpractice Versus Ordinary Negligence

Negligence is the most likely claim that will be faced by a forensic psychiatrist.[5] The ordinary English meaning and the legal meaning of negligence are similar, but the legal profession continues to refine and dispute its exact definition. The legal profession most recently attempted a unifying definition in its Restatement (Third) of Torts:

> A person acts negligently if the person does not exercise reasonable care under all the circumstances. Primary factors to consider in ascertaining whether the person's conduct lacks reasonable care are the foreseeable likelihood that the person's conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm.[6]

Whatever the exact definition, negligence clearly is understood to involve less culpability than truly reckless or intentional conduct. Negligent actors do not desire to bring about the consequences that follow, nor do they know or believe they are substantially certain to occur. There is merely a risk of such consequences, which is sufficiently great to lead a reasonable person to guard against them.[7]

At the most basic level, the common law holds that physicians are required to conduct examinations with reasonable care. Physicians, like everyone else, are subject to the law's usual demands for prudence. However, if a person has knowledge or skill superior to an ordinary person, the law demands that person's conduct to be consistent with that level of knowledge. Physicians are also therefore expected to possess and display an appropriate level of special knowledge and ability.[7] Thus, they are expected to meet a standard of medical care displayed by other physicians in their specialties.

In contrast with the continuing refinement of "negligence" as a source of liability, the fundamental law of medical malpractice is well settled. Medical malpractice theory depends on three duties that a physician owes to a patient: a duty to possess the requisite knowledge and skill such as is possessed by the average member of the medical profession; a duty to exercise ordinary and reasonable care in the application of such knowledge and skill; and a duty to use best judgment in such application.[8] The most basic requirement of a tort action for medical malpractice is the existence of a physician-patient relationship. If that relationship exists, and if the defendant has breached the applicable standard of medical care owed to the plaintiff, the physician may be held liable for malpractice.

The ethical and legal ambiguity surrounding whether a physician-patient relationship exists in third-party evaluations has allowed claimants to pursue ordinary negligence claims as well as medical malpractice claims. Thus, there are two distinct sources of liability for injuries caused in forensic practices involving third-party evaluations. Whether a claim of negligence constitutes a malpractice claim as opposed to an ordinary negligence claim depends to a large degree on whether the court determines that a doctor-patient relationship exists. As one court noted, "The distinction between medical malpractice and negligence is a subtle one, for medical malpractice is but a species of negligence and no rigid analytical line separates the two" (Ref. 9, p 808).

The distinction between professional and ordinary negligence may be subtle, but it has profound implications for forensic practitioners. The duration of statutes of limitations for ordinary negligence is often longer than that for medical malpractice claims. Physicians therefore have a longer exposure to claims of negligence by people whom they examine without intent to treat. Unlike medical malpractice claims, ordinary negligence claims do not require the use of expert medical witnesses to establish causation and deviations from accepted standards of care.[7] This distinction is highly significant. The requirement to have an expert medical witness serve as a screen against the most frivolous of malpractice cases, since a plaintiff can win a malpractice case only if at least one physician deemed expert by the court testifies that the defendant physician's treatment fell below the standard of care. In contrast, in an ordinary negligence case, the plaintiff usually is not obliged to use an expert and simply can argue to the jury that the physician should be held liable for injuries proximately caused by the examination.

In addition, ordinary negligence claims may lie outside the scope of physicians' malpractice insurance. In medical malpractice actions, physicians are provided protection by professional liability insurance purchased by themselves or by their employers. In contrast, unless specifically covered by rider in a medical malpractice policy, the physician performing third-party evaluations, if sued for ordinary negligence under common law, may not have this or any other liability protection.[3]

In this situation, a plaintiff may well seek to recover the physician's personal assets.

Is There a Doctor-Patient Relationship in Third-Party Evaluations?

To prevail in any negligence claim, a plaintiff must prove by a preponderance of the evidence that:

1. The defendant had a duty or obligation, recognized by the law, requiring the person to conform to a certain standard of conduct.
2. The defendant breached the duty, failing to conform to the standard required.
3. The breach of duty resulted in injury or damage to the other party.
4. A reasonably close causal connection exists between the conduct and ensuing injury. The breach of duty was the "proximate cause" of injury.[7]

While any or all of the four elements of a negligence claim may be disputed in a lawsuit, most cases involving IMEs turn on whether the physician owes a particular duty of care to the evaluee.[1] A court's interpretation of the nature of the relationship between a psychiatrist and an evaluee in an examination conducted for a third-party evaluation determines whether the court treats a claim as malpractice.[1,3,10,11]

The Colorado Supreme Court, in considering liability in medical third-party evaluations (*Greenberg v. Perkins*),[12] delineated the following positions held by various courts:

1. In the absence of physician-patient relationship, a physician owes no duty to an examinee (the traditional view upheld by courts).
2. A duty of care exists if the examining physician undertakes in some way to act on behalf of the examinee or induces reasonable reliance by the person examined (also a view traditionally upheld by courts).
3. Medical malpractice standards govern, and a duty of care exists, simply on the basis of the relationship created by the referral and examination.
4. Medical malpractice standards govern the duty of the functions the physician agrees to undertake, but are limited in scope.
5. The absence of a physician-patient relationship precludes a malpractice action, but an ordinarily negligence action can be maintained in appropriate circumstances, based on the recognized principle that a person who assumes to act must act with care.

In most jurisdictions, courts have held that a third-party evaluation does not confer a duty of the physician to the evaluee, and the lack of a physician-patient relationship continues to act as a bar against suits for professional negligence.[10,11] Nevertheless, although courts have been split, there is a recent trend among them to find that an IME creates at least a limited physician-patient relationship. Even a limited relationship implies duties, the breach of which may be sufficient to sustain certain malpractice claims.[1,3]

For example, in 2004, the Michigan Supreme Court held that a physician who conducts an IME for personal injury litigation creates a limited physician-patient relationship and may be liable for physical harm caused to the evaluee during the examination, under a claim of medical malpractice (*Dyer v. Trachtman*).[13] In *Stanley v. McCarver*,[14] decided by the Arizona Supreme Court in 2004, the majority opinion held that the absence of a traditional, formal doctor-patient relationship does not necessarily preclude the imposition of a duty of care. The Colorado court in *Greenberg v. Perkins* (1993)[12] held that the IME itself may be said to create a relationship between the parties and imposes on physicians a duty to exercise a level of care consistent with their professional training and expertise. The highest courts in at least three other states—Connecticut, Montana, and New Jersey—have also found that liability exists, although they disagree on its scope.[1]

The same reasoning regarding negligence and malpractice claims has been applied to psychiatric and psychological evaluations conducted for third parties. The Virginia Supreme Court found that a doctor's examination of a party in litigation whose mental condition is in controversy is considered health care rendered by a health care provider (*Harris v. Kreutzer*).[15] In this case, the plaintiff brought a medical malpractice action against a psychologist retained by the defendant to conduct an IME to evaluate the plaintiff's claim of a traumatic brain injury. The plaintiff claimed that the psychologist verbally abused her and that his intentional treatment of her resulted in severe psychological trauma. The court held that since the psychologist agreed to conduct the IME, the relationship constituted a physician-patient relationship. Although the court specifically stated that the duties inherent in this relationship were more limited than those of a traditional physician-patient relationship, it noted that physicians conducting an IME have a duty to examine evaluees without causing harm and may be liable for medical malpractice if they violate this duty.

Similarly, in *Lambley v. Kameny*,[16] a prospective reserve police officer was required to undergo preemployment psychological screening. He had received a diagnosis of passive-aggressive personality disorder. On the basis of this diagnosis the psychiatrist conducting the evaluation found the evaluee psychologically unfit and he was denied a position. The evaluee sued the examining psychiatrist, claiming that the diagnosis had been erroneous. A Massachusetts Appeals Court found the applicant's claim that the psychiatrist was negligent in his examination and diagnosis was justified and that this negligence could constitute medical malpractice on the basis of a limited physician-patient relationship.

In another case involving a psychological evaluation, *Todd v. Angelloz*,[17] the husband in a divorce proceeding filed an action against a psychologist who conducted a court-ordered evaluation resulting in only supervised visitation with his children. An appeals court held that the husband's cause of action against the psychologist constituted a malpractice claim within the scope of the Medical Malpractice Act of Louisiana because the evaluation involved a professional assessment of the husband's condition.

The Limited Physician-Patient Relationship: What Duties Exist?

The law considers both third-party evaluations and evaluations conducted for treatment purposes to constitute the practice of medicine. Although knowledgeable psychiatrists may be aware of the differences between the two types of evaluations, case law does not differentiate between them. For example, in *Harris v. Kreutzer*,[15] the Virginia Supreme Court clearly stated that such a third-party evaluation conducted for purposes of litigation is nevertheless health care rendered by a health care provider and that the examination is considered a professional act by the doctor, designed to result in a medical diagnosis of the evaluee.

However, most courts that have held that an IME creates a physician-patient relationship have found that the physician's duty to the evaluee under such circumstances is more limited than that of a traditional physician-patient relationship. Case law has indicated that within this limited relationship, IME physicians owe the following legal duties to their evaluees:

1. not to cause injury during the examination;
2. to disclose significant findings in a reasonable manner; and
3. to maintain confidentiality.[1]

Breaches of these duties can lead to malpractice claims against physicians who conduct evaluations for third parties, including psychiatrists.

The Duty Not to Cause Injury During the Examination

Most courts agree that an examining physician has the duty to use reasonable skill consistent with the standard of care to avoid physically injuring the examinee during the examination. The Colorado court in *Greenberg v. Perkins*[12] noted that regardless of the standard of care, all courts that have considered the issue agree that, at the least, IME physicians have a minimal duty to a nonpatient examinee to do no harm in conducting the examination[1] (see also *Smith v. Welch*[18]; *Dyer v. Trachtman*[13]). The legal duty not to cause injury is consistent with one of the oldest precepts of medical ethics, *primum non nocere*, or do no harm, known as the principle of nonmaleficence. The duty to do no harm is the least controversial of those associated with the limited physician-patient relationship.[1] Harm includes physical injury but may also include nonphysical damage such as loss of employment or psychological injury.

Courts have held that this duty applies to third-party psychiatric examinations. The Virginia Supreme Court, in *Harris v. Kreutzer*,[15] specifically limited the duty of the IME physician to the exercise of due care consistent with the applicable standard to do no harm. In addition, at least one court has indicated in *dicta* that a mental health examiner may be liable to an examinee when the examiner harms the examinee's mental health via the examination and when the injury is foreseeable. In *Martinez v. Lewis*,[19] the court foresaw such a case as that of *Harris v. Kreutzer*[15] when it stated:

> It is entirely possible that a duty of care could arise while a physician or other health care provider conducts an evaluation in a manner which worsened the examinee's mental health and the physician or health care provider knew or should have known about information that would have cautioned against conducting the examination in that manner [Ref. 19, p 218].

The Duty to Disclose Significant Findings in a Reasonable Manner

Although courts have differed on this question, a recent trend in case law has established that the IME physician has a duty to take reasonable steps to ensure that the evaluee is advised of significant medical

findings (see *Stanley v. McCarver*[14]). In *Webb v. T.D.*,[20] for example, the court held that a physician, in this case an orthopedic surgeon hired to perform an IME, owed duties to exercise ordinary care to discover conditions posing imminent danger and to take reasonable steps to communicate such dangers. In *Meinze v. Holmes et al.*,[21] an Ohio appeals court held that even though a doctor-patient relationship does not exist, if a reasonable physician of ordinary skill and diligence would disclose the information in question, a physician conducting a third-party examination employed by an insurer has a similar duty to disclose.

Thus, physicians conducting third-party evaluations have a responsibility to disclose to the examinee any life-threatening or serious medical problem discovered during the course of the examination. There is no case law relating to this duty in psychiatric evaluations. Nevertheless, the obvious concerns that may trigger this duty in a psychiatric examination would be the discovery by the evaluating psychiatrist of suicidal ideation or plan or intent to harm another person. Such findings warrant intervention, as indeed *Tarasoff v. Regents of the University of California*,[22] and both its progeny and similar state legislation suggest.[23]

Psychiatric ethics guidelines do not address an ethical duty to disclose life-threatening findings during psychiatric IMEs. However, the American Medical Association (AMA) ethics guidelines state that IME physicians have a responsibility to inform the patient about important health information or abnormalities discovered during the course of the examination.[24] In addition, the opinion continues, physicians should ensure to the extent possible that the patient understands the problem or diagnosis. When appropriate, physicians should suggest that the patient seek care from a qualified physician and, if requested, provide reasonable assistance in securing follow-up care.

Whether direct disclosure is warranted depends on the circumstances. Courts have found that the duty to disclose may be fulfilled by direct disclosure to the examinee with instructions to seek treatment, by reporting findings to the examinee's treating physician, or by communicating the existence of the problem to the examinee's attorney.[3] For example, the court in *Meinze v. Holmes et al.*[21] found that this duty was fulfilled by the insurer's transmittal of pertinent medical information to the insured's attorney. Under certain circumstances, it may be more appropriate to inform the treating physician or the evaluee's attorney rather than the evaluee.

The Duty to Maintain Confidentiality

Breach of confidentiality (sometimes called breach of fiduciary duty of confidentiality) is a type of tort claim distinct from malpractice, but a psychiatrist's breach of confidentiality may give rise to either an ordinary negligence or malpractice claim. In the IME context, the psychiatrist is expected to share certain medical information and findings with a third party. However, this permission to share information is often limited to relevant issues. In addition, permission to disclose relevant information to one third party does not constitute permission to disclose to others.

Like all health care providers, psychiatrists are bound by state and federal confidentiality laws, including the Privacy Act of the Health Insurance Portability and Accountability Act (HIPAA),[25] if the physician is a HIPAA-defined, covered health care provider.[26–29] Psychiatrists publishing private information to third parties beyond what is relevant to the reason for the examination, even with limited authorization to disclose to those third parties, or publishing any information beyond the third parties for whom limited authorization has been given, face potential liability from traditional privacy-related torts such as intrusion on seclusion and unreasonable publicity given to another's private life.[30] Thus, both sanctions and legal liability are possible in the event of a breach of confidentiality in a third-party evaluation.

In *Pettus v. Cole*,[31] for example, a California Appeals Court held that a limited physician-patient relationship was formed with evaluees by psychiatrists performing employment-related evaluations, and therefore the psychiatrists had a duty of confidentiality to the evaluees. The court ruled that two psychiatrists violated the California Confidentiality of Medical Information Act when they disclosed to an employer certain details of psychiatric disability evaluations that they had performed on behalf of the employer. The court stated that:

> . . . although employee put his mental condition in issue by requesting paid disability leave and employer had right to know whether employee was in fact disabled and perhaps whether disability was work-related, detailed psychiatric information ultimately used to make adverse personnel decisions was far more than employer needed to accomplish legitimate objectives [Ref. 31, p 402].

In addition, the information may not be disclosed, as it was in this case, without a written authorization from the evaluee.[4,32]

Duties That Do Not Exist in the Limited Physician-Patient Relationship

Other duties that arise from a traditional doctor-patient relationship have been found not to exist in the context of third-party evaluations. For example, evaluees generally cannot sue successfully for inaccurate or missed diagnoses (see, for example, *Slack v. Farmers Insurance Exchange*[33]). In *Harris v. Kreutzer*,[15] the Virginia Supreme Court expressly stated that the physician conducting an IME has no duty to diagnose. Although courts considering this question have been split, the majority have held that the IME physician does not owe a duty to the patient to diagnose any significant medical conditions accurately.[1]

However, some courts have held otherwise. For example, as noted in *Lambley v. Kameny*,[16] an appeals court found that the psychiatrist conducting the preemployment evaluation had a duty to diagnose the applicant's problem with reasonable professional skill even though a "traditional" doctor-patient relationship did not exist. The psychiatrist's failure to do so, the court stated, resulted in potential liability for medical malpractice in this case. In *James v. Brown*,[34] the Supreme Court of Texas held that a plaintiff could recover for negligent misdiagnosis as a medical malpractice claim against the defendant psychiatrist who served as expert witness.

Examining physicians, including psychiatrists, also have no duty to intervene directly in the evaluee's care if they find that treatment is inadequate or if they believe other treatment may be more effective. Such interventions go beyond the duty to disclose. Moreover, such advice could be construed as establishing a physician-patient relationship between the examiner and examinee, thus exposing the physician to possible medical malpractice liability.[3]

Creating a Traditional Doctor-Patient Relationship

The defense against malpractice liability in third-party evaluations is severely undercut and may even be lost when a court determines that a treatment relationship has been created.[11] This relationship is, in essence, an expressed or implied legal contract. Whether such a contract is formed depends in large part on what occurred in the mind of the potential patient, not in the mind of the physician.[10] This patient-friendly view borrows liberally from the codes of ethics of the legal profession, in which the existence of the attorney-client relationship is determined by reference to the mind of the putative client, not the perception of the attorney.[35] Courts considering this relationship will inquire whether a reasonable person in the position of the potential patient would have concluded that a physician-patient relationship existed.[10] If so, they will find that there was a legal physician-patient relationship.

The court's inquiry will take into account several factors and circumstances, such as the clarity of the nature of the relationship between the physician and the evaluee based on practical and financial arrangements. For example, in *Gallion v. Woytassek*,[36] the Supreme Court of Nebraska held that a court-ordered examination of the physical or mental condition of a criminal defendant did not create a doctor-patient relationship, as it clearly could not be construed as an evaluation for the purpose of treatment.

Similarly, employees who undergo psychiatric or medical examinations at the request of their employers should recognize that these examinations are for the benefit of the employer and that no physician-patient relationship arises from the evaluation. For example, when the employer pays for the examination, courts will consider that the examinee should be more likely to realize that the examination is for the benefit of the employer. In contrast, examinees who pay for their examinations may have a reasonable expectation that services are being rendered for their benefit and that payment is evidence of a contract and a treatment relationship.[10]

Courts will also consider whether the parties behaved in a manner that would lead an objective observer to conclude that a contract was formed. The courts have interpreted a variety of different acts undertaken by a physician to establish a physician-patient relationship. If the physician offers affirmative medical treatment, a court may reasonably assume that a doctor-patient relationship has been created. In addition, anything said or done during or as a result of the examination, upon which the evaluee comes to rely, will also be considered to establish such a relationship.[1,3] Under these circumstances, the examining physician becomes a treating physician, even though there is no explicit contractual agreement. The physician then assumes the duties and obligations of a reasonable physician and is sub-

ject to the laws of medical malpractice[1,3,10] (see for example, *Dugan v. Mobile Medical Testing Services, Inc.*[9] and *Licht v. Hohl Mach. & Conveyor Co., Inc.*[37]).

The duty to disclose and the risks inherent in offering advice or treatment suggestions in an IME context may create a set of conflicting circumstances that can present a challenge in third-party evaluations. Psychiatrists providing third-party evaluations are clinicians by training and disposition and may find that they inadvertently slip into a treatment role. In addition, as noted, physicians have an ethical and legal duty to alert the examinee of abnormal findings. Nevertheless, unguarded comments regarding the severity of the condition, recommendation of diagnostic procedures, or treatment advice should be avoided.[10] IME physicians should refer evaluees to their private physicians for prompt evaluation and treatment. Psychiatrists should respond to evaluees' questions regarding clinical matters by reminding evaluees of the nonclinical nature of their role.

The situation most fraught with the risk of malpractice liability arises when psychiatrists agree to perform a forensic evaluation or to provide court testimony for patients whom they have been treating clinically. In these circumstances, in addition to causing potential ethics-related problems,[38] the third-party evaluation may destroy the treatment relationship and expose the psychiatrist to claims of both medical and forensic malpractice. Therefore, for both ethical and risk management reasons, psychiatrists are advised to make every effort to avoid providing forensic services for patients whom they are treating.[4,10,39]

Ordinary Negligence Claims

Courts have held that physicians have a duty not to harm an evaluee, even in those states that follow the traditional precedent that IMEs do not create a physician-patient relationship. Thus, an evaluee can bring suit against a forensic psychiatrist if harm is suffered as a result of an examination on the grounds of simple negligence (negligence *per se*, gross negligence, and intentional misdeeds) rather than medical malpractice.[4]

Injury as a consequence of an IME may be more common in other areas of medicine—for example, when a plaintiff claims that a functional orthopedic evaluation has resulted in a back injury. Nevertheless, such claims could arise from psychiatric evaluations. For example, the stress of an evaluation might exacerbate an evaluee's condition.[38] Such situations can arise, particularly in adversarial evaluations, when the IME becomes part of a hostile discovery process.[40]

In *Dalton v. Miller*,[41] for example, a plaintiff sued a psychiatrist retained by an insurance company to conduct an IME for emotional harm. The suit claimed numerous causes of action, including misrepresentation, deceit, invasion of privacy, intentional infliction of emotional distress, and civil conspiracy. The trial court dismissed all the charges, but the appeals court found that the psychiatrist may have had a duty to avoid causing harm during the psychiatric examination and remanded the case to the trial court to decide the matter under the laws of ordinary negligence.

Other Causes of Action

Other possible causes of action related to third-party evaluations include defamation, invasion of privacy, breach of contract, perjury, and other intentional torts. For example, negligent interference with a contractual relationship is a relatively new but developing doctrine that may create liability for third-party evaluations, including psychiatrists.[42] Of possible causes of action other than negligence or malpractice, defamation appears to be the most common. Although mere opinions are not actionable, other types of statements may be. For example, generally, physicians cannot be sued for defamation for opinions concerning a worker's ability to work, unless the statement made was false and reckless.[42]

Nevertheless, courts have held that a psychiatrist's report concluding that an employee was mentally unfit to work may be actionable, since it reflects on the employee's reputation and ability to work. In *Rand v. Miller*,[43] a West Virginia court held that a psychiatrist 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 would still be possible.[11]

In *Hoesl v. United States*,[44] a government employee sued a government-employed psychiatrist for defamation for damages resulting from an allegedly negligent report asserting that the employee had a mental disability. A United States District Court in California held that:

> . . . in a case involving an unambiguous and considered publication to an employer that an employee has a specified mental disorder serious enough to make him unfit for his job, California courts would unquestionably . . . hold the publication defamatory on its face [Ref. 44, p 1173].

The court also stated that even if the publication was not obviously libelous, it was still actionable, provided the plaintiff proved damages. Although it did not explain its reasoning, apparently this California court believed that simply attaching a psychiatric diagnosis to an individual constituted defamation, possibly due to the stigma associated with mental illness.[42]

Other causes of action may include intentional torts. For example, physicians who intentionally harm or molest patients during IMEs, or any examination, may face assault or battery charges[1,5] (see *Slack v. Farmers Insurance Exchange*[33]). Forensic psychiatrists may be sued for intentional infliction of emotional distress, for example, if they conduct a psychiatric evaluation and the subject of the evaluation contends that it was conducted in a manner intentionally designed to be emotionally damaging.[4] Intentional torts (and criminal acts) are not covered by malpractice insurance.

Liability and the Third Party

When contracting with a third party, the IME physician assumes obligations directly to that party. Courts have held that physicians conducting third-party evaluations owe a duty to the party who retains the physician to provide reasonable care to the evaluee, even if no duty to the evaluee exists. In virtually all jurisdictions, physicians who provide third-party evaluations can be sued for malpractice if the party who employs the evaluator, whether an insurer, an attorney, or a litigant, is injured by the consequences of negligent forensic evaluation.[1,3,4,38,42]

For example, in *Ryans v. Lowell*,[45] a psychiatrist reviewing a plaintiff's files for an insurance company recommended that benefits be terminated. The evaluee sued, claiming lack of a personal examination and misdiagnosis. The court found that the psychiatrist owed no duty of care to the claimant, but only to the client, a rehabilitation commission, who was not suing the psychiatrist. In *Hafner v. Beck*,[46] an Arizona court of appeals found that a workers' compensation claimant who underwent a psychological IME did so only as part of the workers' compensation claim process and not for purposes of treatment or medical advice. This court stated, "[T]hus even if psychologist's conduct fell below standard of care for psychologists, it was breach of duty owed to workers' compensation carrier, not to claimant" (Ref. 46, p 1105).

Intentional tort claims brought by third parties are also possible. For example, forensic psychiatrists who intentionally misrepresent their qualifications may be sued for fraud by the attorney or other person employing them, when the misrepresentation is uncovered and the testimony of the forensic expert is disallowed by the court, resulting in the loss of the lawsuit.[4]

Protection from Legal Liability

Professional Medical Judgment Rule

Psychiatric examiners who conduct a careful and competent examination are not liable if their conclusions or opinions are ultimately determined to be erroneous. They are shielded by the "professional medical judgment" rule, which holds that physicians are not liable for mere errors in professional judgment so long as their decisions were based on a proper medical foundation (see, for example, *Vera v. Beth Israel Medical Hosp.*[47] and *Davitt v. State*[48]).

Legal Immunity

There are two types of immunity relevant to third-party evaluations: quasi-judicial immunity and witness immunity. Quasi-judicial immunity refers to immunity for persons other than judges who are performing judicial duties. Witness immunity protects testimony in a judicial proceeding from civil liability. Most states recognize an immunity from liability for statements made in judicial proceedings. The purpose of both protections is to encourage honest performance of duties, including provision of testimony, free from the fear of civil liability.[11,32,38]

Psychiatrists and psychologists who function in a quasi-judicial role, such as conducting evaluations and making recommendations related to fact-finding and rendering legal decisions, are protected by quasi-judicial immunity. For example, in cases involving custody, psychological testimony provided to assist the court in coming to custody determinations has been deemed to be protected (see, for example, *McCleery v. Leach*[49] and *Todd v. Angelloz*[17]). Judicial immunity may even protect physicians acting as consultants to state boards of medicine. In *Kutilek v.*

Gannon,[50] a District Court in Kansas extended absolute judicial immunity to the physicians retained by the Kansas Board of Medicine as consultants in a disciplinary action after they were sued for defamation, among other violations, by the physicians subject to the disciplinary action. The court reasoned that since the board served a quasi-judicial role by statute and its members perform judicial function, they were entitled to immunity.

However, quasi-judicial and witness immunity from liability for third-party evaluations and testimony are not absolute. The immunity available to IME physicians varies with the type of examination conducted. Quasi-judicial immunity is generally available only when the examiner is retained by and reports directly to the court (see *Todd v. Angelloz*[17]) and only when the judicial function is predicated on the examination. For example, there can be no quasi-judicial or witness immunity in an IME performed for nonlitigation purposes, such as the determination of disability, if there are no activities that occur in a judicial context.

Even when psychiatrists are retained by a party for litigation purposes and conduct an examination at that party's request, or when a court enters an order authorizing the IME, most courts find there is no quasi-judicial immunity for the IME physician's activities. Thus, in general, experts hired by one of the parties to litigation are not covered by quasi-judicial immunity,[38] although they may be entitled to witness immunity in connection with statements made during deposition or trial testimony (see *Dalton v. Miller*[41]). Witnesses who lie in their testimony can, of course, be prosecuted for perjury, a criminal offense for which there is no immunity[11,38] (see, for example, *Riffe v. Armstrong*[51]).

Moreover, neither quasi-judicial nor witness immunity precludes a complaint based on the physician's actions in conducting a forensic evaluation and preparing a report. Psychiatrists may still be held liable for negligence if the requisite degree of skill in examination is not exercised.[11] In *Murphy v. A. A. Matthews, a Div. of CRS Group Engineers, Inc.*,[52] for example, the Missouri Supreme Court held that witness immunity does not bar lawsuits against professional expert witnesses for alleged negligence in reaching opinions. The court opined that witness immunity should be applicable only to defamation or to retaliatory cases against adverse witnesses. The court felt that the imposition of liability would encourage experts to be careful and accurate.[32] As previously noted in *Dalton v. Miller*,[41] the appeals court found that the psychiatrist was not entitled to quasi-judicial immunity and that he could be held liable for any harm done during the examination.

Disciplinary Actions That May Result From Third-Party Evaluations

A forensic psychiatrist who gives false or negligent testimony in a judicial proceeding may be subject to sanction by a medical licensing board or by a professional society for ethics violations, even if protected from civil suit by quasi-judicial or witness immunity.[4] The American Psychiatric Association (APA) supports peer review processes conducted by state licensing boards and professional organizations.[53] The APA and AAPL address the ethics applicable to third-party evaluations.[39,53] A breach of ethics or report of unethical or unprofessional conduct of an AAPL or APA member can result in censure by the APA.[32] Disciplinary actions resulting from peer review processes in professional organizations have been legally challenged but upheld. In June 2001, for example, the United States Court of Appeals for the Seventh Circuit held that a professional society could discipline a member for improper testimony (*Austin v. American Association of Neurological Surgeons*[54]).

Physicians may also be reported to their state medical boards and disciplined.[4,32] The AMA, which considers the practice of medicine to include the provision of testimony, strongly supports regulatory and disciplinary actions by state medical boards, particularly in respect to expert testimony.[55,56] Filing a complaint with a state licensing board offers several advantages to evaluees over pursuing a legal claim. Licensing board complaints do not require damages, as in civil suits. In addition, there often are no statutes of limitations on board complaints. Medical boards generally investigate all complaints received regardless of their apparent merit. In addition, the costs of filing this type of complaint, if any, are negligible, unlike the potential costs associated with retaining an attorney and filing a lawsuit.

Various state medical boards have taken a variety of steps to regulate the practice of third-party evaluations and forensic testimony. These boards may also have special requirements for out-of-state expert witnesses, including licensure in the state for forensic activity. Violations of such regulations could result in the out-of-state expert's incurring civil and criminal

penalties.[4,57] In addition, in 2004, the Federation of State Medical Boards passed a resolution stating that the false, fraudulent, or deceptive testimony given by a medical professional while serving as an expert witness should constitute unprofessional conduct,[5] further justifying disciplinary action against forensic experts.

Discussion

Liability risk is significantly lower for psychiatrists who provide clinical services for forensic reasons than for those who provide treatment to patients. Nevertheless, psychiatrists who perform examinations on behalf of third parties run the risk of malpractice liability and other sources of liability in common law, with regard to both the evaluee and the retaining third party. If a court holds that a third-party evaluation established a limited or traditional physician-patient relationship, psychiatrists are vulnerable to professional negligence liability. In the absence of such a relationship, they are liable to ordinary negligence and other types of tort claims. In addition, psychiatrists providing forensic services are always vulnerable to complaints made to state licensing boards and professional organizations, which can result in disciplinary action and sanctions.

Psychiatrists are therefore well advised to stay abreast of evolving legal standards. To minimize liability exposure, psychiatrists should explicitly inform patients that they are acting on behalf of a third party. Evaluees should understand the nature and purpose of the examination and the physician's relationship with the third party. They should require evaluees to sign a consent form indicating that they have been so advised. Psychiatrists should also obtain signed authorization to disclose information to a specific third party.

Psychiatrists should exercise caution in entering a dual relationship as both a treatment provider and a forensic expert or as an evaluator for a third party. Even absent a formal dual relationship, psychiatrists should avoid by word or deed any indication of the intent to provide treatment or other psychiatric or medical services. Nevertheless, should examiners discover a serious psychiatric or medical condition involving life-threatening danger, they should disclose this information to the evaluee or the evaluee's physician or attorney.

As has been discussed, balancing these two courses of action can present a dilemma in minimizing liability associated with creating a doctor-patient relationship. In the event that a serious or life-threatening danger is discovered, psychiatrists should direct evaluees to their private physicians for prompt evaluation and treatment. If the evaluee does not have a treating physician, when appropriate, physicians should suggest that the evaluee seek care from a qualified physician and, if requested, provide reasonable assistance in securing follow-up care. However, in doing so, psychiatrists should avoid making direct comments to the evaluee regarding the severity of the condition, avoid recommending diagnostic procedures, and avoid providing treatment advice.

Finally, psychiatrists who routinely perform third-party evaluations and provide testimony should be certain that their malpractice insurance policies contain provisions for forensic activities. Not all malpractice claims are covered by all policies. In addition, in third-party evaluations or in the case of expert testimony, claims such as ordinary negligence other than malpractice claims may not trigger coverage. Physicians should be familiar with the details of their policies and arrange for the appropriate coverage.[38]

The boundaries of third-party evaluations and expert testimony liability in civil litigation are constantly shifting. Case law specific to psychiatric third-party evaluations continues to evolve. Nevertheless, it is reassuring that most of the decisions made by the courts are congruent with established medical and psychiatric ethics. Psychiatrists should therefore be familiar with their ethical obligations and ensure that their professional behavior reflects these principles and obligations. Practices that follow these standards of ethics result in best clinical and forensic practices and minimize liability risk.

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