The Doctor-Patient Relationship and Liability in Third-Party Evaluations for Civil Litigation

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Psychiatrists often believe they are protected from liability when conducting third-party evaluations in civil litigation. This belief is based on the understanding that a physician-patient relationship is required for liability to be found and the assumption that no physician-patient relationship is created when examinations are conducted at the request of a third party. Historically, many courts have upheld this view and have found that physicians owe no legal duty of care to the person being evaluated and thus cannot be liable for any injuries. Nevertheless, as an increasing number of courts have indicated, the nature of the physician-patient relationship in third-party evaluations and the issue of associated liability is not that straightforward.

Although claims against psychiatrists for third-party evaluations are significantly less common than they are for clinical practice, such suits are no longer extremely rare. Forensic psychiatrists frequently perform independent medical examinations (IMEs) and provide reports and, at times, testimony regarding their findings. These are the most common areas of risk for forensic psychiatrists. Liability may be incurred both toward the person being evaluated and the third party retaining the psychiatrist. Negligence is the claim most likely to be faced by forensic psychiatrists conducting third-party evaluations. Negligence is defined as the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation. Common law holds that physicians are required to conduct all examinations, regardless of purpose, with reasonable care. This reasonable care standard requires that, at a minimum, standard routine examination procedures result in no harm to the person being examined. Harm includes both physical injury and nonphysical damages, such as loss of employment or psychological injury. Violation of this standard can lead to claims of ordinary negligence.

Physicians are also required to possess a standard minimum degree of special knowledge and ability. If a person has knowledge or skill superior to an ordinary person, the law will demand that that person's conduct be consistent with that level of knowledge. Breaches of duty by treating physicians within the physician-patient relationship therefore generally fall under statutory laws relating to professional negligence, known as medical malpractice. Injury as a consequence of an IME may be more common in other areas of medicine—for example, a plaintiff may claim that a functional orthopedic evaluation resulted in a back injury. However, such claims could arise from psychiatric evaluations. For example, the stress of an evaluation might exacerbate the condition of a person being evaluated. Such situations can arise, particularly in adversarial evaluations, when the IME becomes part of a hostile discovery process. Courts have found that psychiatrists may have a duty to avoid breaching the standard of care and proximately causing harm during a third-party civil psychiatric examination.

Ordinary negligence or malpractice: implications

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

- The defendant had a duty or obligation to the plaintiff, requiring the person to conform to a certain standard of conduct.
- The defendant breached the duty, failing to conform to the standard required.
- The breach of duty resulted in (or proximately caused) injury or damage to the other party.
- A reasonably close causal connection exists between the conduct and ensuing injury.
While any or all of the 4 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 person being evaluated as a result of a doctor-patient relationship or the existence of some other relationship. Thus, whether a claim of negligence constitutes a malpractice claim as opposed to an ordinary negligence claim depends, among other issues, on whether the court determines a physician-patient relationship exists. The ethical and legal ambiguity surrounding the issue of whether a physician-patient relationship exists in third-party evaluations has allowed claimants to pursue ordinary negligence claims as well as medical malpractice claims. The distinction between professional and ordinary negligence may have significant implications. Statutes of limitations for ordinary negligence are usually longer than those for medical malpractice claims. Physicians therefore have a longer exposure to claims of negligence from people 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. The plaintiff in such a cause of action must only show damages and establish a causal relationship between the examination and the harm done. In addition, unless specifically covered by a rider in a medical malpractice policy, the physician performing third-party evaluations may not have malpractice insurance or any other liability protection if sued for ordinary negligence under common law.

Recent trends in the law

If a court finds that a physician-patient relationship has been established, the psychiatrist will be responsible for meeting all the duties associated with this traditional relationship. Therefore, a court's interpretation of the nature of the relationship between a psychiatrist and a person being evaluated in an examination conducted for a third-party evaluation will determine whether the court considers negligence claims under malpractice codes. In recent years, a number of courts have found the IME creates at least a limited physician-patient relationship. Although it is not as broad as the typical relationship between a treating physician and a patient, this relationship implies duties, the breach of which may be sufficient to sustain certain malpractice claims. The same legal reasoning has been specifically applied to psychiatric evaluations for third parties.

Case law has indicated IME physicians owe the following legal duties to the person being evaluated:

- To not cause injury during the examination (ie, to follow accepted professional protocols).
- To disclose significant findings in a reasonable manner.
- To maintain confidentiality. Breaches of these duties can potentially lead to malpractice claims against physicians conducting evaluations for third parties, including psychiatrists.

Creating a traditional doctor-patient relationship

The defense to 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. 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 person being evaluated, not in the mind of the physician. Courts considering this issue will inquire whether a reasonable person in the position of the person being evaluated would have concluded that a physician-patient relationship existed. This determination is often considered a matter of fact by courts and is based on a number of factors, such as the clarity of the nature of the relationship between the physician and the person being evaluated (based on practical and financial arrangements). The courts have interpreted a variety of acts undertaken by a physician to establish a physician-patient relationship. In addition to including any treatment or advice given by the physician to the person being examined, anything said or done during or as a result of the examination on which the person being evaluated comes to rely will also be considered to establish such a relationship. Courts will also consider whether the parties behaved in a manner that would lead an objective observer to conclude that a contract was formed. Most important, if the physician offers affirmative medical treatment, a court may reasonably assume a physician-patient relationship has been created. Under these circumstances, the examining physician becomes a treating physician even though there is no explicit contractual agreement. The physician assumes the duties and obligations
of a reasonable physician and becomes subject to the laws of medical malpractice.\textsuperscript{1,3,7}

The situation most fraught with risk of malpractice liability arises when psychiatrists agree to perform a forensic evaluation or provide court testimony for patients they have been treating clinically. In these circumstances, in addition to causing potential ethical problems, 18 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.\textsuperscript{4,11,18}

**Liability and the third party**

When contracting with a third party, the IME physician also assumes obligations directly to that party.\textsuperscript{1,3,4,8,19} Courts have held that physicians conducting third-party evaluations owe a duty to the third party who retains them to provide reasonable care to the person being evaluated, even if no duty to the person being evaluated exists. In virtually all jurisdictions, physicians who provide third-party evaluations can be sued for malpractice by the retaining third party if the party, whether an insurer, an attorney, or a litigant, is injured by the consequences of negligent forensic evaluation.\textsuperscript{20,21}

**Legal immunity**

There are 2 types of immunity relevant to third-party evaluations. Quasi-judicial immunity refers to immunity for persons other than judges who are performing judicial activities. Witness immunity protects testimony in a judicial proceeding from civil liability.\textsuperscript{8,12,22} However, these types of immunity are not absolute. Case law has shown the immunity available to IME physicians varies with the type of examination conducted. In general, experts hired by one of the parties to litigation are not covered by quasi-judicial immunity, even if an IME has been ordered by the court.\textsuperscript{8} Moreover, even if protected from civil suit by quasi-judicial or witness immunity, a forensic psychiatrist who gives false or negligent testimony in a judicial proceeding may still be subject to sanction for ethics violations by a medical licensing board or by a professional society.\textsuperscript{4} Physicians may also be reported to their state medical boards and disciplined.\textsuperscript{4,22}

**Conclusion**

The boundaries of third-party evaluations and expert testimony liability in civil litigation are constantly shifting. Psychiatrists should therefore be familiar with their ethical and legal obligations and operationalize them to minimize liability risk. They are also well advised to stay abreast of evolving legal standards and to obtain appropriate insurance coverage for their forensic work. Drs Simon and Gold are clinical professors, and Dr Simon is director, of the program in psychiatry and law at Georgetown University School of Medicine, Washington, DC. Dr Simon is editor, with Robert E. Hales, MD, of The American Psychiatric Press Textbook of Suicide Assessment and Management. Drs Simon and Gold are also co-editors of the American Psychiatric Publishing Textbook of Forensic Psychiatry, published in 2004.

**References:**

10. Dalton v Miller, 984 P2d 666 (Colo Ct App 1999).
17. Lambley v Kameny, 682 NE2d 907 (Mass App Ct 1997).


Links: