Chapter 2
Legal and Ethical Issues in Providing Mental Health Disability Evaluations

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Introduction

The practice of psychiatry generally entails a low liability risk when compared to other medical specialties (Physicians Insurers Association of American 2011). The two greatest professional liability risk areas for psychiatrists are treating patients with suicidal behaviors and psychopharmacology issues (Professional Risk Management Services, Inc. 2010). Nonphysician clinicians have an even lower liability risk. When providing an evaluation for non-treatment purposes, such as disability evaluations or fitness for duty evaluations, the risk of being sued for malpractice is minimized even further. Moreover, the fact that a lawsuit is filed against the clinician does not mean that the defendant clinician will be found liable. Many cases filed against clinicians are not pursued, or are dismissed during litigation. Thus, performing disability evaluations presents low professional liability risk for mental health clinicians.

Nevertheless, the risk, though small, cannot be ignored. Mental health professionals conducting disability evaluations should understand what aspects of this practice present liability risks and how to effectively manage these risks to decrease the possibility that they may inadvertently engage in practices that create liability. This is easier said than done, as this is a relatively new area of legal scrutiny. Case law defining liability and risks is new and evolving. The following discussion reviews the current legal decisions, and their implications, which define areas of risk and assist mental health clinicians in managing risks. Case examples in the form of specific legal cases will be provided throughout the chapter to illustrate these points.

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Patients or Evaluees

In those situations where the disability evaluation is performed on a non-patient, the evaluation is viewed as a type of independent medical evaluation (IME). For the purposes of this chapter, liability will be discussed in terms of IMEs. The issue of what duties, if any, are owed by a clinician evaluating a non-patient evaluee is a legal question that courts have only begun to address and some duties remain undefined. Moreover, there are other problems that can arise when a treating clinician takes on the additional role of objective reporter or expert for purposes of disability evaluation (see discussion below on dual roles).

The Mental Health Disability Evaluation

Regardless of whether the disability evaluation is being performed for a patient or a non-patient, mental health clinicians should be aware that disability evaluations differ in significant ways from clinical evaluations for treatment purposes. Unlike a treatment evaluation, the disability evaluation is conducted for the sole purpose of sharing clinical information with a third party, such as a disability insurance company or an employer. The evaluee should understand the purpose of the evaluation and should also understand that treatment is not a primary or additional goal.

Another difference between mental health treatment evaluations and disability evaluations is that various types of disability evaluations inherently carry a risk of moving into litigation, resulting in the need for the evaluating clinician to testify in legal or administrative proceedings. Mental health evaluators can be required to provide deposition or trial testimony, or testimony in an administrative tribunal (such as in disputes regarding Social Security Disability Insurance claims or Workers' Compensation claims). Clinicians unfamiliar with or lacking training in defending their opinions in a legal arena may find themselves unprepared to provide adequate testimony.

Finally, many mental health disability evaluations require expertise beyond that provided by most general psychiatry or psychology post-graduate training programs. Disability evaluations require a detailed evaluation of work issues (ability to perform work tasks as described in a job description), beyond that typically required in an evaluation conducted for treatment purposes. In addition, there may be specific federal and state laws relevant to conducting and reporting the results of mental health disability evaluations (such as workers' compensation laws) that mental health evaluators must understand and with which they must comply. For example, as discussed in Chap. 10, Americans with Disabilities Act evaluations often request answers to questions involving statutorily defined terms not typically addressed in a clinical evaluation conducted for treatment purposes or even other types of forensic evaluations.

Liability, While Limited, Is Increasing

While the risk of liability associated with performing disability evaluations is relatively low, as noted above, there are some legal risks and ethical standards that should be understood. Historically, there was little professional liability risk for mental health clinicians performing an IME, such as a disability evaluation. Courts and state licensing boards were not interested in allegations that were not related to treatment or were outside the treatment relationship.

However, more recently, courts have been asked to consider evaluator liability in such non-treatment relationships. Licensing boards have also expanded their regulatory interest to cover IME activities. As a result, there is expanding liability for mental health clinicians providing disability evaluations. Accordingly, clinicians performing disability evaluations should have an understanding of the various existing legal and ethical obligations imposed by legislatures, regulators, courts, and professional associations. Mental health clinicians should also confirm with their malpractice liability insurance carrier that conducting disability evaluations outside of a treatment relationship is covered under their policy.

This chapter presents case law examples illustrating the aspects of practice for clinicians providing disability evaluations and other types of IMEs that have become the subject of debate in the courts. These cases illustrate the dynamic process by which the legal system is continuing to assess and define the duties and responsibilities that IME clinicians owe evaluees, despite the fact that no treatment relationship exists. By becoming familiar with some themes of the cases, mental health clinicians can minimize the risk associated with the provision of disability evaluations. Moreover, by understanding the legal expectations associated with these evaluations, clinicians should be better able to assess when a referral to an independent evaluator is appropriate for their own patients who require a disability evaluation.

A glossary of legal terms is provided in Appendix I, and a more comprehensive survey of appellate IME liability case law is presented in Appendix II. Clinicians should be mindful that the law in the area of IME liability continues to evolve. The cases discussed here are always subject to being reversed, being overruled, and being affected by subsequent changes in administrative and statutory law. Also, while many of the cases discussed in this chapter do not involve a mental health IME, the impact of the decisions would be applicable to other types of IMEs, including mental health disability evaluations.

Dual Roles

When treating clinicians take on the additional role of objective reporter or expert for purposes of disability evaluation, the dual roles can bring with them the very real possibility, even the inevitability, of conflicting obligations (i.e., the patient's

clinical needs vs. the patient's legal needs). Conflicting obligations can increase the risk of clinical, ethical, and even legal problems.

When performing a disability evaluation, clinicians are expected to strive for objectivity. As noted by the American Medical Association (AMA) in Ethics Opinion 10.03 *Patient-Physician Relationship in the Context of Work-Related and Independent Medical Examinations* (American Medical Association 1999), physicians should "evaluate objectively the patient's health or disability. In order to maintain objectivity, [physicians] should not be influenced by the preferences of the patient-employee." In the related Council on Ethical and Judicial Affairs Report, the AMA gives the following example: "even though a patient may not want to return to work, an exam could reveal that he or she is able to resume employment duties" (American Medical Association, Council on Ethical and Judicial Affairs 1999).

According to the *Specialty Guidelines for Forensic Psychology* (*Forensic Psychology Guidelines*) developed by the American Psychological Association and the American Psychology-Law Society (APLS), "when conducting forensic examinations, forensic practitioners strive to be unbiased and impartial, and avoid partisan presentation of unrepresentative, incomplete, or inaccurate evidence that might mislead finders of fact" (American Psychological Association and American Psychology-Law Society 2011).

Disability evaluations are clinical evaluations conducted for non-treatment purposes. As such, they are similar in many, and at times all, respects to forensic mental health examinations. The American Academy of Psychiatry and the law (AAPL), the professional organization of forensic psychiatrists, has provided *Ethics Guidelines for the Practice of Forensic Psychiatry* (*Ethics Guidelines*). These address many issues that arise in disability evaluations. AAPL's guidance in respect to objectivity is similar to that of the AMA's and in the section "Striving for Objectivity" states:

> Psychiatrists who take on a forensic role for patients they are treating may adversely affect the therapeutic relationship with them. Forensic evaluations usually require interviewing corroborative sources, exposing information to public scrutiny, or subjecting evaluees and the treatment itself to potentially damaging cross-examination. The forensic evaluation and the credibility of the practitioner may also be undermined by conflicts inherent in the differing clinical and forensic roles. Treating psychiatrists should therefore generally avoid acting as an expert witness for their patients or performing evaluations of their patients for legal purposes (American Academy of Psychiatry and the Law 2005).

Similarly, the *Forensic Psychology Guidelines* state:

> Providing forensic and therapeutic services to the same individual or closely related individuals involves multiple relationships that may impair objectivity and/or cause exploitation or other harm. Therefore, when requested or ordered to provide either concurrent or sequential forensic and therapeutic services, forensic practitioners are encouraged to disclose the potential risk and make reasonable efforts to refer the request to another provider (American Psychological Association and American Psychology-Law Society 2011).

Certain inherent conflicts may be unavoidable when mental health clinicians attempt to provide disability evaluations for their own patients (Strasburger et al.

1997). Clinicians' assessments, recommendations, and opinions that do not meet the disability documentation expectations of a patient could be detrimental to a patient's interests if benefits are denied. This can have serious implications for the therapeutic relationship. If, on the other hand, clinicians tailor their assessments, recommendations, and opinions to the patient's disability documentation expectations, then their effectiveness as a treating clinician is seriously compromised, if not destroyed. In addition, such actions may create risk and liability because, if challenged, they may be found to fall below the standard of care. In either situation, if patients think they have been harmed by the clinician's involvement, patients may be inclined to sue the clinician claiming either the treatment or the evaluation was negligently provided.

As discussed below related to informed consent, it is important for clinicians to ensure their patients understand the different obligations that accompany the different roles by explaining the limits of the roles of treatment provider and disability evaluator and outlining the potential conflicts. In some situations, "wearing both hats" may be unavoidable. For example, Social Security Disability Insurance bases decisions regarding award of benefits almost solely on information provided by the mental health treatment provider. Alternatively, evaulees may live in communities where access to an independent mental health clinician is limited. Nevertheless, treating clinicians should think carefully before undertaking to provide disability evaluations for their own patients, since the problems this potentially can precipitate may not be easily resolved and may increase liability exposure.

Qualified Mental Health Clinicians

Another consideration when providing disability evaluations for a mental health clinician's own patients is that of qualifications. The issue of qualifications may become highly relevant in more complex evaluations, or evaluations in the context of litigation or potential litigation. AAPL's *Practice Guideline for Forensic Evaluation of Psychiatric Disability* (*Practice Guideline*) (Gold et al. 2008), AAPL's *Ethics Guidelines* (American Academy of Psychiatry and the Law 2005), and the *Forensic Psychology Guidelines* (American Psychological Association and American Psychology-Law Society 2011) address the need to develop and maintain competency. For example, AAPL's *Practice Guideline* states, "it is expected that any clinician who agrees to perform forensic evaluations in this domain has the appropriate qualifications" (Gold et al. 2008).

Moreover, courts may expect all clinicians doing forensic activities to follow ethics codes of forensic specialty organizations. In *Sugarman v. Board of Registration in Medicine*, the state medical board sanctioned a psychiatrist who had been retained as an expert witness in a highly publicized custody dispute and, in violation of the court's order, as well as AAPL's *Ethics Guidelines*, had shared in a very public manner details of the litigation. The physician appealed the board's

sanctions and the state Supreme Court, relying on AAPL's ethical guidelines on confidentiality, affirmed the board's decision and found that the psychiatrist had violated her ethical obligations as a forensic psychiatrist. The court said that it did not matter that she was not a member of AAPL; when undertaking tasks that are performed by forensic psychiatrists, she was expected to follow AAPL's guidelines. As stated by the court:

> Sugarman was, or should have been aware of the Ethical Guidelines for the Practice of Forensic Psychiatry (AAPL Guidelines) promulgated by the American Academy of Psychiatry and the Law (AAPL)…and the Principles of Medical Ethics with Annotations Especially Applicable to Psychiatry (1986) promulgated by the American Psychiatric Association (Principles of Medical Ethics). As she was engaged in the practice of forensic psychiatry in this case, Sugarman's lack of membership in the AAPL is immaterial. (*Sugarman v. Board of Registration in Medicine* 1996).

Informed Consent

Just as professional ethics require that informed consent be obtained before providing clinical treatment to patients, mental health clinicians also have an ethical duty to obtain informed consent for disability evaluations, as noted in AAPL's *Practice Guideline* (Gold et al. 2008), in the *Forensic Psychology Guidelines* (American Psychological Association and American Psychology-Law Society 2011). There should be discussions advising an evaluee of the nature and purpose of the evaluation so the evaluee can provide informed consent to proceed before the clinician conducts the disability evaluation. As stated in the *Forensic Psychology Guidelines*:

> Because substantial rights, liberties, and properties are often at risk in forensic matters, and because the methods and procedures of forensic practitioners are complex and may not be accurately anticipated by the recipients of forensic services, forensic practitioners strive to inform service recipients about the nature and parameters of the services to be provided (American Psychological Association and American Psychology-Law Society 2011).

Moreover, evidence of the discussions and the evaluee's understanding and consent to proceed should be documented in a form signed by the evaluee. If the evaluee refuses to consent to the conditions of the evaluation, the risk management advice is to not proceed with the evaluation until the referral source can address this problem.

In addition to being ethically required, the practice of obtaining explicit and documented informed consent is a good risk management strategy. Many evaluees do not understand the nature or implications of a disability evaluation, and feel "forced" to undergo the evaluation. They often perceive that they are required to undergo an intrusive examination in order to access monetary benefits or as a condition of their employment. While evaluees may experience this as involuntary, unlike a court ordered evaluation, evaluees do in fact have a choice as to whether

to undergo the evaluation. Mental health clinicians can avoid misunderstandings and manage the evaluee's expectations through the informed consent process. Clinicians should be certain that evaluees understand that they have this choice, albeit between less than optimal options, such as forgoing a disability claim or voluntarily relinquishing employment.

AAPL's *Practice Guideline* (Gold et al. 2008) specifies the elements of informed consent for disability evaluations. This guideline recommends that mental health clinicians advise evaluees prior to beginning the evaluation that:

1. The evaluation is not for treatment purposes and the evaluee is not and will not become the evaluating clinician's patient.
2. The purpose of the evaluation is to provide an opinion about the evaluee's mental state and level of impairment or disability.
3. The information and results obtained from the evaluation are not confidential, in that they will be shared with the referral source and may be disclosed to the court, administrative body, or agency that makes the final determination of disability.
4. The evaluation is voluntary and that breaks are allowed and encouraged when needed.
5. The evaluee has the right not to answer questions, but that refusal to answer specific questions may influence the results of the evaluation and will be reported to the referral source.
6. Although the evaluating clinician renders an opinion, the regulatory agency, employer, or a jury will make the ultimate determination of disability.
7. A written report will be produced and will be turned over to the retaining third party. Once the report is released to the third party, the evaluating clinician does not control it or determine who has access to it.

Confidentiality

Obligation to Maintain Confidentiality

Historically, clinicians have believed that in the absence of a treatment relationship, the traditional obligation to maintain confidentiality is also absent. Despite this widespread misapprehension, it is clear that even in the absence of a treatment relationship, mental health clinicians are ethically and legally obligated to maintain a certain degree of confidentiality. In addition to courts finding IME clinicians liable for breach of confidentiality (i.e. *Pettus v. Cole* 1996), ethics codes, such as those from the AMA, AAPL, and the AMA, specifically address the IME clinician's duty to maintain confidentiality.

AAPL's *Ethics Guidelines* address the general issue of confidentiality as follows:

> Respect for the individual's right of privacy and the maintenance of confidentiality should be major concerns when performing forensic evaluations. Psychiatrists should maintain confidentiality to the extent possible, given the legal context. Special attention should be paid to the evaluee's understanding of medical confidentiality. A forensic evaluation requires notice to the evaluee and to collateral sources of reasonably anticipated limitations on confidentiality. Information or reports derived from a forensic evaluation are subject to the rules of confidentiality that apply to the particular evaluation, and any disclosure should be restricted accordingly (American Academy of Psychiatry and the Law 2005).

AAPL's *Practice Guideline* specifically addresses confidentiality in disability evaluations as follows:

> The purpose of a disability evaluation is the collection of information about an individual that will be communicated to a third party…Despite the lack of confidentiality inherent in disability evaluations, psychiatrists are ethically obligated to maintain confidentiality as much as possible. This necessity should also be explained to evaluees in the context of discussing the limits of confidentiality. Information obtained should be released only to the party who has been authorized to receive it (Gold et al. 2008).

Similarly, according to the *Forensic Psychology Guidelines*, "forensic practitioners recognize their ethical obligations to maintain the confidentiality of information relating to a client or retaining party, except insofar as disclosure is consented to by the client or retaining party, or required or permitted by law" (American Psychological Association and American Psychology-Law Society 2011).

Note that as with treatment relationships, there can be exceptions to confidentiality, such as for the safety of the evaluee or third party (discussed below).

Have the Evaluee Authorize Release of Information

The sole purpose of the disability evaluation is to provide information to the entity requesting the evaluation. Accordingly, clinicians should be certain to discuss the limits of confidentiality with the evaluee prior to the evaluation in the consent process. Prudent clinicians should consider having the evaluee sign an authorization for release of information prior to the evaluation, as part of the informed consent discussion and process, making certain that the authorization includes permission to disclose information to the appropriate parties. If the evaluee refuses to sign, the evaluation should not go forward.

Covered entities under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) are allowed by regulation [45 C.F.R. § 164.508(b)(4)(iii)] to condition performance of the IME on the evaluee signing an authorization for release of information to the third party requesting the IME. HIPAA considerations aside, release of health information is strictly regulated by federal and state confidentiality laws. Therefore, in addition to possible ethical violations, clinicians may create liability exposure should disputes regarding unauthorized disclosure of information arise after information has been released. In addition, for the same

reasons, if after the evaluation has been completed, the evaluee withdraws the authorization to release information, clinicians should be certain not to release the information unless and until a signed authorization is again provided. Clinicians should also ensure that they disclose information only pursuant to the written authorization signed by the evaluee.

Clinicians should ensure the authorization form for release of information complies with applicable state law and federal law, including HIPAA's Privacy Rule [45 C.F.R. §164.508(c)] and Confidentiality of Substance Abuse Treatment Records (42 C.F.R. Part 2) [42 C.F.R. §2.21]. These laws specify the exact elements that are to be included in an authorization form for the release of health information, such as the reason for the disclosure, entity to whom records are to be released, and expiration date or event, among other specific elements.

Release Only the Minimum Necessary

Part of the duty to maintain confidentiality is to disclose only relevant information. This duty may be included in state regulations. For example, New Jersey Administrative Code § 13:35-6.5(f) states in part that licensees rendering IME services "shall…avoid the unnecessary disclosure of diagnoses or personal information which is not pertinent." Also, case law in any particular state or jurisdiction may have developed to require only the minimum necessary information be disclosed. According to AMA Ethics Opinion E-5.09, *Confidentiality: Industry-Employed Physicians and Independent Medical Examiners* (American Medical Association 1999), "the physician should release only that information which is reasonably relevant to the employer's decision regarding that individual's ability to perform the work required by the job." Similarly, according to AAPL's *Practice Guideline*:

> …information that is not relevant to the disability evaluation should be considered confidential. Consent to release information in disability evaluations does not give a psychiatrist *carte blanche* to reveal all information obtained during the evaluation to anyone who is interested in it…The matter of confidentiality is particularly relevant because of the relationship between FFD [fitness for duty] examinations and the workplace. For example, it is often unnecessary for FFD reports to describe an evaluee's background (e.g. family and social histories) except to the extent that such information is directly related to the specific referral questions" (Gold et al. 2008).

The *Forensic Psychology Guidelines* also state, "forensic practitioners are encouraged to limit discussion [in reports and testimony] of background information that does not bear directly upon the legal purpose of the examination or consultation" (American Psychological Association and American Psychology-Law Society 2011).

A relatively recently implemented federal law, the Genetic Information Nondiscrimination Act of 2008 (GINA) is also relevant to issues of confidentiality and disclosure. Title II of GINA went into effect in November 2009 and prohibits employers from using genetic information, defined to include family medical

history, in employment decisions. The United States Equal Employment Opportunity Commission (EEOC) enforces Title II, and under the EEOC's regulations [29 C.F.R. §1635], employers must inform healthcare providers in advance NOT to provide genetic information (including family history) in response to a request for health information.

In 29 C.F.R. §1635.8(b)(1)(B), the EEOC provided the following "safe harbor," that is, model language for this warning to be included in information requests:

> The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers or other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. "Genetic information", as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.

When processing requests for information, clinicians should release information only with the evaluee's authorization, and only that information that is relevant to the purpose of the evaluation and that is consistent with the request for information.

Evolving Legal Duties

The case law developing the legal duties related to the provision of IMEs, and thus the liability associated with breach of those duties, is evolving. There is no uniformity in decisions among jurisdictions or even within the same jurisdiction. Even judges hearing the same case disagree with each other, and judges in many cases regarding liability in IMEs have entered opinions dissenting from the majority.

Duties Owed—If Any—to Evaluees Vary by Jurisdiction

To prevail in a medical malpractice lawsuit, the plaintiff must prove that the defendant clinician breached a duty owed to the plaintiff and that the breach caused the plaintiff to suffer damages. The courts have not been consistent in their determinations of what duties, if any, are owed by the IME clinician to the evaluee. Courts have adopted a range of positions when analyzing the potential duties owed to evaluees in evaluations conducted for non-treatment purposes such as disability evaluations. Some courts say that since no traditional physician–patient relationship exists in such evaluations, no duties exist, so there can be no breach of duty, and

therefore no malpractice (*Smith v. Radecki* 2010; *Joseph v. McCann* 2006). Some courts take the opposite view and have ruled that the duty of care owed to evaluees is the same as that owed to patients (*Lambley v. Kameny* 1997). Some courts have taken a middle position and have ruled there is a limited duty owed in IMEs, such as the duty to not injure the evaluee (*Ramirez v. Carreras* 2004).

The current general trend is for courts to impose malpractice liability for breaches of certain duties owed to evaluees despite the absence of the traditional clinician–patient relationship. The main types of medical malpractice liability imposed by courts on IME clinicians are discussed below. These cases help establish general principles for conducting disability and IME evaluations, and so assist mental health clinicians in managing the risk of liability associated with the provision of disability evaluations.

Duty to Protect Evaluee's Confidentiality

As discussed above, mental health clinicians performing disability evaluations are expected to maintain the evaluee's confidentiality. This obligation can be met by obtaining the evaluee's written authorization prior to releasing information, and releasing only that information authorized to be released. Releasing clinical information without the evaluee's authorization can result in a finding of liability due to breach of the duty of confidentiality, as in the following case.

Case Law Example I

A psychiatrist performed a disability evaluation on an employee. Without authorization from the evaluee, the psychiatrist discussed the evaluee's clinical information with the employer and suggested the employer send the evaluee to a second psychiatrist for a substance abuse evaluation. After the second evaluation, the second psychiatrist also discussed the evaluee's alcohol use with the employer, also without a release to do so from the evaluee. Based on the reports from the two psychiatrists, the employer required the evaluee to complete a 30-day inpatient alcohol treatment program as a condition of returning to work. The employee/evaluee refused and was fired; he then sued both psychiatrists, along with the employer. Along with other findings, the court held that both psychiatrists violated state confidentiality law by releasing clinical information to the employer without an authorization (*Pettus v. Cole* 1996).

In addition, even with authorization, only the minimum necessary information should be released. The following case example demonstrates the potential liability associated with the release of more than the minimum necessary as recommended by the AMA and AAPL (discussed above).

Case Law Example II

A psychiatrist (who was also a lawyer) performed a fitness for duty evaluation on a police officer. The clinician saw the evaluee for three sessions and produced a 21-page fitness for duty report. The report included various aspects unrelated to fitness for duty such as many inappropriate details about the evaluee's home life. The federal trial court granted summary judgment to the clinician. The appellate court reversed and allowed the evaluee's case against the clinician to go to trial, stating that the evaluee "is entitled to have a jury hear his claim and determine whether the disclosure exceeded the scope necessary to determine fitness for duty" (*McGreal v. Ostrov* 2004).

Another type of disclosure that can violate the confidentiality associated with an IME involves requests for an IME clinician to disclose IME reports prepared in other, unrelated cases. As always, there has to be a legally valid basis for disclosure, such as an authorization, as illustrated by the case below.

Case Law Example III

A neurologist was retained by the defense in an automobile accident case to perform an IME on the plaintiff. The physician's IME reports from other, unrelated cases, were subpoenaed by plaintiff's attorney to show bias on the part of the physician. The defense filed a motion to quash the subpoena for the unrelated IME reports. The trial court denied the motion and ordered the physician to disclose reports from prior, unrelated examinations of personal injury plaintiffs. The court allowed the physician to redact the name of the evaluees in these reports. The defense appealed the trial court's order and the appellate court quashed the order. The appellate court held that the trial court erred by compelling disclosure without notice to subjects of the IME reports and without adequate privacy protections. The court also noted that state law regarding confidentiality of medical information was to be followed (*Graham v. Dacheikh* 2008).

This case indicates that mental health clinicians requested to provide copies of IME reports from other cases should not automatically do so simply based upon the request. If this circumstance arises, clinicians should discuss the issue with the retaining party, and if disclosure is required, request that the reports be de-identified or "sanitized."

All three cases discussed above (*Pettus, McGreal*, and *Graham*) also illustrate the expectation of compliance with all state and federal confidentiality laws by clinicians performing disability evaluations. In the *Pettus* case, the court found that both evaluating psychiatrists violated state law requiring an authorization for release of information prior to releasing information. While not addressed by the court, clinicians should note that the second psychiatrist, described by the court as "a psychiatrist with expertise in chemical dependency" may also have been required to comply with 42 CFR Part 2, the federal regulations that govern the release of substance abuse treatment records. Moreover, had the *Pettus* case been

decided after HIPAA's Privacy Rule was in effect, and if the physicians were "covered entities" subject to this federal regulation, releasing information without the evaluee's authorization would have been in violation of HIPAA's regulations.

Similarly, the court in the *Graham* case held that state law related to confidentiality of medical information was to be followed. It was also noted by the court in the *McGreal* case that the evaluating clinician's consent form failed to comply with state confidentiality law, which lists the elements to be included in a valid consent for release of information form.

Duty to Warn or Protect

As mental health clinicians are aware, the duty to maintain confidentiality in treatment settings has certain important exceptions based on overriding legal duties regarding patient safety or safety of others. This same exception holds true in non-treatment settings such as disability evaluations. Most states have statutes that require clinicians to warn or protect third parties from dangerous patients. In the context of disability evaluations, AAPL's *Practice Guideline* addresses this as follows:

> An important exception to confidentiality may arise if the evaluee threatens his or her own safety or the safety of others. If an evaluee discloses suicidal ideation or intent or threatens to harm a coworker, supervisor, or employer, the psychiatrist is ethically and perhaps legally obligated to take appropriate steps to ensure the safety of the evaluee or potential victims (Gold et al. 2008).

Courts may expect this duty to warn or protect from IME clinicians as well as treating clinicians, as the following case illustrates.

Case Law Example IV

This suit was filed against the IME psychologist, not by the evaluee, but by a third party. After the evaluee pled guilty to stalking his neighbors (plaintiffs in this case), the probation department retained a psychologist to conduct an IME. The IME psychologist met with the evaluee one time during which the psychologist said that the evaluee had never indicated that he intended or planned to harm the neighbors. The IME psychologist did not advise the probation officers of any particular concerns. Thirteen days after the IME, the evaluee attempted to break into the neighbors' home but was apprehended by the police. He was charged with various felonies and sentenced to prison. Plaintiffs alleged the IME psychologist negligently failed to warn them or the probation office of the threat to them posed by the evaluee. Although the federal trial court granted summary judgment for the IME psychologist, the court made it clear that the duty to warn or protect under state law does apply to IME mental health providers. In this case, however, the court found the duty was not triggered. The case was affirmed on appeal (*Fredericks v. Jonsson* 2010).

Duty to Not Harm the Evaluee

Most courts also agree that IME clinicians can be liable for injuring an evaluee during the evaluation. The duty not to injure the evaluee may include mental harm in addition to physical harm, as indicated by the case below.

Case Law Example V

The *pro se* evaluee sued the psychiatrist who had performed an IME for misrepresentation, deceit, invasion of privacy, intentional infliction of emotional distress, and many other allegations. The appellate court held that emotional harm during the examination may be actionable, and cited the state Supreme Court's language in a different case: "It is entirely possible that a duty of care could arise while a physician or other health care provider conducts an evaluation of an examinee's mental health" (*Dalton v. Miller* 1999).

In another case, *Harris v. Kreutzer* (2006), a psychologist's allegedly verbally abusive behavior during an IME of an evaluee asserting traumatic brain injury resulting in psychological trauma was recognized as actionable. Thus, the obligation of the examiner to discover relevant information regarding the evaluee's injuries and impairments must be balanced against the obligation not to worsen those injuries or impairments in the process of learning about them. Among other reasons, including the ethical obligation to treat evaluees with dignity and respect, mental health clinicians should endeavor to minimize additional distress or adverse circumstances associated with what for many evaluees is a stressful, intrusive, and/or unwarranted mental health evaluation.

However, losses allegedly caused by the IME clinician's report are generally not actionable. As stated by another court, "the IME physician, acting at the behest of a third party, is not liable to the examinee for damages resulting from the conclusions the physician reaches or reports" (*Dyer v. Trachtman* 2004, p. 315).

Duty to Diagnose

There have been a few decisions where the court imposed on IME clinicians the duty to properly diagnose (*Ritchie v. Krasner* 2009; *Lambley v. Kameny* 1997); however, none of the cases under which this duty has been imposed involved mental health evaluations.

Duty to Notify Evaluee of a Serious Medical Condition

Courts may also find that the clinician performing a disability evaluation has the duty to inform the evaluee about a potentially serious medical condition. In addition to case law (*Stanley v. McCarver* 2004; *Reed v. Bojarski* 2001), liability

for failure to notify an evaluee of a serious medical condition may be predicated on a violation of state law (such as New Jersey Administrative Code § 13:35-6.5) and ethical obligations (such as AMA Ethics Opinion E-10.03, *Patient-Physician Relationship in the Context of Work-Related and Independent Medical Examinations*). While most of the cases imposing this duty involve a significant radiological finding, mental health clinicians should keep this duty in mind should an evaluee present with a serious medical condition, such as a neurological condition, the significance of which does not seem to be appreciated by the evaluee.

Liability Exposure

Litigation

As discussed above, performing disability evaluations is not an activity with a high risk of liability, but courts are showing an increased willingness to find liability on the part of clinicians performing disability evaluations and other IMEs if they breach the limited duties owed to evaluees. While this chapter has focused on medical malpractice cases, unhappy or dissatisfied evaluees can file other types of claims, such as infliction of emotional distress or defamation. However, it is worth noting that IME liability cases also share what is typical in medical malpractice litigation: an adverse event involving the evaluee. The following case illustrates this observation.

Case Law Example VI

The employer sent the individual for psychiatric evaluation to determine fitness for duty. The evaluating psychiatrist saw the evaluee twice and returned him to full duty. The evaluee was under the care of a treating psychiatrist. More than three months after the IME was performed, the evaluee committed suicide. Along with the treating providers, the psychiatrist who performed the evaluation was named in the medical malpractice lawsuit based on the suicide. The evaluating psychiatrist's motion for summary judgment, dismissing him from the case, was granted (*Eckman v. Cipolla* 2009).

Even if the independent mental health clinician is ultimately not found liable, the time and stress associated with defending such a claim is significant.

In response to an evaluee filing a legal claim against an IME mental health clinician, the defendant clinician may be entitled to immunity from such lawsuit. There are two general types of immunity relevant to IME activities. The first type is quasi-judicial immunity which provides immunity from suit only for "judicial" activities. These are typically limited to evaluations paid for by the court rather than the parties. For example, a disability evaluation performed as part of a workers' compensation case would not be protected by judicial immunity. The second type of immunity relevant to independent mental health evaluations is witness immunity, which provides immunity from suit for testimony in judicial

proceedings, including depositions. Witness immunity also generally precludes suit based on contents of the written reports, as illustrated in the following case.

Case Law Example VII

This suit was filed against the evaluating physician not by the evaluee, but by the evaluee's treating physician. In his IME report, Dr. M criticized Dr. Y's treatment of the IME evaluee. Dr. Y sued the IME physician alleging defamation and invasion of privacy. The trial court granted summary judgment to the IME physician, holding that he had immunity. The appellate court affirmed the IME physician's summary judgment holding that witness immunity precludes liability based on the content of the report (*Yeung v. Maric* 2010).

Nevertheless, immunity will not shield IME clinicians from all liability. For example, IME mental health clinicians can be sued for negligent performance of an IME even if they are immune from liability based on their report. Accordingly, as previously mentioned, mental health clinicians conducting disability evaluations should conduct themselves professionally, avoid being rude, or intentionally creating discomfort.

State Licensing Boards and Disability Evaluations

Administrative actions, such as investigations by state licensing boards, can be an area of professional liability risk exposure when performing disability evaluations. Filing a licensing board complaint is relatively easy for an unhappy evaluee. There is no cost involved and evaluees are not required to show that damages were sustained, as is required in medical malpractice actions. While not all licensing boards will address complaints regarding IMEs, some regulators will. For example, under Arizona law (A.R.S. §32.1451), the medical licensing board may take action against a physician who commits unprofessional conduct while performing an IME.

Mental health clinicians are encouraged to check with their licensing board(s) to determine if there are any regulations, guidelines, or policy statements related to performing disability evaluations and other types of IMEs. Understanding the expectations of the applicable boards can assist mental health clinicians in meeting the standards of professionalism. As an example, boards may discourage independent evaluators from becoming the evaluee's treating clinician after the evaluation is complete. This is the expectation of the Rhode Island Medical Board, as evidenced by its policy statement *Independent Medical Examinations*:

> The Board considers it generally inappropriate for a physician to perform an IME/Independent Insurance Evaluation and to offer or serve as the subsequent treating provider for a patient. If a physician who performs an IME is to serve as a treating provider, then a sufficient span of time must elapse such that no reasonable individual could conclude a

> contingent relationship between the IME determination and the decision to pursue subsequent care with the IME physician or the IME physician's practice group. (Rhode Island Medical Board 2011)

Issues involving professional licensure may also be relevant when doing IMEs. For example, Alaska law (Administrative Code 12 § 40.945) provides that physicians performing a face-to-face IME are practicing medicine. The possible implications of an IME being deemed the practice of medicine include, at least, that appropriate licensure is required in that state, and that the clinician may be subject to oversight by the medical board in that jurisdiction. Licensure requirements should be determined prior to performing disability or IME evaluations in states other than those where the IME mental health clinician is licensed. The unauthorized practice of medicine or the unauthorized practice of psychology would not be covered by liability insurance policies. Therefore, prudent clinicians performing IMEs outside of the states where they are licensed should check with those states' licensing boards before performing the IME to determine if a license is needed.

Other Types of Administrative Actions

Other types of administrative actions, such as complaints filed with professional organizations, and complaints filed with governmental agencies other than licensing boards, are also potential areas of risk for mental health clinicians performing disability evaluations or other types of IMEs related to disability. For example, an evaluee could file a complaint alleging that the IME clinician has violated federal HIPAA regulations.

Most HIPAA complaints filed against IME clinicians involve lack of access to the clinician's information. As discussed above, the information collected during a mental health IME is considered protected health information (PHI), although it is not collected for treatment purposes. Under the Privacy Rule, evaluees are entitled to access their own PHI held by a covered entity. The Privacy Rule is enforced by the Office for Civil Rights (OCR), and OCR has made it clear in its enforcement case examples that an IME evaluee is to be provided access to records held by an IME clinician who is a covered entity under HIPAA, including copies of disability reports (Office for Civil Rights 2011).

The practical implications of the Privacy Rule's requirements have yet to be worked out. Many mental health disability evaluation referrals include explicit instructions that clinicians should refer evaluees' requests for reports to the referral agency or insurer, and not release reports to evaluees. Even the federal government has not provided consistent instruction in regard to releasing reports to evaluees. The Social Security Administration, for example, specifically directs clinicians to not provide disability reports to evaluees (Social Security Administration 2003).

The issue of releasing reports directly to evaluees is still so new that no case law has directly addressed a legal conflict that would provide guidance on this matter. Nevertheless, prudent mental health clinicians who are covered entities under HIPAA or who practice in states where state law requires that evaluees have access to the IME report, should at a minimum ensure that any contracts entered to provide disability evaluations do not preclude the release of reports to evaluees.

Conclusion

Even in the absence of a clinician–patient treatment relationship, performing disability evaluations can lead to professional liability exposure. However, the risk is very low and can be managed with an understanding of the exposure and the expectations of the courts and regulatory agencies. Informed consent discussions with the evaluee are crucial for ensuring patients/evaluees have a true understanding of the evaluation and the role of the evaluating clinician. Non-patient evaluees need to understand that the evaluation is being conducted at the request of a third party, and that the evaluating clinician is not providing treatment.

While keeping the low risk exposure in mind, it is helpful to review cases decided by the courts involving disability evaluations and other IMEs. Such a review indicates that courts have been particularly willing to allow cases alleging that the evaluating clinician breached confidentiality, injured the evaluee (physically or emotionally) during the performance of the evaluation, and failed to disclose to the evaluee a serious medical condition. Finally, clinicians should keep in mind that licensing boards are taking an increased interest in regulating the performance of evaluations in terms of licensure requirements, particularly for out-of-state clinicians, and investigating complaints against the evaluating clinician filed by the evaluee.

Key Points

1. Avoid performing a disability evaluation for a patient if doing so could present an ethical or treatment conflict.
2. Understand the professional liability exposure associated with performing disability evaluations and IMEs. Be familiar with relevant state and federal laws, ethical obligations, and clinical guidelines related to evaluating disability.
3. Contact your professional liability insurance company to discuss coverage for disability evaluations and other forensic activities.
4. If performing disability evaluations outside of the states where you are licensed, check with those states' licensing boards prior to conducting the evaluation to see if a license is needed.
5. Have the evaluee sign a written consent to the evaluation prior to the evaluation.

6. Understand obligations to maintain confidentiality.
7. Discuss the limits of confidentiality with the evaluee prior to the evaluation.
8. Have the evaluee sign an authorization for release of information prior to the evaluation, allowing you to disclose information to the appropriate parties.
9. Ensure your authorization form for release of information complies with applicable state law and federal law, such as the Privacy Rule under HIPAA.
10. Disclose information only pursuant to the written authorization signed by the evaluee.
11. Release only that information that is relevant to the purpose of the evaluation.
12. If only specific information is requested to be disclosed, limit disclosure to only the requested information.
13. Ensure that any contracts entered to provide disability evaluations do not preclude notifying the evaluee directly of any serious medical condition found during the evaluation.
14. If you are a covered entity under HIPAA, or if state law requires that evaluees have access to the IME report, ensure that any contracts entered to provide disability evaluations do not preclude releasing your report to the evaluee.
15. Do not assume that courts in your jurisdiction will not find clinicians liable for the performance of disability evaluations, even if they have previously declined to impose such liability.
16. Remember that immunity, if available, will not shield clinicians performing IMEs from all liability. For example, clinicians can be sued for negligent performance of the IME, even if they are immune from liability based on consequences of their report.

Appendix I: Glossary of Legal Terms

Actionable	What the plaintiff alleges the defendant did wrong is sufficient to support a legal cause of action seeking to impose liability on the defendant
Cause of action	What is alleged by plaintiff to have occurred that is the basis for a lawsuit (e.g., medical malpractice, defamation, invasion of privacy, and battery); each cause of action has specific elements that plaintiff must prove; the elements and requirements for filing a lawsuit vary by state
Defendant	The party that is being sued by the plaintiff
Dissenting opinion	Written by judges hearing a case who do not agree with the opinion of the majority of judges; in their dissenting opinion (which follows the majority opinion), they explain their legal reasoning for their opinion that the judges in the majority decided the case incorrectly
Plaintiff	The party that filed suit against the defendant
Pro se	Without attorney representation in litigation

Quash	To declare void, such as when a court quashes a subpoena for records
Remand	After reviewing the case, and disagreeing with the lower court, the appellate court sends the case back down to the trial court with instructions, such as proceeding with a trial consistent with the appellate court's opinion
Summary judgment	Requested by a party in litigation prior to trial, asking for judgment to avoid an unnecessary trial
Tort	Type of legal action allowing recovery by those harmed by the acts of others; civil action involving private parties as opposed to a crime where the government prosecutes criminal actions

Appendix II: IME Physician Liability

Survey of Recent Appellate Case Law (Decided 1993–2011)

Note: The cases listed below are subject to being heard by the trial court on remand, being reversed on appeal, or being overruled by subsequent court opinions. The cases listed below could also be affected by regulatory and statutory changes in the law.

Significance of ordinary negligence versus medical malpractice action

Case	Type of case	Language from the court	IME provider liable?
Bazakos v. Lewis, 911 N.E.2d 847 (N.Y. 2009) Alleged injury during IME; case filed as ordinary negligence action, outside statute of limitations for medical malpractice actions	Question certified to state's highest appellate court by lower appellate court	"We hold that a claim against a doctor for his alleged negligence in performing an independent medical examination (IME) is a claim for malpractice, governed by CPLR 214-a's two-year-and-six-month statute of limitations…[T]he relationship between a doctor performing an IME and the person he is examining may fairly be called a 'limited physician-patient relationship'" Note: There is a dissenting opinion	No
Gentry v. Wagner, 2009 WL 1910959 (Tenn.Ct.App. 2009) Alleged injury during IME; case filed as ordinary negligence; no expert testimony offered Pro se plaintiff	Appeal from trial court's grant of IME physician's summary judgment	"We agree with the conclusion of the trial court: 'An implied patient-physician relationship did exist between the Plaintiff Gentry and the Defendant Wagner. This is a medical malpractice action.…' The medical malpractice statutes require expert testimony to establish the applicable standard of care…Because Mr. Gentry failed to offer any expert testimony, the trial court properly granted the defendant's motion for summary judgment"	No

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Case	Type of case	Language from the court	IME providerliable?
Devitre v. Orthopedic Center of St. Louis, 349 S.W.3d 327 (Mo. 2011) Alleged injury during IME; case filed as assault and battery; affidavit required for medical malpractice claim was not filed	Appeal from trial court's dismissal for failure to file affidavit required in medical malpractice action; transferred from Court of Appeals	"Having reviewed persuasive authority from other jurisdictions, this Court concludes that a physician who only provides an independent medical examination but does not treat the examinee 'has a limited physician-patient relationship with the examinee that gives rise to limited duties to exercise professional care.'…'The limited relationship…imposes a duty on the independent medical examination physician to perform the examination in a manner not to cause physical harm to the examinee.'…The factual allegations in Mr. Devitre's petition state the claim that Dr. Rotman caused personal injury to him during the course of the independent medical examination when he manipulated Mr. Devitre's arm…The claimed injuries allegedly were caused by the health care service Dr. Rotman provided to Mr. Devitre. Such a claim is a medical malpractice…claim….Mr. Devitre's allegations of personal injury constitute a claim for medical malpractice, not assault and battery. Therefore, he was required to file a health care affidavit pursuant to section 538.225.1. His failure to file the affidavit warrants a dismissal…" Note: There is a dissenting opinion	No

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Case	Type of case	Language from the court	IME provider liable?
Canfield v. Grinnell Mut. Reinsurance Co., 610 N.W.2d 689 (Minn. App. 2000) Alleged injury during IME; expert affidavit was insufficient for medical malpractice action	Appeal from trial court's grant of IME physician's summary judgment	"The issue in this case is whether the expert affidavit requirement applies to a claim against a doctor who was not providing care and treatment, but was conducting an IME required and paid for by an insurer. We hold that because this is not a claim for medical malpractice, Minn. Stat. § 145.682 [requiring an expert affidavit] does not apply"	Unknown; reversed and remanded for trial; no subsequent opinion reported
Yoder v. Cotton, 758 N.W.2d 630 (Neb. 2008) Alleged injury during IME; case filed as ordinary negligence, not medical malpractice	Appeal from trial court's grant of IME physician's summary judgment; state Supreme Court moved case from Court of Appeals	"The Yoders argued that because there was no physician-patient relationship, their claim cannot be defined as a medical malpractice actions and therefore is not governed by the Nebraska Hospital-Medical Liability Act or any other statutory limitations on recoverable damages…we conclude that a physician conducting an IME is performing a professional service. Our law requires a plaintiff to present expert testimony of causation in a medical malpractice case in order to overcome summary judgment and Yoder failed to do so"	No

The issue of duty owed to IME evaluee

Case	Type of Case	Language from the Court	IME Provider Liable?
Heller v. Peekskill Community Hospital, 198 A.D.2d 265 (N.Y. 1993) Alleged premature return to work caused further injury	Appeal from trial court's denial of IME physician's summary judgment	"In order to maintain an action to recover damages arising from medical malpractice, a doctor-patient relationship is necessary…In general, this [doctor-patient relationship] is not formed when a doctor examines a patient solely for purposes of rendering an evaluation for an employer or potential employer…However, an important exception to this rule occurs when the examining doctor causes further injury by either affirmatively treating the patient or affirmatively advising the patient as to a course of treatment…Dr. Winokur affirmatively advised him as to a course of treatment by suggesting that he seek physical therapy from a specified physical therapist and by directly advising him that he was fit to return to work without restriction as to the type of physical activity he was to perform there. Further, he alleges, this latter advice, which caused or exacerbated his injuries, was both incorrect and foreseeably relied upon. These allegations are sufficient to withstand a motion to dismiss for failure to state a cause of action and/or for summary judgment"	Unknown; denial of summary judgment affirmed; no subsequent opinion reported
Lawliss v. Quellman, 38 A.D.3d 1123 (N.Y. 2007) Alleged negligent advice caused further injury	Appeal from trial court's denial of IME physician's summary judgment	"While an IME performed at the request of a third party does not ordinarily give rise to an actionable physician-patient relationship….such a relationship may be implied where the IME physician affirmatively advises the patient…plaintiff presented evidentiary facts tending to show that defendant affirmatively advised him as to the inappropriateness of surgery and recommended physical therapy as an alternate course of treatment…..[W]hether defendant's advice was negligent and plaintiff's reliance was foreseeable and detrimental also present questions of fact which should be resolved by a jury"	Unknown; denial of summary judgment affirmed; no subsequent opinion reported

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Case	Type of Case	Language from the Court	IME Provider Liable?
Badolato v. Rosenberg, 67 A.D.3d 937 (N.Y. 2009) Alleged premature return to work caused further injury	Appeal from trial court's denial of IME physician's summary judgment	"The [trial court] properly denied….summary judgment dismissing the complaint on the ground that no physician-patient relationship existed…plaintiff's deposition testimony…raised triable, material issues of fact as to whether (1) the defendant affirmatively advised the plaintiff as to a course of treatment by recommending that the plaintiff return to work without any restrictions on his physical activities, (2) the advice was incorrect, (3) it was foreseeable that the plaintiff would rely on the advice since the plaintiff testified that two other treating physicians advised him not to return to work, and (4) the plaintiff relied on the advice to his detriment"	Unknown; denial of summary judgment affirmed; no subsequent opinion reported
Webb v. T.D., 951 P.2d 1008 (Mont. 1997) Alleged misdiagnosis and failure to limit work activity caused further injury	Appeal from trial court's grant of IME physician's summary judgment	"We do not, by this opinion, conclude that physicians retained by third parties who perform independent medical examinations have the same duty of care that a physician has to his or her own patient…..a health care provider in Montana who is retained by a third party to do an independent medical examination has the following duties: 1. To exercise ordinary care to discover those conditions which pose an imminent danger to the examinee's physical or mental well-being and take reasonable steps to communicate to the examinee the presence of any such condition; and 2. To exercise ordinary care to assure that when he or she advises an examinee about her condition following an independent examination, the advice comports with the standard of care for that health care provider's profession"	Unknown; reversed and remanded for trial; no subsequent opinion reported

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Case	Type of Case	Language from the Court	IME Provider Liable?
Ramirez v. Carreras, 165 S.W.3d 371 (Tex. App.—Corpus Christi 2004) Alleged injury during IME	Appeal from trial court jury's finding IME physician was not negligent	"When a physician examines a person for the benefit of a third party and no physician-patient relationship exists, the only duty owed by the physician is the duty not to injure the examinee…[W]e find that the jury's finding [of no negligence] was not against the great weight and preponderance of the evidence"	No
Smith v. Welch, 967 P.2d 727 (Kan. 1998) Alleged assault, battery, outrageous conduct, and invasion of privacy	Appeal from trial court's grant of IME physician's summary judgment	"Does a physician performing an independent medical examination have a duty not to negligently injure the person examined? Yes…Is the duty of a physician not to injure the person being examined affected by the fact that the physician was employed by a third party? No"	Unknown; reversed and remanded for trial; no subsequent opinion reported
Joseph v. McCann, 147 P.3d 547 (Utah App. 2006) Alleged incorrect psychiatric IME evaluation of police officer led to termination	Appeal from trial court's grant of IME physician's summary judgment	"Without the existence of a physician-patient relationship between McCann and Joseph, Joseph cannot maintain a medical malpractice claim against McCann. Because Joseph was not McCann's patient seeking psychiatric treatment and because the contract for medical services was between McCann and the City, not McCann and Joseph, we conclude that there was no physician-patient relationship between McCann and Joseph. Therefore, the trial court did not err when it held that McCann 'owed no legal duty to [Joseph] from which a [medical malpractice] action could be commenced'"	No

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Case	Type of Case	Language from the Court	IME Provider Liable?
Smith v. Radecki, 238 P.3d 111 (Alaska 2010) Alleged harm during IME Pro se plaintiff	Appeal from trial court's grant of IME physician's summary judgment	"We are not persuaded that a physician who performs an IME undertakes a traditional physician-patient relationship or owes an examinee the duty of care that attends such a relationship…[W]e acknowledge that courts in several other states have held that physicians owe a limited duty of care in an IME setting. For example, the Tennessee Court of Appeals held that a limited physician-patient relationship exists when an IME is conducted, such that the physician has a duty not to injure the patient during the examination…Other courts have held that physicians have limited duties of care encompassing the duty to discover and warn an examinee of conditions which pose an 'imminent danger' to the examinee's health, and to provide correct information to a patient about his condition in the event the IME physician 'gratuitously undertakes to render services which he should recognize as necessary to another's bodily safety'…Though we acknowledge this growing body of case law, we also recognize that it is not implicated by the evidence Smith offered." Footnote: "We agree with Smith that the absence of a physician-patient relationship does not *immunize* a physician performing an IME from all tort liability, and we do not rule out the possibility that a physician could be liable for conduct committed during an IME…"	No

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Case	Type of Case	Language from the Court	IME Provider Liable?
Lambley v. Kameny, 682 N.E.2d 907 (Mass. App. Ct. 1997) Alleged misdiagnosis in pre-employment psychological fitness screening	Appeal from trial court's dismissal of claim for lack of proof	"In short, Lambley's claims realistically constitute a charge that Dr. Kameny was 'negligent or mistaken in terms of [his] medical judgment' regarding Lambley's psychological condition; such an impugning of Kameny's psychiatric judgment would appear to be well within the jurisdiction of a medical malpractice tribunal…In our view, the duty to exercise reasonable professional care and skill…is practically indistinguishable from the duty owed by a physician to his conventional patient, at least with respect to the tortious, as opposed to the contractual, consequences of the relationship"	Unknown; dismissal of claim was vacated; no subsequent opinion reported

Allegations Made Against IME Physicians

Alleged injury during the evaluation—physical injuries

Case	Type of Case	Language from the Court	IME Provider Liable?
Dyer v. Trachtman, 679 N.W.2d 311 (Mich. 2004) Alleged injury during IME	Lower courts unclear on type of action—ordinary negligence or medical malpractice; state Supreme Court guidance sought	"Having reviewed persuasive authority from other courts, we conclude that an IME physician has a limited physician-patient relationship with the examinee that gives rise to limited duties to exercise professional care…the relationship is not the traditional one. It is a limited relationship. It does not involve the full panoply of the physician's typical responsibilities to diagnose and treat the examinee for medical conditions. The IME physician, acting at the behest of a third party, is not liable to the examinee for damages resulting from the conclusions the physician reaches or reports. The limited relationship that we recognize imposes a duty on the IME physician to perform the examination in a manner not to cause physical harm to the examinee…Thus we overrule *Rogers* and its progeny…"	Unknown; reversed and remanded for trial; no subsequent opinion reported
Mero v. Sadoff, 37 Ca..Rptr.2d 769 (Cal.App.2.Dist. 1995) Alleged injury during IME	Appeal from trial court's grant of IME physician's summary judgment	"Imposing liability for negligence in the examination even in the absence of a physician-patient relationship would serve the policy of preventing future harm by precluding a situation in which a physician could negligently injure an examinee with impunity…In the instant case, the trial court granted summary judgment, in part on the ground there was no physician-patient relationship between defendant and plaintiff, so defendant could not be held liable for injuries incurred by plaintiff during his examination of her. This was error"	Unknown; reversed; no subsequent opinion reported
Greenberg v. Perkins, 845 P.2d 530 (Colo. 1993) Alleged injury from testing ordered by IME physician	Appeal from appellate court's reversal of trial court's summary judgment to IME physician	"…our conclusion that [IME physician] owed to [evaluee] a duty to act with reasonable care so as to not cause her injury by referring her for testing of a type that foreseeably would result in injury based on information known to him"	Unknown; affirmed reversal of summary judgment; no subsequent opinion reported

See also ***Ramirez*** (above), ***Smith*** (above), and cases under "Significance of Ordinary Negligence vs. Medical Malpractice Action" (above)

Alleged injury during the evaluation—emotional injuries/infliction of emotional distress

Case	Type of Case	Language from the Court	IME Provider Liable?
Harris v. Kreutzer, 624 S.E.2d 24 (Va. 2006) Alleged intentional infliction of emotional distress and malpractice during IME	Appeal from trial court's grant of IME psychologist's demurrer and dismissal of evaluee's motion for judgment	"[W]e hold that a cause of action for malpractice may lie for the negligent performance of a Rule 4.10 [required IME] examination. However, a Rule 4.10 physician's duty is limited solely to the exercise of due care consistent with the applicable standard of care so as not to cause harm to the patient in actual conduct of the examination…[plaintiff alleged the IME psychologist] 'failed to provide appropriate psychological care in performing his examination and evaluation.' Specifically, Harris averred Dr. Kreutzer 'verbally abused [her], raised his voice to her, caused her to break down in tears in his office, stated she was 'putting on a show' and accused her of being a faker and a malingerer' during the Rule 4.10 examination, despite his alleged prior knowledge of her fragile mental and emotional state. If such conduct was proven at trial, and appropriate expert testimony showed such conduct breached the applicable standard of care for a reasonably prudent clinical psychologist in Virginia, then a trier of fact could conclude that malpractice occurred…[Regarding the intentional infliction of emotional distress] Harris failed to state facts sufficient to establish that Dr. Kreutzer's conduct was outrageous or that her distress was severe"	Unknown; remanded for trial; no subsequent opinion reported
See also ***Martinez*** (below) and ***Dalton*** (below)			

Alleged misdiagnosis

Case	Type of Case	Language from the Court	IME Provider Liable?
Martinez v. Lewis, 969 P.2d 213 (Colo. 1998) Alleged misdiagnosis and report resulted in further injury due to terminated benefits	Appeal from appellate court's affirmation of trial court's grant of IME physician's summary judgment	"…we hold that Dr. Lewis did not owe Martinez a duty of care. We note that this conclusion is in accord with virtually every other court to consider this issue. For example…[t]he *Felton* court stated: 'We independently have reviewed out-of-state authorities and find overwhelming agreement that a physician has no liability to an examinee for negligence or professional malpractice absent a physician/patient relationship, except for injuries incurred during the examination itself.'…[Also] because the alleged misrepresentations did not significantly impact the public as consumers of Dr. Lewis's services, Martinez was also precluded from pursuing a claim against him for violations of the CCPA [Colorado Consumer Protection Act]." FOOTNOTE REGARDING ACTIONABLE EMOTIONAL HARM DURING IME: "…a determination of whether or not a duty exists under *Greenberg* does not turn on a physician or health care provider causing *physical* injury to the examinee. It is entirely possible that a duty of care could arise while a physician or other health care provider conducts an evaluation of an examinee's mental health. For instance, if the physician or health care provider conducted an evaluation in a manner that 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, a duty may well arise under *Greenberg*"	No

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Case	Type of Case	Language from the Court	IME Provider Liable?
Ritchie v. Krasner, 211 P.3d 1272 (Ariz. App. Div.1 2009) Alleged misdiagnosis caused evaluee's death four years after IME	Appeal from jury verdict finding IME physician liable	"We do not hold that every IME physician has a duty of care in every situation. In this case, Krasner was hired to determine the extent of Jeremy's work-related injury and make treatment recommendations. By agreeing to do so, he assumed a duty to 'conform to the legal standard of reasonable conduct in light of the apparent risks'…Therefore, we hold the trial court correctly held that Krasner owed a duty of reasonable care to Jeremy…Based on the record in this case, we cannot find that the jury erred in finding Krasner's misdiagnosis was partially the proximate cause of Jeremy's injury, and ultimately, his death. The jury heard testimony from expert witnesses and reviewed volumes of evidence. Based on this, it reasonably could have found it foreseeable that Krasner's report prevented Jeremy from seeking treatment either because he relied on Krasner's report or because [insurer] relied on the report, causing it to terminate Jeremy's workers' compensation coverage. Further, the jury could have found Jeremy's physical deterioration and reliance on medication foreseeable" REGARDING IME PHYSICIAN'S IMMUNITY: "…a witness has absolute immunity when testifying in a judicial proceeding….however…the testimony must have some relation to the subject judicial proceeding…Although we consider workers' compensation hearings that occur before administrative law judges judicial proceedings, the administrative process involved in reviewing a claim for compensation is not…Krasner's conduct and IME report fall outside the scope of witness immunity. He conducted the IME for the benefit of [insurer], not for a judicial proceeding"	Yes
See also ***Lambley*** (above) and ***Webb*** (above)			

Alleged failure to notify evaluee of serious medical condition

Case	Type of Case	Language from the Court	IME Provider Liable?
Stanley v. McCarver, 92 P.3d 849 (Ariz. 2004) Alleged breach of duty to inform evaluee timely of pre-employment x-ray results	Appeal of appellate court's reversal of trial court's grant of IME physician's summary judgment	"We do agree with the court of appeals that the duty imposed is to act as a reasonably prudent health care provider in the circumstances….But whether this duty requires direct communication with the subject of the x-ray regarding any abnormalities discovered may depend upon factors, such as whether there is a treating or referring physician involved in the transaction, whether the radiologist has means to identify and locate the patient, the scope of—including any contractual limitations on—the radiologist's undertaking, and other factors that may be present in a particular case". Note: There is a dissenting opinion	Unknown; remanded; no subsequent opinion reported
Reed v. Bojarski, 764 A.2d 433 (N.J. 2001) Alleged breach of duty to report directly to evaluee serious medical condition found on pre-employment IME	Appeal from appellate court's affirmation of trial court's jury verdict for IME physician	"…we are confronted with the question whether a physician, performing a pre-employment screening, who determines that the patient has a potentially serious medical condition, can omit informing the patient and delegate by contract to the referring agency the responsibility of notification. The answer is no"	Unknown; reversed and remanded for trial; no subsequent opinion reported

Alleged breach of confidentiality

Case	Type of Case	Language from the Court	IME Provider Liable?
McGreal v. Ostrov, 368 F.3d 657 (7th Cir. 2004) Alleged wrongful disclosure of police officer's mental health fitness for duty report	Appeal from federal trial court's grant of IME psychologist's summary judgment	"The crux of McGreal's complaint is that the department had no valid reason to order him to submit to the fitness exam in the first place. He maintains they were simply trying to manufacture a reason to fire him in retaliation for his exercise of his First Amendment rights. Even under *Sangirardi* the department would not be entitled to require a mental health exam for this purpose. Moreover, under *Sangirardi*, the defendants were not entitled to disclosure of anything other than the fitness for duty determination. They were not entitled under any Illinois law to force the disclosure of the intimate and irrelevant details of McGreal's home life. Finally, McGreal claims that dissemination of the report was broader than necessary to determine his fitness for duty and also that the defendants republished the information without further consent as required by the Confidentiality Act. Under these circumstances, McGreal is entitled to have a jury his claim and determine whether the defendants reasonably ordered the exam and whether the disclosure and republication exceeded the scope necessary to determine fitness for duty"	Unknown; reversed and remanded for trial; no subsequent opinion reported

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Case	Type of Case	Language from the Court	IME Provider Liable?
Pettus v. Cole, 49 Cal.App.4th 402 (Cal. App. 1 Dist. 1996) Alleged wrongful disclosure of IME reports to the employer without evaluee's authorization	Appeal of trial court's grant of IME physicians' motion for judgment	"The issues presented… include (1) Whether and to what extent medical information complied during the psychiatric examination of an employee may be disclosed to the employer by a psychiatrist without employee authorization or consent, where the employee has requested leave from work because of a stress-related disability, the examination is required under the employer's short-term disability policy, and the examination has been arranged and paid for by the employer…We conclude as a matter of law that [IME psychiatrists] violated the [state confidentiality of medical information statute] by providing [the employer] a detailed report of their psychiatric examinations of Pettus without a specific written authorization for such disclosure…we conclude that Pettus made a prima facie showing of invasion of privacy by the psychiatrists, but, based on evidence presented by [the employer] in its defense case, there is a serious question whether Pettus waived this claim by voluntarily disclosing to his supervisors… much of the sensitive personal information that was subsequently transmitted in the psychiatrists' reports"	Unknown; reversed and remanded for trial; no subsequent opinion reported

Alleged breach of duty to warn

Case	Type of Case	Language from the Court	IME Provider Liable?
Fredericks v. Jonsson, 609 F.3d 1096 (10th C.C.A. 2010) Third-party alleges IME psychologist breached duty to warn	Appeal from federal trial court's grant of IME psychologist's summary judgment	"…the relevant analysis conducted by the mental health provider—determining whether the person being evaluated is a danger to others—would seem to be the same whether or not the person is being treated by the provider. It would therefore be reasonable to assume that the legislature intended the statute to address the entire subject—that is, all such assessments by mental health providers…Because the Plaintiffs have not pointed to any evidence that [the evaluee] communicated to Dr. Jonsson 'a serious threat of imminent physical violence against a specific person or persons,' …Dr. Johnsson is not subject to liability under Section 117 and summary judgment was appropriate"	No

Immunity

Case	Type of Case	Language from the Court	IME Provider Liable?
Dalton v. Miller, 984 P.2d 666 (Col. App. 1999) IME psychiatrist seeks immunity from evaluee's allegations Pro se plaintiff	Appeal from trial court's grant of IME psychiatrist's summary judgment	"…quasi-judicial immunity is generally not extended to an examination conducted at the request of one of the parties to the litigation….Here defendant was chosen by the insurer to conduct an independent psychiatric examination of plaintiff and report back to the insurer…Accordingly, we hold that professionals conducting an independent medical or psychiatric examination pursuant to a C.R.C.P. 35 request are not entitled to absolute quasi-judicial immunity for their activities…[W]e hold that defendant is entitled to absolute immunity from civil liability for any statements he made during the course of his videotaped trial preservation deposition testimony that would have been played at trial in lieu of actual testimony from defendant. In addition, he is entitled to immunity for the contents of the report he prepared for counsel for insurer, which detailed his conclusions from his examination of plaintiff…As to any remaining claims based on the conduct of defendant during his examination plaintiff, the judgment is reversed, and the cause is remanded for further proceedings…"	Unknown; remanded for trial; no subsequent opinion reported
Yeung v.Maric, 232 P.3d 1281 (Ariz. App. Div. 1 2010) Treating MD alleged defamation in IME report See also ***Ritchie*** (above)	Appeal from trial court's grant of IME physician's summary judgment	"The issue we must address is whether a witness in a private, contractual arbitration is protected by the absolute privilege that is afforded to participants in judicial proceedings. Because the socially important interests promoted by the privilege are present in arbitrations as well as judicial proceedings, we agree with the trial court and conclude the privilege does apply…[A]n absolute privilege protects [IME physician] from potential liability for allegedly defamatory statements made in his IME report…"	No

References

American Academy of Psychiatry and the Law: Ethics guidelines for the practice of forensic psychiatry. http://www.aapl.org/ethics.htm (2005). Accessed 20 Dec 2011

American Medical Association: CEJA report patient-physician relationship in the context of work-related and independent medical examinations. http://www.ama-assn.org/resources/doc/code-medical-ethics/1003a.pdf (1999). Accessed 20 Dec 2011

American Medical Association: Code of medical ethics, opinion. 5.09 confidentiality: Industry employed physicians and independent medical examiners. http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion509.page? (1999). Accessed 20 Dec 2011

American Medical Association: Code of medical ethics, opinion 10.03 Patient-physician relationship in the context of work-related and independent medical examination. http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion1003.page? (1999). Accessed 20 Dec 2011

American Psychological Association and American Psychology-Law Society: Specialty guidelines for forensic psychology. http://www.ap-ls.org/aboutpsychlaw/SpecialtyGuidelines.php (2011). Accessed 1 June 2012

Dalton v. Miller, 984 P.2d 666 (Colo. App. 1999)

Dyer v. Trachtman, 679 N.W.2d 311 (Mich. 2004)

Eckman v. Cipolla, 24 Misc.3d 1222(A) (N.Y. Supp. 2009)

Fredericks v. Jonsson, 609 F.3d 1096 (10th C.C.A. 2010)

Gold, L.H., Anfang, S.A., Drukteinis, A.M., et al.: AAPL practice guideline for the forensic evaluation of psychiatric disability. J. Am. Acad. Psychiatry Law **36**, S3–S50 (2008)

Graham v. Dacheikh, 991 So.2d 932 (Fla. App. 2 Dist. 2008)

Harris v. Kreutzer, 624 S.E.2d 24 (Va 2006)

Joseph v. McCann, 147 P.3d 547 (Utah App. 2006)

Lambley v. Kameny, 682 N.E.2d 907 (Mass. App. Ct. 1997)

McGreal v. Ostrov, 368 F.3d 657 (7th Cir. 2004)

Office for Civil Rights: HIPAA enforcement case example private practice revises process to provide access to records regardless of payment source. http://www.hhs.gov/ocr/privacy/hipaa/enforcement/examples/allcases.html#case11 (2011). Accessed 19 June 2012

Pettus v. Cole, 57 Cal.Rptr.2d 46 (Cal. App. 1 Dist. 1996)

Physician Insurers Association of America: Risk Management Review (Psychiatry). Physician Insurers Association of America, Rockville (2011)

Professional Risk Management Services: Two top liability risks for psychiatrists: Patients with suicidal behavior and psychopharmacology. http://www.psychprogram.com/news/2010-top-risks.html (2010). Accessed 19 June 2012

Ramirez v. Carreras, 165 S.W.3d 371 (Tex. App. – Corpus Christi 2004)

Reed v. Bojarski, 764 A.2d 433 (N.J. 2001)

Rhode Island Medical Board: Policy statement independent medical examination. http://www.health.ri.gov/publications/policystatements/BoardOfMedicalLicensureAndDiscipline.pdf (2011). Accessed 1 June 2012

Ritchie v. Krasner, 211 P.3d 1272 (Ariz. App. Div. 1 2009)

Smith v. Radecki, 238 P.3d 111 (Alaska 2010)

Social Security Administration: HIPAA and the Social Security Disability Programs—Information for Consultative Examination Providers. http://www.socialsecurity.gov/disability/professionals/hipaa-cefactsheet.htm (2003). Accessed 18 June 2012

Stanley v. McCarver, 92 P.3d 849 (Ariz. 2004)

Strasburger, L.H., Gutheil, T.G., Brodsky, A.: On wearing two hats: Role conflict in serving as both psychotherapist and expert witness. Am. J. Psychiatry **154**, 448–456 (1997)

Sugarman v. Board of Registration in Medicine, 662 N.E.2d 1020 (Mass. 1996)

Yeung v. Maric, 232 P.3d 1281 (Ariz. App.Div. 1 2010)

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