Welcome to the NEXT edition of “Resident Owlery,” a newsletter developed by Professional Risk Management Services® to provide psychiatry residents in training with the tools you need to help manage your risks as you prepare to start your psychiatric careers. Featuring risk management resources, educational articles, and the latest announcements and events from PRMS, this quarterly newsletter will share relevant news, useful tips, and important updates in the field of psychiatry to help keep you, your patients, and your practice safe, from residency to retirement.

**WHAT YOU’LL FIND INSIDE:**

- 10 Things About: Treating Children & Adolescents
- Employment Contracts
- Forensic Pointers

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1. The greatest professional liability exposures related to minor patients are the same as for adult patients – psychopharmacology and treating patients with suicidal behaviors.

2. Licensing board complaints filed against child and adolescent psychiatrists often involve divorced/divorcing parents one of whom is not on board with the psychiatrist’s treatment recommendations – particularly when medication is involved. Board complaints are often also filed in retaliation of a psychiatrist’s required child abuse reporting.

3. Most prescribing for minors is off-label, which can lead to heightened scrutiny of prescribing decisions. Although it is perfectly acceptable to prescribe off-label provided there is an evidence-based reason for doing so, as part of the informed consent process, parents should be made aware of this fact.

4. Generally, a parent or legal guardian must consent to the treatment of a minor. Consent given by one who does not have the legal authority to give consent is no consent. If the person accompanying a minor child to an appointment is not a parent, absent a true medical emergency, you should ask for documentation giving them the legal authority to consent to treatment.

5. If a minor patient’s parents are divorced, you should take reasonable steps to determine which parent(s) have the legal authority to consent to treatment. These legal rights should be spelled out in a custody order or similar document and it is appropriate for you to ask to see the portion that pertains to treatment decisions.

6. In some states, minors of a certain age may have been granted the right to consent to mental health treatment. Prior to treatment, however, you should still satisfy yourself that the patient has the maturity and comprehension to give informed consent. In those situations where the minor has consented to his or her own treatment, the patient is entitled to confidentiality.

7. When it is a parent or guardian consenting to treatment, confidentiality of the minor’s treatment information should be discussed and agreed upon prior to initiation of treatment, or when the patient has reached an appropriate age in ongoing treatment. Minors should never be promised absolute confidentiality as it is highly likely that a parent will be able to access treatment records should he or she choose to do so.

8. Regardless of any agreement made by parents not to access a minor’s treatment record, bear in mind the parents’ ultimate right to access and authorize disclosure of the record when documenting. Document discreetly whenever possible.

9. Once a minor reaches the age of majority, he or she controls access to their records – even those records covering treatment to which parents previously consented. Accordingly, before releasing information, you must have the patient’s signature.

10. Avoid assuming the dual role of forensic Psychiatrist in custody disputes involving your patients. Once such additional role has been assumed, there will almost certainly be conflicting demands that ultimately impact negatively upon the treatment relationship with your patient.
EMPLOYMENT CONTRACTS

As young psychiatrists leave their residency and fellowship programs and experienced psychiatrists consider becoming employed by others, all must contemplate signing an employment contract. Certainly salary is a primary concern but there are other components that are equally important and often overlooked. The following is a non-exclusive/non-exhaustive list of things to keep in mind before you sign on the dotted line.

• Have a written agreement. While those who are becoming full-time employees typically have a formal contract, those who are independent contractors often do not. This can be especially problematic when the relationship ends.

• Have a clear understanding of your duties. Duties “as assigned” or “practice of psychiatry” leaves a lot of room for interpretation and for an employer to take advantage of you. Are you going to be expected to supervise others? What are your responsibilities for taking call? Will malpractice insurance cover these duties? (You would be surprised how often people engage in an activity that is not technically covered under their insurance policies.) Does your contract allow you to engage in outside activities that you may be interested in pursuing such as teaching or volunteering your services?

• Avoid indemnification/hold harmless clauses. Typically these clauses will look something like this: “Each party agrees to indemnify and hold harmless the other party from any claims, liabilities, losses, damages and expenses asserted against the other party arising out of the indemnifying party’s negligence, willful, misconduct, and negligent performance of or failure to perform, any of its duties or obligations under this agreement.” What this means in plain English is that in the event of any of your actions - or inactions - cause the entity/individual for whom you are working to be sued, you will be obligated to pay any settlements or verdicts rendered against them. And even if they prevail, you will be required to pay their attorneys’ fees. This sort of provision is far more likely to appear in an independent contractor agreement than a regular employment contract. They are problematic because malpractice insurance typically won’t cover liability assumed under a contract with another and thus, any monies owed must come out of the physician’s own pocket. It is recommended that you have these provisions stricken from the agreement. Do not be fooled into thinking that you are in any way protected by a mutual indemnification clause whereby the other party agrees to indemnify you under the same circumstances. If you carry malpractice insurance, you are already protected.

• Know the term of the agreement. How long is the agreement for? How does it renew? Is renewal automatic? Do you have the ability to renegotiate after a certain period of time? You don’t want to find yourself a few years down the road seeing the bulk of the practices patients and still receiving a starting salary.

• Understand how the contract can be terminated. What notice must you give before leaving the practice? If you have a lengthy notice, you may find it difficult to actually leave as your future employer may not be able to hold your position open for more than 60 days. Under what circumstances can your employer terminate the agreement? In many instances a contract will allow for immediate termination by your employer if you lose your license to practice medicine, your DEA certificate, or if you become permanently disabled. Can your employer terminate your employment without cause? If your employer can terminate your employment without cause upon 30, 60 or 90 days’ notice, you do not have the one to two year contract you think you have. Your contract is merely as long as the length of the notice provision. What about termination for breach? Can each party terminate if the other fails to meet its obligations under the contract? Are there cure provisions - in other words, does each party have an opportunity to fix the problem once it has been identified to the other?

• Understand what type of medical malpractice insurance you have. If the practice covers you with a claims-made medical malpractice insurance policy (or switches to that type of policy in the future), tail coverage will need to be purchased. As this can be a fairly large expense, it is important that it be discussed and agreed to and documented in the contract.

• Plan for continuity of care after treatment. The general rule is that when a psychiatrist is employed by a practice, even though he or she may be the only one seeing a particular patient, the patient is deemed to be a patient of the practice as opposed to the individual psychiatrist’s patient. Even so, there are often issues regarding continuity of care when a psychiatrist leaves a practice period for example, whose obligation is it to notify patients of the psychiatrist departure, and what will the patient’s be told? This can be a huge point of contention if the psychiatrist departure from the practice is contentious. Ideally, it is the practice that should be required to send notice, but the departing psychiatrist should have input into the content of that notice. What about patients who wish to follow you to your new location? Will the practice allow you to have copies of their charts? Who will pay for the copies? Is there a non-compete clause that precludes you from seeing former patients at your new location? Non-compete clauses are often upheld by courts so long as they protect the employer’s business interests, are not too broad in terms of time and geography, and are not harmful to the public.

• Avoid leaving anything to chance. Ask for clarification of vague or ambiguous language and ask that it be clarified within the agreement. If your employer has agreed to terms that are not part of the contract, insist that they be written in. Somewhere within the agreement there will likely be a provision stating that the written contract represents the entire agreement between the parties which means that if it’s not in the contract, it’s not enforceable. Do not begin work, until your contract is signed by all parties.

• Hire an attorney. Your prospective employer will not be offended by this. But do involve the attorney early in the negotiation process rather than agreeing to terms and then having the attorney make changes. Just as physicians specialize, so do attorneys so it is important...
The following forensic psychiatry risk management tips are applicable when a psychiatrist is acting as an independent evaluator or expert witness in civil, administrative or criminal proceedings were the primary goal is to evaluate not to treat. The evaluation may include an independent medical examination or a review of medical records and other written materials, or both. The most frequent areas of forensic psychiatry practice include: providing an expert psychiatric opinion on a civil trial on behalf of the plaintiff or defendant, performing independent medical examinations (IMEs), reviewing medical records for legal purposes. It may adversely affect the quality of the evaluation.

Clarify, upon accepting an assignment, who will own and have access to any reports, notes, or records of the evaluation once the assignment is complete. Do not accept an assignment or the individual who is retaining you attempts to influence the objectivity of your evaluation. All communication regarding the assignment should occur through the attorney or organization that hired you.

Generally, there is no psychiatrist-patient relationship for legal purposes. It may adversely affect the quality of the evaluation.

Consider obtaining a license in the state where the evaluation institute take place. Alternatively, consider performing a forensic examination in a state where you are not licensed to practice may be a violation of the state’s licensing laws. Confirm that you, as an out of state physician not licensed in the state where the evaluation is to take place, can legally perform a forensic examination.

Fees
Do not provide forensic psychiatry services for an attorney who wants you to accept a contingency fee. It could appear to a jury that your objectivity has been compromised at the prospect of financial gain. If you provide trial or deposition testimony you will be cross-examined about fees. Your fees should be reasonable and in line with the community standard for forensic psychiatry services. Exorbitant fees will compromise your credibility as an objective medical expert.

The Evaluation or Consultation
Performing a forensic examination in a state where you are not licensed to practice may be a violation of the state’s licensing laws. Confirm that you, as an out of state physician not licensed in the state where the evaluation is to take place, can legally perform a forensic examination.

Clarify your role with the evaluee and document it. The person being examined must clearly understand that you are not his or her “doctor” and that you have been retained solely to evaluate and give an opinion. In nearly all cases you will not continue to follow the person evaluated, and that fact must be made clear to all parties. In rare cases you will be asked to perform a second or follow up evaluation.

Have the evaluee sign a written consent for the valuation, regardless of whether or not written consent...
is legally required.

The evaluatee should sign a release, prior to the examination, waiving confidentiality for specific purposes. The release should include permission to disseminate the report to the appropriate parties, to have your deposition taken and provide testimony at trial. The release should be prepared by an attorney familiar with the state law pertaining to psychiatrist patient privilege and confidentiality in the state where the evaluation is performed. The release should also comply with all federal confidentiality laws, including HIPAA’s privacy rule.

Is the evaluation is court ordered and the evaluatee refuses to participate, prepare your report advising of the failure to participate. It may not be possible for you to provide a diagnostic opinion in this instance, even with review of prior medical records. In such cases you have the option of stating that you reached no conclusions due to the failure to appear.

If the evaluation is conducted on the evaluatee while he or she is a patient in the hospital, do not write orders in the medical records or give verbal orders to the nurses.

Be certain that you know how who has legal authority to consent to the evaluation of a child before performing an evaluation and rendering an opinion about which parent or legal guardian should have custody. Make sure that the legally authorized party gives written consent for a custody evaluation.

Report

Your written report is often a pivotal piece of information in a forensic case. When preparing your report include at least the following:

• Identify who requested the examinations/evaluation
• Reasons for your consultation
• Issues that you have been asked to address or questions you have been asked to answer
• List all material that has been reviewed as part of your evaluation and opinion, including the parties records, medical journals and professional literature
• Document all elements of the examination that are relevant to the issues
• Identify the party responsible for the follow up and treatment
• Prepare a clear, succinct conclusion

Deposition/Testimony

If your deposition is requested, prepare for it. The attorneys will question your conclusions, sometimes quite vigorously. Review the transcribed deposition for accuracy. This task may seem burdensome, but it will avoid some embarrassing moments.

When being deposed, consider similar cases that you have consulted on and whether your testimony is consistent with those cases. If not, be very clear on the distinctions. The attorneys will often have transcripts from testimony in prior cases, and your prior testimony can be used to attack your credibility.

Some forensic testimony will involve issues of legal capacity or competency to perform a particular task. When working in the legal setting, the accuracy and reliability of psychiatric diagnosis is critical. Be certain you are clear when asked capacity questions. Are you being asked about past capacity, present capacity, or future capacity? Have you reviewed or do you already understand the legal definitions you will be asked to use?

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Often legal terms have special meanings, and you must understand the meaning of the terms in the state where you are working. For example, there are at least three legal standards used to define “insanity.”

Attention to current medical literature is critical. You need to know what your peers are thinking and advising because in some cases you will be asked about the standard of care.

Avoid discussions with the press about any case where you have been retained to provide a forensic evaluation or consultation. If it is a high-profile case, you may find yourself under scrutiny, and no comment is the appropriate response.

Expert testimony may be subject to peer review.

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Accordingly, know and follow all applicable standards governing forensic practice, such as documenting your examinations, identifying personal opinions as such, identifying material you relied on in reaching your conclusions, etc. Remember that you have been retained to render a medical opinion and not a legal opinion.

Additional Resources:

From the American Academy of Psychiatry and the Law (AAPL):
• Ethical Guidelines for the Practice of Forensic Psychiatry, available at www.aapl.org/ethics.htm
• Practice Guidelines for the Forensic Evaluation of Psychiatric Disability, available at www.jaapl.org

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VIEW FROM THE JURY BOX:

CLARK V. STOVER

A PSYCHIATRIC MALPRACTICE MOCK TRIAL

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