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Guidelines for Notification of the Limits of Confidentiality/Privilege for Court-Ordered Evaluations of Adults

6/8/16

Over the years, a great deal of discussion has been generated in the 15(a) peer review groups regarding the “Lamb warning.” It became clear from these discussions that clinical practice varied widely regarding the specific information presented to evaluatees at the initiation of forensic assessments. In order to clarify the material that is essential to communicate in **all court-ordered evaluations of adults**, the CQI Committee consulted with the DFP Committee, and forwarded to them the universe of items that evaluators presented. The DFP Committee made recommendations, which were subsequently discussed by a smaller group (Dr. Debra Pinals, Dr. Ira Packer, Dr. Naomi Leavitt, and Dr. Geri Fuhrmann), and vetted by the DMH legal department. The elements were then classified into required, optional and not-recommended categories. Note: the optional and not-recommended categories are not exhaustive lists.

I. Required

A. The following elements are necessary to include in every court-ordered evaluation regarding limitations on confidentiality and privilege.

- Name of evaluator
- Discipline
- If supervisee, state that he/she is working under supervision
- Type of evaluation(s)
- Evaluation(s) ordered by the court
- Purpose of the evaluation(s)

- Information is not confidential and can be reported to the court
- You can decline to participate in whole or in part
- Clinician will file a written report regardless of the person's participation
- Clinician may provide oral testimony
- The result of the evaluation could be commitment for further evaluation or treatment in a psychiatric hospital (for sec. 15b, 15e, 16, 17, 18a, and sec. 12e evaluations) or to a substance abuse facility (for sec. 35 evaluations)

B. For competence to stand trial evaluations (including cases where both competence to stand trial and criminal responsibility were requested) that the competency evaluation may be introduced into evidence at trial, if the defendant raises a mental state defense (*Commonwealth v. Harris* "...in cases going forward, a defendant should be specifically informed, when given the *Lamb* warnings, that the results of, and content of the report of, a competency evaluation may be used against him at trial should he decide to place his mental state at issue and offer evidence in support of that issue at trial.")

Note: In Dr. Pinals' 6/20/14 memo to all DFPs and CJCC2s she stated, "...forensic evaluators should include this information in their Lamb warnings in a manner that, in the judgment of the evaluator, the subject of the evaluation can best understand."

Potential wording: "This evaluation could be used against you should you raise mental health issues at trial."

C. For criminal responsibility evaluations:
The fact that information about the defendant's mental state may be used at trial should already have been disclosed during the discussion of purpose of the evaluation.

D. Mandated Reporter/Duty to Protect Others/Duty to Prevent Self-harm

- Children: MGL c.119 s.51A
- Elders: MGL c.19A s.15
- Disabled: MGL c.19C s.10
- Duty to Protect Others: MGL c.123 s.36B
- Self-harm:

For psychologists: MGL c.112 s.129A

For social workers: MGL c.112 s. 135A

For physicians: no statutory *requirement* that a physician take action to prevent self-harm, but MGL c. 233 s. 20B allows breach of confidentiality in these circumstances

Potential wording: "I am mandated to report abuse or neglect of a child, an elder or a disabled person. I may also take action if I become concerned you will harm yourself or others."

E. The timing for delivering these warnings is discipline specific

For psychologists: per 251 CMR 1.11

...If the client has come to the psychologist specifically for psychological evaluation, court ordered evaluation, or psychological testing, the client shall be informed about all confidentiality limitations before said evaluation or testing begins.

For social workers: per 258 CMR 22

A social worker shall inform a client of the client's confidentiality rights and the limitations and exceptions to such rights...no later than the end of the first client encounter or professional consultation...unless sound professional practice dictates otherwise... Where the client is not informed of these confidentiality rights... at the first client encounter...the social worker shall also document the reasons for the delay...

For psychiatrists: No specific guidance in CMR; however, psychiatrists should inform evaluatees of the limits of confidentiality per the AAPL Ethics Guidelines (2005): "At the beginning of a forensic evaluation, care should be taken to explicitly inform the evaluatee that the psychiatrist is not the evaluatee's 'doctor.'" Also, per the AAPL Practice Guideline for the Forensic Assessment - Section 5.2 (2015): "...evaluatees must always be informed of the limits of confidentiality, the persons with whom the information will be shared, and the purpose of the interview. Evaluatees may require frequent reminders of the limits of confidentiality during the course of an assessment, especially when multiple interviews are conducted over a prolonged period."

II. Optional (These elements do not pertain to the limits of confidentiality, but may be included.)

- You can terminate the interview at any time
- Length of commitment for treatment (e.g., up to 90 days for section 35)
- Length of commitment if recommended for further evaluation (15b, 15e, 16a, 18)
- Your participation could result in further evaluation outside a hospital (e.g. court clinic, jail)
- The evaluator will provide an opinion and make recommendations to the court; the judge makes the final decision
- A description of data clinician will use if you choose not to participate

III. NOT recommended

- You have a right to have an attorney present (it is not a right-see Forensic Frequently Asked Questions dated 6/23/15 for further discussion of this issue).
- You have a right to refuse medication
- You have a right to refuse medication in a hospital except in emergencies
- Description of the types of emergencies that could engender forced

medication

- Your participation could result in further evaluation at DMH or BSH, and description of the differences between DMH and BSH
- Description of dispositional options upon return to court (following further evaluation)
- Information about potential loss of FID card/license to carry

ADDITIONAL NOTE: What to tell petitioners in s.12e and s.35 evaluations

Court clinicians should inform petitioners/potential petitioners of all the limits of confidentiality at the outset. Clinicians can use their judgement regarding other information (e.g. length of commitment, specific facilities).