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Guidelines for Notification of the Limits of Confidentiality/Privilege for Court-Ordered Evaluations of Adults
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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. Pinal's 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 American Academy of Psychiatry and Law (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."

F. How many elements must an individual demonstrate s/he understands?

- the purpose(s) of the interview (including that it could be used for making recommendations about need for hospitalization)
- limits of privilege
- voluntariness

The evaluator need NOT ascertain the evaluatee's understanding about mandated reporting/confidentiality limits. The mandated reporting/Tarasoff "warnings" are contained in statutes [noting that M.D.'s are not required by statute to give a warning about mandated reporting, but it is good practice nonetheless], and are not part of professional ethical standards. There is no provision in statute to discontinue obtaining information if the individual does not understand the warning and discloses abuse of protected populations, or intent to harm self or other.

However, for the "Harris" warning, there may be an issue of admissibility – this was not fully addressed in the case. The court wrote: "Thus, 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 at trial and offer evidence in support of that issue at trial. *A person suffering from a mental condition may not otherwise fully comprehend the significance of the use to which the examination may be put.*" [emphasis

added] This last sentence at least suggests that comprehension is important. In light of the ambiguity, the best practice would be to include a statement of whether the defendant understood that element too, but proceed nonetheless. If the defense attorney wants to contest any such testimony, they at least would have the relevant data.

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

IV. Which limits of confidentiality should be explained to petitioners under ss.12 and 35, and other collateral sources?

Collateral sources (outside of the inpatient facility conducting the evaluation¹, and not including the attorneys or the judge) should be informed that information provided will not be held confidentially, and could be used for the purposes of the evaluation (which should be described). Evaluators should request their consent to proceed. It is advisable, but not required, to provide more specific information about limits of confidentiality (i.e., mandated reporting/Tarasoff).

¹ This is based on the understanding that those working in the facility are aware of the limits of confidentiality, and information is shared among providers routinely. Similarly, legal professionals do not require our telling them about the limits

It should also be noted, that unlike the situation with evaluatees with whom we have a professional relationship to which confidentiality and privilege would attach, this is not the case with collateral sources. Nevertheless, Specialty Guidelines for Forensic Psychology (SGFP) state that:

“Forensic practitioners disclose to potential collateral sources information that might reasonably be expected to inform their decisions about participating that may include, but may not be limited to, who has retained the forensic practitioner; the nature, purpose, and intended use of the examination or other procedure; the nature of and any limits on privacy, confidentiality, and privilege; and whether their participation is voluntary.”

AAPL Ethical Guidelines also state: “A forensic evaluation requires notice to the evaluatee *and to collateral sources* [emphasis added] of reasonably anticipated limitations on confidentiality.

V. When contacting collaterals, what information can the evaluator reveal about the defendant (e.g., the current charges, information from the CARI)?

Evaluators can provide information about anything that is in the public record, or presented in open court, including: current charges, disposition, court date. It should be noted that we do not need to get the defendant’s consent prior to contacting collaterals (other than individuals or entities who require authorization for release of information).

VI. If an evaluator proceeds with an assessment knowing that the evaluatee does not comprehend the limits of confidentiality, isn’t s/he violating the ethical duty to obtain informed consent?

There is no informed consent needed in a court-ordered forensic evaluation. Both forensic psychiatry and forensic psychology standards note this. The following is a quote from the AAPL ethical guidelines: “It is important to appreciate that in particular situations, such as court-ordered evaluations for competency to stand trial or involuntary commitment, neither assent nor informed consent is required.” The SGFP includes the following statement: “If the examinee is ordered by the court to participate, the forensic practitioner can conduct the examination over the objection, and without the consent, of the examinee.”

VII. For individuals who do not appear to understand the “Lamb” warning, why are there more safeguards for proceeding with an evaluation for criminal responsibility vs. competence to stand trial?

There are both practical and principled reasons for making a distinction. If a defendant is so impaired as to not understand the “Lamb” warning, it would not make sense to then discontinue the competence to stand trial evaluation. Competence is an issue that is not just in the domain of the defense, but case law indicates that judges also have a

responsibility to raise the issue if it comes to their attention (e.g., *Pate v. Robinson*, 383 U.S. 375 (1966)).²

Criminal responsibility, by contrast, is an affirmative defense raised by the defendant. It also involves the possibility of providing incriminating information that can be detrimental to his/her case. Therefore, there is more concern about protecting the individual's rights. This is particularly true in Massachusetts, where a judge can order a CR evaluation, without the defense attorney's request or even consent (in most other jurisdictions, a CR evaluation is ordered only if the defense raises the issue). That is why, in Massachusetts, we recommend contacting the attorney for consent to proceed as the best practice.

² Although *Pate* is not exactly on point, the Supreme Court noted that "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently "waive" his right to have the court determine his capacity to stand trial." The logic is applicable - a defendant's right to a fair trial will be violated if a competence determination cannot be made.