Risk Management

Malpractice – Part III

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This is the third installment in a series of columns examining the topic of malpractice. In the first column (Haller 2009a), I suggested that part of good medical practice is being ever attuned to the possibility that potential malpractice may “lie,” i.e., exist. If you are concerned that you may be in such a situation with one of your patients, try the LODLO (Light Of Day Look Over) test. By this I mean that you should consider how you would feel while describing your behavior or practice pattern in that particular case to a colleague. If you would feel uncomfortable exposing what you are doing or have done to the light-of-day of the colleague’s assessment, then you may well have a problem and should consult your malpractice carrier.

In the second column (Haller 2009b), I described the four “D’s” of malpractice. They are: Dereliction of Duty Directly resulting in Damages. Each of these elements must be present or malpractice does not exist. The column went on to discuss the concept of dereliction. Such can occur through either negligence or abandonment.

In this column, I want to describe the concept of duty. In order to be successfully sued for malpractice, a duty must be proven to exist on the part of the psychiatrist to the plaintiff (person bringing the suit). Usually, this concept is obviously present because the plaintiff was a patient.

The child and adolescent psychiatrist has other duties, as well. For example, most, if not all, jurisdictions now have a duty to warn or protect statute. This means that if a psychiatrist knows or should have known that his or her patient potentially is dangerous to another individual or group of individuals, the psychiatrist has a legal obligation to take steps to obviate the likelihood that such will occur. The steps that must be taken will be defined by state statute. Failure to follow these directives will leave the psychiatrist open to litigation by any subsequent victim of the patient’s actions.

Another duty the psychiatrist has which is beyond that created by the doctor–patient relationship is the obligation to report suspected child abuse or neglect. Here again, the obligation is defined by state statute, both as to what situations must be reported and to whom.

As to the duties arising out of the doctor–patient relationship, there are several. First of all, the psychiatrist has a duty to do no harm. Should the psychiatrist cause harm through either action or failure to take action, potential liability ensues. Another duty is to fulfill the contract which the psychiatrist has with the patient (or, in the case of a minor, with the legal guardian). As a rule, and unless otherwise stated, the contract will be to properly diagnose the patient’s condition. Failure to properly diagnosis would be a violation of one’s duty to fulfill that contract to the patient.

After completing the diagnostic process, but before beginning treatment, the psychiatrist must get informed consent. (The duty to obtain informed consent is actually a separate claim from that of malpractice. I include it here because of its relevance to any discussion of duty.) This is obtained by giving the patient or legal guardian all of the information that is material to make a decision about whether to undergo a proposed treatment. Treatment absent this consent is a legal violation potentially leading to litigation against the psychiatrist.

In providing both diagnosis and treatment, the psychiatrist has an obligation to meet an acceptable standard of care. This is defined by one’s colleagues and in learned treatises. The practice guidelines published by the AACAP could be such a publication.

Another duty which a psychiatrist accepts by seeing someone as a patient is to keep confidential all information obtained in the course of diagnosis and treatment. Confidentiality is an ethical duty which a physician has to not discuss information about a patient outside of the treatment setting.

A related concept is that of privilege. The holder to the privilege (i.e., the patient or legal guardian) must give permission before a psychiatrist can release any information about that patient to a third party whether it be an insurance carrier or another physician.

In short, when one steps into the medical arena to treat patients, several duties accompany that action. Adhering to these duties makes for better treatment as well as helps to keep the psychiatrist out of the courtroom.

References

Dr. Haller is in private practice. He is not an attorney. His statements should not be taken as legal advice.

Risk Management by Lee Haller, M.D., is supported by Darwin National Assurance Company, the professional liability service endorsed by AACAP. The agency compensates Dr. Haller for writing the Risk Management column.