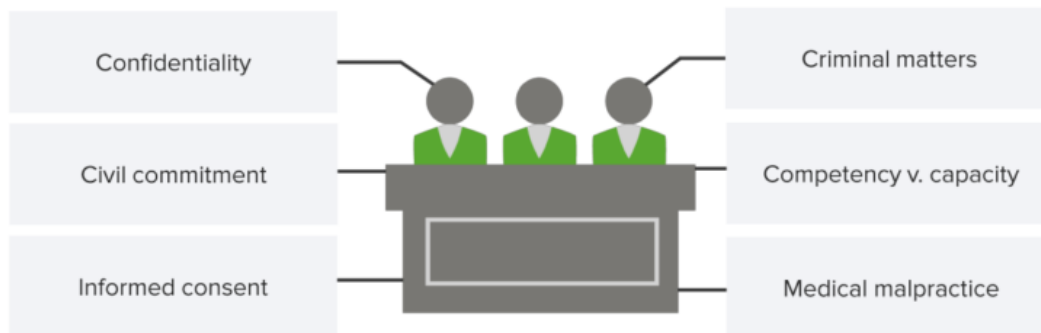


Forensic Psychiatry — Informed Consent, Competency and Capacity; Criminal Matters, and Malpractice

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Today, forensic psychiatry is a broader science that entails the study of the interaction of psychiatry and the law. It includes matters of criminal law, civil law and development, and application of mental health legislation. In most situations, a third party requests forensic psychiatry help; for example, a policeman may divert a mentally ill person to the hospital emergency department for treatment. The main aspects of forensic psychiatry include informed consent, competence and capacity, criminal matters, and psychiatric malpractice.





Informed consent

Informed consent refers to the **patient granting permission to a doctor based on his/her knowledge of possible consequences in terms of risks and benefits**. The doctor discloses appropriate information to a competent patient, who makes a voluntary choice regarding his/her treatment. The process of obtaining informed consent in patients with diminished mental capacity has procedural difficulties, due to a lack of concentration and cooperation, and ethical dilemmas due to these individuals' unreliable judgments.

In psychiatry, informed consent is needed for:

- **Procedures**, such as electroconvulsive therapy (ECT), anesthesia and sedation, and restraint
- **Research trials**
- **Discharge against medical advice** or attempts to leave the hospital without documentation or against medical advice by patients with clouded sensorium.

Informed consent in psychiatry is built on:

- **Voluntarism**: the ability to judge and independently engage in what the individual sees as right and best for him/her
- **Information disclosure**: all necessary information, such as the purpose, process, possible risks, and benefits, are explained in understandable terms
- **Decisional capacity**: ability to make rational decisions based on comprehension of information and logical reasoning

If a patient has an altered mental status, it is important to determine whether s/he has the capacity to make informed health care decisions and consent to treatment. Physicians who understand the patient's medical illness and have skills in determining the patient's capacity may include psychiatrists, geriatric psychiatrists, and geriatricians.

Competence and capacity

Competence refers to an individual's ability, both legal and natural, to engage in a given behavior. It entails many activities including, but not limited to, the following:

- Enter into a contract
- Prepare a will
- Stand trial as a defendant

- Make a medical decision

Incompetence is a judicial decision arrived at in court proceedings based on an expert witness' (forensic psychiatrist) submission.

Capacity refers to an individual's ability to form a rational decision based on his/her understanding and available information. **Incapacitation is a physician's (psychiatrist) decision**, which is commonly applied in substituted consent scenarios, to avoid halting a medical process as the doctors await a legal consent.

Questions of competence and capacity arise in 3 - 25% of patients. Most problems go undetected.

Assessment of competence and/or capacity

In most nations, the law of presumptive competence dictates that **every person over the age of 18 years enjoys autonomy and self-determination**; thus, everyone has a right to accept or decline medical treatment. However, the person must have the ability to make a reasonable decision at the time. The psychiatrist's role is to determine whether the patient is capable of making this decision.

To demonstrate competence, the patient must demonstrate the following abilities:

- **Understand the information** given by the psychiatrist
- **Appreciate the consequences** of his/her selection and demonstrate the ability to think through all other choices
- **Make, maintain, and communicate** a rational choice

This does not require medical tests or given assessment rubrics. The psychiatrist will ask several questions to assess the patient's competence based on the above determinants.

In the event that the patient lacks the capacity to make certain decisions, the psychiatrist should offer emergency treatment, as needed, and seek the decision later or, if possible, locate a surrogate, family member, or court-appointed guardian.

Some challenges encountered while assessing competence include:

- The change of competence levels with time, rendering the older assessment invalid
- Competence may vary with tasks.
- The patient's decision may not be the same as the decision made by the surrogate/ guardian on his/her behalf.
- Presumptive lack of capacity in older children is flawed
- Improved capacity after treatment is rarely considered

Malpractice in psychiatry

Just like other medical practice fields, psychiatrists may be liable when harm occurs to, or is caused by, the psychiatric patient. The psychiatrist-patient relationship is difficult to establish but, on initiation, it is a relationship filled with trust and prone to exploitation and malpractice risks.

There are five factors that increase the risk of malpractice among psychiatrists.

Suicide occurrences

This is the **most common cause of malpractice claims** against psychiatrists, especially those offering patient care. It rarely happens in the outpatient setting. Malpractice cases can arise when the patient takes his/her own life, and the doctor has not noted any prior suicidal ideation or attempts in the medical record. It is important **to record even the most unlikely event and assess the plan and nature of execution alongside its practicality and need for hospitalization.**

Lack of emergency help

A call from a psychiatric patient issuing a threat may be viewed as a normal occurrence. However, a delay in deploying emergency assistance is a common cause of liability for a psychiatrist who offers follow-up help in an outpatient setting.

Adverse effects of medications

Patients react differently to medications and unpredictable adverse effects, such as violent behavior after taking medication, have been documented. Development of adverse effects, such as **tardive dyskinesia**, to incapacitating and irreversible levels, are common causes of litigation; therefore, every time a psychiatrist prescribes a drug, he/she should exhaustively explain possible side effects associated with the drug.

Exploitation of the trust in the relationship (sexual misconduct)

In a few instances, the psychiatrist takes advantage of his/her powerful position and sexually exploits a patient, thus causing sexual harm which the psychiatrist is liable for. The most common scenario is false accusations of sexual abuse from the psychiatric patient. Thus every psychiatrist should record the nature of the disorder and any abnormal behaviors manifested by the patient in prior visits.

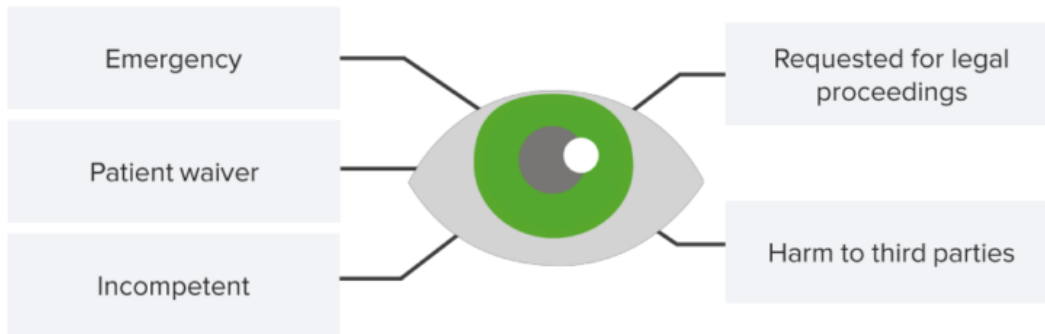
Third-party disclosure liability

It is common to receive homicidal threats from psychiatric patients and, even with proper documentation to avoid litigation, problems may arise in deciding whether to alert the authorities.

If a patient threatened to kill his neighbor, do you disclose the patient's diagnosis and progress details with the neighbor, or even the police? This would be considered a **breach of doctor-patient confidentiality**. On the other hand, maintaining confidentiality might lead to negligence charges against the doctor if the patient does commit murder. The **right decision in such a case depends on the situational reality of the threat** and the favor of the laws of the land.



When is it okay to breach confidentiality?



In all medico-legal proceedings involving malpractice, **the following must be proved, beyond a reasonable doubt**, for a conviction.

1. An **established doctor-patient relationship** exists when the doctor examines the patient and prescribes medication or any other form of treatment. Existing medical records, such as prescription notes, bills, or phone calls provide evidence of an existing relationship.
2. **Negligence from the practitioner and failure to offer psychiatric services at the same level a competent practitioner would have offered.** The recommended level of care, per the regulatory body requirements, is known as the standard of care, which is presented in court by a qualified psychiatrist as an expert witness. The complainant must prove a breach in this standard of care.
3. **Harm must have occurred**, either to the patient or another person, but inflicted by the patient. Common forms of harm include monetary losses due to unnecessary medications, pain due to injury caused by a violent patient, and job loss due to incapacitation.
4. The harm to the patient, or caused by the patient, must be traced to the negligence or breach of the standard of care. This is known as an **establishment of a causal link between negligence and injury.**

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