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Ethics Interface

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The column is meant to be an educational forum for life care planners. It is not designed to offer an authoritative opinion from the editor or editorial board of the Journal of Life Care Planning, the board of the International Academy of Life Care Planners (IALCP), or the board of its parent organization, the International Association of Rehabilitation Professionals (IARP), nor is it designed to represent or replace official opinions from the certifying body or other organizations associated with the practice of life care planning.

Ethical Dilemma

I need help understanding who I can talk to when working on a legal life care planning case: (see problems embedded in responses below):

Response

The Health Insurance Portability and Accountability Act (HIPAA, 2002) Privacy Rule and Public Health Guidance from the Centers for Disease Control and the U.S. Department of Health and Human Services have offered guidance on the privacy of medical records:

The HIPAA Privacy Rule (Standards for Privacy of Individually Identifiable Health Information) provides the first national standards for protecting the privacy of health information. The Privacy Rule regulates how certain entities, called covered entities, use and disclose certain individually identifiable health information, called protected health information (PHI). PHI is individually identifiable health information that is transmitted or maintained in any form or medium (e.g., electronic, paper, or oral), but excludes certain educational records and employment records. Among other provisions, the Privacy Rule

- gives patients more control over their health information;
- sets boundaries on the use and release of health records;
- establishes appropriate safeguards that the majority of health-care providers and others must achieve to protect the privacy of health information;
- holds violators accountable with civil and criminal penalties that can be imposed if they violate patients' privacy rights;
- strikes a balance when public health responsibilities support disclosure of certain forms of data;
- enables patients to make informed choices based on how individual health information may be used;
- enables patients to find out how their information may be used and what disclosures of their information have been made;
- generally limits release of information to the minimum reasonably needed for the purpose of the disclosure;

- generally gives patients the right to obtain a copy of their own health records and request corrections; and
- empowers individuals to control certain uses and disclosures of their health information." (Retrieved from http://www.cdc.gov/mnwr/preview/mmwrhtml/m2e4lla1.htm on July 18, 2009).

The International Academy of Life Care Planners (2006) provides guidance in the Standards of Practice, IV Standards of Performance, 1.

> Confidentiality: Appropriate confidentiality is a sensitive and important concept. Some professionals will have communications protected by "privilege" which is statutorily based in each state. For example, although no "Life Care Planners" are currently covered by privilege, many may be professional counselors, licensed psychologists or others who have the additional statutory protection. Litigation has the additional component of attorney work product that may have an effect on what information may be disclosed. The Life Care Planner must be thoroughly informed on this topic.

It is therefore important the life care planner well understand the rules and guidelines of their primary profession.

The Commission on Health Care Certification (CHCC) Standards and Examination Guidelines offers direction for these concerns. In Principles and Associated Rules: Principle 1-Moral and Legal Standards: Rules of Professional Conduct: R1.4

> Disability examiners and life care planners will not engage in any act or omission of a dishonest, deceitful, or fraudulent nature in the conduct of their professional activities." Rules of Professional Conduct R2.3 reads: "Disability examiners and life care planners are obligated to clarify the nature of their relationship to all involved parties when providing services at the request of a third party.

A Life Care Planner conducting a vocational evaluation as part of the life care plan may be a Certified Rehabilitation Counselor governed by the CRCC Code of Ethics, which contains a section on forensic cases. For example:

Section F: Forensic and Indirect Services

F.1. Client or Evaluee Rights

a. Primary Obligations: Rehabilitation counselors produce unbiased, objective opinions and findings that can be substantiated by information and methodologies appropriate to the evaluation, which may include examination of individuals, research, and/or review of records. Rehabilitation counselors form opinions based on their professional knowledge and expertise that can be supported by the data gathered in evaluations. Rehabilitation counselors define the limits of their opinions or testimony, especially when an examination of individuals has not been conducted. Rehabilitation counselors acting as expert witnesses generate written documentation, either in the form of case notes or a report, as to their involvement and/or conclusions.

d. Indirect Service Provision. Rehabilitation counselors who are employed by third parties as case consultants or expert witnesses, and who engage in communication with clients or

evaluees, fully disclose to individuals (and/or their designees) the role of the rehabilitation counselor and limits of the relationship. Communication includes all forms of written or oral interactions. When there is no intent to provide rehabilitation counseling services directly to clients or evaluees and when there is no in-person meeting or other communication, disclosure by rehabilitation counselors is not required.

g. Duty to Confirm Information. Where circumstances reasonably permit, rehabilitation counselors seek to obtain independent and personal verification of data relied upon as part of their professional services to the court or to parties to the legal proceedings.

The specific concerns are addressed below:

Q: As a Plaintiff-retained life care planner and vocational expert on a personal injury case, I have a signed release. Can I consult with the physical therapist who conducted a Functional Capacity Evaluation for the Worker's Compensation portion of the case, to which I am not a party, and prepared a rather disparaging report? I would be seeking clarification regarding the evaluation, as the report did not specify the protocol and test instruments used. I may be able to state reasons I would not rely on the report.

A: Because you have a signed release, it is perfectly acceptable for you to talk to the physical therapist. It will, however, be important for you to disclose your role to this person before requesting the information. Also, be aware that the release is tailored to HIPAA requirements, signed and executed appropriately. Without this, the release and subsequent information could be disqualified.

It may however, be wise to discuss the situation with your retaining attorney prior to contacting the physical therapist. The attorney's role is to advocate for their client. Our role is to provide a professional and objective opinion. A better way to handle the situation of a provider that seems to be biased may be to ask the attorney who retained you to take a discovery deposition and ask all the needed questions in that forum. This puts the witness under oath and allows the witness to be impeached later if the testimony given is discredited.

Q: When retained by the defense, can I call the last and previous employers to inquire about job requirements, performance and references, without a signed release?

A: Job requirements may be a matter of public record or information that is not considered private and does not need a release of information. Job performance evaluations may be part of the employment records provided from discovery by the defense or you may ask the retaining attorney to subpoena the personnel records. An employment reference call may be placed to a former employer but you must identify your role. However, without a signed release, most employers will only confirm job title and dates of employment and will not offer personal information, reason for termination, or willingness to rehire. If this information is provided, a rehabilitation counselor could include this in their evaluation of employability.

Q: When retained by the defense, can I call the treating doctor's office or the rehabilitation institution where a plaintiff underwent recovery, to ask generic questions regarding procedures, costs, and standard discharge recommendations? I do not have a signed release from the evaluee but my questions are generic.

A: It is not necessary to have a release of information to get general information

about procedures, costs, and standard discharge recommendations when not concerning a specific patient.

Q: In a workers' compensation case, I have been retained by the defense and I am going to conduct an evaluation. At court I run into the plaintiff attorney and we have a conversation about scheduling the evaluation. We are familiar with one another from cases wherein he/she has retained me as the plaintiff expert, and in this small venue, plaintiff and defense attorneys regularly share experts. Is it ethical for me to talk to opposing counsel directly?

A: Since you have already had this conversation with the opposing attorney, be certain to mention this to your referring attorney in the event that they may have another plan in mind. It is, however, best practice for you to schedule the evaluation directly through your retaining attorney, unless there has been some arrangement made between your referral source and the plaintiff attorney that has otherwise been communicated to you. While it can seem artificial and inefficient to communicate in this way, it eliminates possible misunderstanding and misinterpretation. It is best to handle all case related communications in this way. Note that workers' compensation is a system precluded under HIPAA, although best practices prevail in this kind of situation.

References

HIPAA Privacy Rule and Public Health Guidance from CDC and the U.S. Department of Health and Human Services. Retrieved from, http://www.cdc.gov/mnwr/preview/mmwrhtml/m2e4lla1.htm

The Commission on Health Care Certification Standards and Guidelines. (2007). Retrieved from, http://www.hhs.gov/ocr/privacy/hipaa/administrative/privacyrule/index.html

Standards of Practice for Life Care Planners. (2006). *Journal of Life Care Planning, 5*(3), 123-129.

New Ethical Dilemma

One of my close relatives was seriously hurt in a motor vehicle accident. They have hired an attorney and it appears a law suit will be filed and a life care plan will be needed. I would like to offer to do this life care plan at no cost. Are there any ethical concerns in this offer?

A response to the above ethical dilemma will be published in the next issue of the *Journal of Life Care Planning*. The *Journal of Life Care Planning* welcomes the submission of real world ethical dilemmas. Submissions will be altered to promote confidentiality and be kept in strict confidence. Please send submissions via email to nancymitchell4574@yahoo.com.