



American Professional Agency



RISK MANAGEMENT



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## CONSIDER THIS ...

# Attorneys Are Calling: Should You Speak with Them?

In today's litigious society, it is becoming common practice for attorneys to reach out to a claimant's treating physicians, including psychiatrists, and request their assistance in litigation. The request to "just talk with you" may range from discussing the patient's treatment, advocating on behalf of the patient in a custody agreement, to acting as a medical expert on your patient's behalf. As practitioners devoted to helping your patients, your initial instinct is to help. However, while your intentions may be admirable, you may be setting yourself up for unintended legal consequences.

## Roles and Circumstances in Which a Treating Psychiatrist May Become Involved in Litigation

Attorneys may reach out to psychiatrists to substantiate a claim for emotional distress in a personal injury case, such as an auto accident, or write an evaluation in favor of one parent over the other in a child custody hearing, or to assist in supporting their client's Workers' Compensation claim. Additionally, to save on litigation costs, plaintiffs' firms have been trying to use a plaintiff's treating psychiatrist as their expert, to avoid the cost of hiring and paying a retained expert to review all the relevant medical records.

Regardless of the actual role the psychiatrist assumes, inevitably **what often occurs is that if there is a negative outcome in the underlying litigation, the patient ends up blaming the bad result on the psychiatrist.** The patient's anger may harm the provider-patient relationship and may result in the psychiatrist being sued or in some circumstances, reported to the physician's governing administrative body, such as the Board of Medicine. Further, if the statements or attestations offered by the treating physician impact the defensibility or damages in the underlying case, the psychiatrist may end up being deposed or involved in some other form of discovery.

## You Receive A Call from an Attorney. What Should You Do?

Before speaking to any attorney, court, third party, or responding to a subpoena for mental health records, appreciate that behavioral health records are often afforded a higher privilege than most medical records under state laws, and cannot be released or discussed without a written authorization from the patient or a valid Court Order. Simply because an attorney represents to you that he or she is counsel for your patient does not mean that you are authorized to speak to him or her. Even an inadvertent disclosure of information can create grounds for a lawsuit against you. Thus, your first matter of business must always be to confirm that there is a valid written release or a Court Order allowing you to discuss your

patient's treatment history. While the written release from the patient or the Court Order may grant you authority to speak with or assist the attorney, neither releases you from any consequences that may arise related to your involvement in the litigation.

### **Risk Management Recommendations**

- With a valid authorization, offer to provide the patient's chart to the attorney to use as a basis for their position in the litigation in lieu of you providing a Declaration, Affidavit, letter, etc.
  - Your chart will contain all the relevant information regarding your treatment, diagnosis and prognosis for future treatment.
  - The chart can be relied upon by experts hired by the parties in the underlying case, thereby hopefully negating the need for any testimony from you.
  - Again, before providing the chart to anyone, confirm that the patient has signed a written release of the record.
- If you wish to take a more affirmative role in assisting your patients, be objective in asserting your opinions and findings in any testimony, Declaration, Affidavit, or letters you provide.
  - To limit potential exposure, simply and objectively relay the treatment rendered to the patient.
    - › Be aware that the testimony you provide could negatively impact the future of the relationship with the patient, even if objective and neutral.
  - The opinions and findings contained within the document must be supported by the facts contained in the psychiatrist's records and stated to a reasonable degree of certainty.
  - The most impactful or persuasive statements come from impartial treaters who relay information regarding the patient's condition, past treatment, and need for future treatment without superlatives or enhancements.
    - › The other side will want to undermine any biased or overly supportive testimony with a deposition or cross-examination that could negatively affect the psychiatrist's credibility and reputation.
    - › Acting as an impartial clinician may not only be in your best interest, but actually serve your patient's best interest as well.





- In circumstances when you are treating a minor and have two parents involved in litigation and taking positions contrary to one another, such as a divorce or child custody battle, remain neutral and remember that, ethically, your obligation is to the patient.
  - It is especially important that you avoid taking sides and simply recite the facts as they have been presented to you.
  - Even in situations where you are designated as the Court Appointed Child Custody Evaluator (or Guardian Ad Litem), you have an obligation to provide the Court with an impartial review and make an unbiased recommendation.
  - Further, it is highly important to remember that when disclosing treatment rendered to the patient, you must have one of the following:
    - › An authorization from both parents (if no custody agreement is in place) or,
    - › An authorization from both parents if there is a joint custody agreement, or
    - › An authorization from the court-appointed guardian.
- Though this is probably the most basic rule and, to a large extent common sense, provide honest and truthful testimony and statements regarding your treatment of the patient and the care rendered.
  - So long as your accounts are truthful, even if litigation is pursued against you personally, you will be in a much stronger position to defend yourself and your statements, than if you took liberties with your testimony.
    - › Be aware that state licensing boards have the ability to sanction practitioners for providing false or misleading testimony.

Consult your risk management professional or local attorney with any questions regarding an attorney request for information.



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