When Good Deeds Go Punished

The Risks Practitioners Face When Assisting Patients in Litigation

By Michelle Birtja

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In today's litigious society, it is becoming common practice for attorneys to reach out to plaintiffs' or claimants' treating physicians, including their psychiatrists, and request their assistance in litigation. This request may be as simple as asking a practitioner to discuss the treatment rendered to a patient, or as involved as having a practitioner act as a medical expert on a patient's behalf.

Irrespective of the extent of the contribution, the participation is never as simple as the attorney will lead a practitioner to believe. As healers devoted to assisting patients, practitioners' initial instincts are to help. However, while their intentions may be noble and admirable, practitioners may be setting themselves up for unintended legal ramifications.

First Contact

Understanding that the inevitable phone call from an attorney may occur, what should practitioners do once they receive one?

First and foremost, before speaking to any attorney, court, third party, or responding to a subpoena for mental health records, it is vital that practitioners remember mental health records are afforded a higher privilege than most medical records and cannot be released or discussed absent an executed authorization from the patient or a valid court order. Simply because an attorney says he represents a patient does not mean the practitioner is authorized to speak to him. Even an inadvertent disclosure of information can create grounds for a lawsuit. Thus, a practitioner's first matter of business must always be to confirm that there is a valid release or order allowing the discussion of a patient's treatment history.

Once it is confirmed that a practitioner has the authority to speak to an attorney, the question then becomes, what is the risk? While a release may grant practitioners the authority to speak to or assist attorneys, it does not release them from any consequences that may arise attendant to their involvement in the litigation.

For instance, it is common for attorneys to reach out to treating psychiatrists when trying to substantiate a claim for emotional distress in an auto personal injury case, or to help support a workers compensation claim. Additionally, to save on litigation costs, plaintiff's firms have attempted to use a plaintiff's treating physician as their expert to avoid the cost of having to hire and pay a retained expert to review all of the relevant medical records.

Irrespective of the actual role or title of a physician, inevitably what occurs is a negative outcome in the underlying litigation, which the patient blames on the physician. For instance,

the patient's anger might result in the physician being sued or, in some circumstances, reported to the physician's governing administrative body. Another example is when the statements or attestations offered by the treating physician impact the defensibility or damages in the underlying case, and the physician ends up being deposed or involved in some other form of discovery. No matter the outcome, the physician's good intentions do not come without a price.

Managing the Risk

Despite what an attorney or even a patient may represent, there are considerable risks for practitioners who get involved in an underlying litigation matter. With this appreciation of potential exposure, what can a practitioner do to limit potential legal or other types of backlash against them?

As an initial response, practitioners can offer to provide their patients' charts to the attorney to utilize as a basis for their position in the litigation, in lieu of authoring a declaration, affidavit, or letter. The chart contains all of the relevant information regarding treatment, diagnosis, and prognosis for future treatment. Further, it can be relied upon by experts hired by the parties in the underlying case, thereby negating the need for testimony. This approach allows practitioners to offer support and assistance to their patients without preparing any documentation that could later be problematic. Again, before providing a chart to anyone, practitioners should confirm that there is a written, executed release that authorizes such a production.

In the event that practitioners decide to take a more affirmative role in assisting patients, they should be objective in asserting their opinions and findings, being careful not to overzealously advocate on behalf of their patients. This may seem contradictory to practitioners, who are taught to fight and advocate for their patients. But in this situation, it is better to simply and matter-of-factly relay the treatment rendered to the patient in order to limit potential exposure.

In order to minimize exposure and risk to themselves, practitioners should stick to their records and limit any statements to factual attestations of the treatment they rendered.

From the defense bar's perspective, we often see declarations, affidavits, or letters clearly authored by plaintiff's counsel and signed by the treating physician, enhancing and editorializing on a plaintiff's condition and need for future care and treatment. The opinions and findings contained within the document are almost always unsupported by the facts contained within the physician's records. In these circumstances, physicians place themselves in a problematic position, as their own records contradict themselves.

Ultimately, a plaintiff's attorney will want to undermine any biased or overly supportive testimony with a deposition or cross-examination that could negatively affect the practitioner's credibility and reputation. Thus, to dissuade the opposing side from being inclined to depose them, a practitioner should put forth an unbiased, objective recitation of the facts. Limiting your opinions or conclusions to those that can be supported by the records and stated to a reasonable degree of certainty will assist them in not only avoiding potential legal ramifications, but also the potential of negatively impacting their character in the community.

Further, more often than not, 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 and enhancements. Therefore, in an effort to avoid inviting a deposition or some other form of discovery, practitioners should stick to their charts and recordation without any enhancements. In this instance, acting as impartial clinicians not only serves their own best interests, but also their patients' best interests, too.

In circumstances where there are two patients involved in the underlying litigation and they have taken positions contrary to one another, remember to remain neutral. Ethically, practitioners still have an obligation to both of their patients and, therefore, cannot take a position adverse to either. In this situation, it is especially important that practitioners simply recite the facts as they have been presented. Further, it is highly important that you have an authorization from both patients that allows the disclosure of the treatments rendered to each of them.

Finally, practitioners must provide honest and truthful testimony and statements regarding the treatment of their patients and the care rendered. So long as their accounts are truthful, practitioners will be in a much stronger position to defend themselves and their statements in the event of litigation than if they took liberties with their testimonies. In fact, state licensing boards have the ability to sanction practitioners for providing false or misleading testimony.

In order to minimize exposure and risk to themselves, practitioners should stick to their records and limit any statements to factual attestations of the treatment they rendered. They should provide objective, truthful, unbiased, and impartial opinions and conclusions. While there are no hard-and-fast rules when it comes to avoiding legal or general risks to themselves, practitioners can follow the above advice to try and minimize exposure. ■

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