When Lawyers Call Clinicians

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Every psychiatrist, psychologist, and psychotherapist gets calls from attorneys from time to time, often with a request involving a patient. Patients sometimes ask their clinicians to become involved in their legal matters. Such calls and requests may sound straightforward, but they are often misleading, incomplete, or misunderstood. One should avoid being reflexively "helpful" when a lawyer calls or a patient makes such a special request. There may be no obligation to respond, or to respond immediately, although subpoenas must not be ignored; promptly contacting an appropriate supervisor, facility risk manager, malpractice insurance carrier, or one's own attorney is often the best course of action. Office staff such as secretaries and receptionists should also be trained and cautioned regarding the principles discussed here. *(Journal of Psychiatric Practice* **2010;16:253–257**)

KEY WORDS: lawyers, telephone contacts, requests for clinical information, subpoena, malpractice, office staff

Every psychiatrist, psychologist, and psychotherapist gets calls from attorneys from time to time. Sometimes the lawyer is straightforward in his or her request. Sometimes the lawyer sounds straightforward but is intentionally incomplete or misleading about the real purpose of the call and the uses to which your information may be put. Sometimes the attorney believes he is being straightforward but the clinician doesn't fully understand the process or potential outcome of the interaction.

Lawyers are very good at eliciting information. They are not at all shy about asking questions, sometimes through investigators or other associates, and they often act as if they are entitled to even fairly personal data about you or your patients. If the clinician balks, the attorney or investigator may react as if surprised, insulted, or even incredulous that the clinician is withholding information. Don't be swayed or bullied; that's often merely part of the inquiry process. It isn't common, but lawyers have been known to take advantage of clinicians, often after suggesting that they are helping a patient.

The clinician should almost always pause before answering or complying with any request for information or action, even those accompanied by a subpoena or release authorization. That doesn't mean being rude, but one should avoid being reflexively "helpful" when a lawyer asks for information, opinions, or some favor on behalf of a patient. Sometimes, of course, the attorney is calling about a malpractice allegation. If there is any hint of that topic, be very cautious about answering and contact your own attorney or malpractice carrier.

One should be certain that office staff such as secretaries, receptionists, and answering service personnel also know how to respond to calls such as these. Common sense (and sometimes the standard of care) dictates that staff be trained regarding divulging information. In larger offices, written policies and procedures should cover confidentiality and imprudent conversations.

Be sure to take notes during the call (keep them in the clinical record if the call is about a patient). Don't rely on your memory to document the call later in the day. Quote the lawyer's words when feasible.

Clinicians who work in hospitals or other large organizations should not routinely handle attorney requests alone. Particularly if one is a trainee, he or she should notify a supervisor or attending psychiatrist. Having done that, however, one should consider that person's recommendation, which may be wise counsel, but should not rely on it as "legal" advice. The supervisor should usually guide you to an institution protocol, risk management procedure, risk management or medical records director, or the

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organization attorney, who may or may not take over the communication process with the attorney.

If you are in private practice, you should have a relationship with an attorney of your own. Your lawyer should be familiar with the various common legal issues of clinical practice, rather than simply being a general practitioner. If you work with an organization that has its own lawyers, use them. If your organization lacks an attorney, recommend that it get one.

Hospital and clinic "risk managers" may or may not be able to handle some attorney contacts. Clarify with your organization what goes to the risk manager and what doesn't. Medical records directors are often the organization's designees to handle requests for patient records and related information. That's fine, so long as that person is sophisticated and knows when to call a risk manager or lawyer. If you sense anything unusual about a records request, don't simply give it to the medical records department to be filled routinely. (Be aware, however, that properly authorized release of information is time-sensitive in many states; legitimate requests must not be ignored or unduly delayed.)

Let's discuss a few common scenarios.

An attorney or other person asks for information about a current or former patient (with apparent authorization, not simply a request to forward records to another clinician). Be cautious. Do not feel obliged to respond on the phone to a seemingly "friendly" request. Be sure both the authorization and the caller are genuine. In most instances, it is best to interrupt the oral query, decline to acknowledge whether or not the person is a patient, ask the caller to put the request into proper written form, and then pass the request along to an appropriate person within your organization (hospital, clinic). If you are in private practice and you believe there is something unusual about the request (and especially if it comes from an attorney), strongly consider checking with your own lawyer or malpractice carrier. Document the call completely, and any actions that you take.

It is often tempting to contact the patient or family to ask about the request, to clarify it, and/or to try to resolve any problem that may exist. I suggest that one not do this when the records are to be sent to an attorney, particularly when the request involves a non-current patient (except perhaps to verify that the request is legitimate, which often should be done by someone other than the clinician). Requests from lawyers or document retrieval services, or from former patients asking that records be sent to an attorney, should be considered *administrative*, not clinical events. In such cases, one doesn't know why the intermediary (lawyer or document service) is involved, nor how things might be complicated if you talk with the patient or family.

If the request appears to be a subpoena (a common format when attorneys or document services request records), *do not* treat the request (demand) as if it were a simple request from a patient or another clinician. If you are working with a hospital or large clinic, refer it to the risk manager or medical records director for response; do not attempt to respond yourself. If you're an independent practitioner, promptly contact your lawyer and/or malpractice carrier.

Never send original records unless a judge tells you to. Copies are almost always sufficient, and may be certified as accurate and complete (medical records personnel know how to do this).

If the entire record has been requested but you do not send it for some reason, document that reason and tell the requestor that you are sending what you believe you can send based on the request or other factors (e.g., in some situations some records covered by federal substance abuse confidentiality protocols or records that you did not create). You may or may not be correct in holding them back, but make it clear that you are acting "in good faith." In general, an attorney or risk manager to whom you refer the request, not you, should decide whether or not there should be some limitation on the response.

Never try to hide or destroy special notes, psychotherapy notes, or other parts of the record, even though it may be proper to withhold them with appropriate notice and explanation to the requestor. *Once a records request is received, the file should remain complete and be protected from loss or change.*

Contrary to what psychotherapists are sometimes taught, psychotherapy notes are rarely exempt from attorneys' requests for mental health records. So far as I know, one is not allowed to hide or withhold psychotherapy or psychoanalytic notes based on the assumption that they have some special exempt status. In most situations and jurisdictions, psychiatric and psychotherapeutic treatment does not enjoy any

greater privacy protection than other medical care. As most readers know, information about evaluation and care for substance abuse is treated differently in some ways from general psychiatric care, but the limiting factor has nothing to do with whether or not the treatment is "psychotherapy."

A lawyer suggests that you meet/speak with him or her about a patient's care. Don't do it. If a lawyer is involved and your care is being questioned, things are already complicated. You are quite vulnerable and should not talk with the lawyer alone. Contact your lawyer and malpractice carrier at once and follow their instructions. They have done this many times; you haven't.

Several months after a patient committed suicide, Dr. A received a call from an attorney asking "if I can make an appointment to meet with you." Upon questioning, the lawyer said that he wanted to discuss some concerns that had been voiced by the patient's spouse, and that "I imagine we can get the whole thing resolved with a little clarification." The lawyer had written authorization from the patient's estate.

Dr. A had thought that the issues surrounding the suicide had been resolved months before. He had expressed condolences, met with the spouse and children of the decedent, and was under the impression that they had accepted the loss as best they could with no implication that the doctor had done anything wrong. Dr. A chose to speak further with the attorney by phone instead of setting up an appointment.

The attorney apologized for doubting the doctor, but "I have to do what my client requests" . . . . "What do you think happened?"

The psychiatrist gave what he thought was a balanced view of the patient's situation, care, and suicide. Unfortunately, his "balanced" explanation included comments that apparently encouraged the attorney to file suit. He heard nothing more until he received a registered letter informing him that he was being sued for malpractice. Over a year later, he heard his telephone comments read back to him during a deposition.

You receive a subpoena. Never ignore subpoenas, but don't respond solely on your own unless you are completely confident that you understand both the subpoena and your proposed response. Document the demand or subpoena; pass it promptly to your attorney or risk manager, and contact your malpractice carrier if you suspect that your own care is being questioned. Note that some subpoenas come from courts; others are from attorneys who may or may not have the authority of a court to tell one what to do. The formats are similar. Let your lawyer or risk manager deal with it.

An attorney asks for a statement or testimony in a legal matter involving a current or former patient. Once again, do not assume that the caller is actually an attorney, or is the lawyer for your patient. In family law matters, especially (e.g., child custody cases), opposing lawyers want access to litigants' mental records. Treat the call as any other request: don't give out information. Tell the caller, in a businesslike manner, to submit requests and supporting documentation in writing.

A psychologist received a call from a person identifying herself as an attorney involved in his patient's child custody dispute and wondering about the procedure for obtaining the patient's counseling records. The psychologist assumed that the person was his patient's lawyer, since the patient had spoken of the dispute and of her female attorney. He told the lawyer that she would have to submit a release before the records could be sent, but in the process confirmed that she was his patient and added, "I think most of her problems are probably behind her now." The spouse's lawyer used those comments against the patient in the custody litigation, implying that the patient indeed had significant problems and that her psychologist merely "thinks" that "most" of them are "probably" resolved.

A patient asks you to become involved in a legal matter (not simply completing a routine insurance or disability form). Patient requests for help outside the treatment setting are inextricably enmeshed in the clinical relationship. The request may or may not be based in real legal need. Some patients are following their lawyers' recommendations to ask their clinicians for something; some are trying to handle a legal matter themselves; some misunderstand the legal situation, and some are attempting to act out within the clinical relationship. Regardless of the situation, patients often misunderstand the limitations on roles that clinicians may ethically assume,

and the potential for conflict between between clinical care and legal or administrative roles.

The clinician's first response should usually be "let's talk about that," especially if the treatment relationship involves any level of counseling or psychotherapy. How is the request affected by, and how does it affect, the therapeutic relationship? One should explore—to himself, with the patient, or both (depending on the context and clinical relationship)—the meaning of the request, what it represents, how various responses might affect the patient's care, and the often substantial countertransference implications.

After three or four counseling sessions, a new patient asked her psychotherapist for a "letter that says I can take care of my daughters." The therapist was a bit surprised, since the patient had not brought up the subject during her initial evaluation, and asked her to "tell me what you mean. What's going on?"

The patient revealed that her husband had threatened to divorce her several weeks before and to take away their children. He had said that all he had to do was tell a judge she couldn't take care of them and "I'd never see them again." She started counseling in a state of near-panic, but had never told the therapist that part of her reason for coming was to prove she was a good mother.

The psychotherapist defused the patient's concerns as best he could, separating fears and fantasies from the reality of the situation. Although her therapeutic ally, he carefully avoided siding with the patient against her husband and offered to see them together (if she wished to do so) for a session or two. The patient declined, but stayed in counseling for several more months, during which the couple remained together.

An attorney asks if you would become an expert witness. The caller may not mention the term "expert," but often uses words such as "testify" or "evaluate" in a context of providing a statement, letter, report, or in-person testimony about a psychiatric or psychological matter. (The law defines "expert" merely as someone qualified to offer an opinion.)

Although forensic work can be interesting and rewarding, there are a number of caveats about agreeing to offer opinions in legal or administrative matters. First, it is almost always unwise (and sometimes unethical) to do so for one's own patient (or former or future patients). There are exceptions for some simple situations, such as maintaining a patient's disability status or becoming involved in civil commitments, but work involving a patient that is outside the purview of clinical interaction very often conflicts with both treatment aims and forensic objectives.[1–3]

A clinician treated a woman for many years in psychodynamically oriented psychotherapy. When she eventually became involved in divorce proceedings, he became an expert witness on her behalf, billing for many additional hours of forensic work. During his deposition, he said that he expected her to continue to be his psychotherapy patient after the divorce litigation was complete. The ethics of the clinician's dual agency was called into question in a subsequent lawsuit against him, and his licensing board became involved.

More information about serving as an expert witness can be found in various articles[4] and books.[5]

An attorney refers a client for treatment. If an attorney appears to be referring a client for clinical care, be sure that you understand the situation completely (and note that the lawyer may not share complete information with you). Many such referrals are at least partially for legal purposes, not merely clinical or humanitarian ones. Try to ascertain whether or not the referral is related to a pending or potential case. If so, carefully question the role of the referral in the litigation. Are you likely to become a witness for the patient? Are your records likely to be used in the case? How will you be compensated? Through ordinary clinical billing? By the lawyer rather than the patient? Via a "letter of protection" (a promise to pay the clinician out of proceeds of a lawsuit or workers compensation, which is often considered unethical if the clinician's work is used in the case)? Are you being asked to offer opinions in the matter (i.e., as an expert witness)? Are you being asked to blend the_conflicting roles of treater and forensic expert?

If you accept the referral, try to be certain it remains a treatment matter. Understand that your records are likely to be viewed by the attorney and may be used in legal proceedings. The patient may

have the impression that you are on his or her "side" in the legal matter, or even expect you to collude with the lawyer on his or her behalf (a common issue in some workers compensation cases). Resist requests from either the lawyer or the patient to become involved as an expert (i.e., offer opinions rather than simply answer factual questions about what happened in the treatment).

A psychiatrist was contacted by a lawyer with whom he had previously worked as an expert witness. The lawyer complimented the clinician on his earlier work and then said that he wanted to refer a client who was severely depressed as a result of being terminated from a high-paying job. The client lived in an urban area about an hour's drive from the psychiatrist's office. The psychiatrist asked for more information, and wondered why the potential patient did not choose his own psychiatrist, and why the attorney thought of him (the psychiatrist) rather than a more geographically convenient doctor. "I trust you," the lawyer replied, and you never know who you're going to get from the Yellow Pages."

The psychiatrist ascertained that the patient would be paying the clinical fees himself, and that he would not be expected to offer any expert opinions in the employment lawsuit that was likely to be filed. Nevertheless, he recognized that his records would probably be disclosed to the lawyer at some point, and that he might be asked to provide "fact testimony" about his diagnosis and treatment. He also recognized that his prior relationship with the attorney might complicate the treatment and prognosis.

The psychiatrist declined the referral and suggested several colleagues who were closer to the client's home. He also suggested that, in the interest of treatment success and the client's well-being, the lawyer try to remain as far away from the client's care as possible.

The Last Word

Be cautious about responding to calls about legal matters, even when your first impulse is to help. Some "clinical" matters are actually legal ones, and vice versa. Your first obligation is to your patients' clinical well being, while the lawyer's first obligation is to his or her client. In some cases, the lawyer and his or her client—who may be a former, or even current, patient— may become your adversary.

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