Being Sued

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I can't think of many worse experiences. Someone comes to your door and serves you with an official-looking paper that says "You have been sued." At that point, it's a done deal. You can't change anything clinically, and you're locked into a process that may take years. It's even bad when you're sure you're going to win and an insurance company will pay if you don't. The dollar cost is not the most expensive part: emotional, time, and energy costs are almost always substantial.

Call your lawyer and your insurance carrier.* Right now. And do everything they say.

Except as absolutely necessary to secure needed care for your patient, don't make any statement about the case, no matter how much you think it may help, to anyone except your lawyer, your insurance carrier, and maybe your spouse. Don't contact the plaintiff or anyone associated with the plaintiff. Don't discuss the clinical case, even informally, with any other defendant or person associated with the patient's care unless your lawyer says it's O.K.

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What If the Plaintiff Is Still Your Patient?

Do not continue to treat a person who is suing you or has officially threatened suit (e.g., with an attorney's "notice" letter). Take appropriate steps to avoid abandoning the patient, and talk with your lawyer or carrier about how such actions may affect the case. Occasionally, a plaintiff doesn't understand exactly whom he or she is suing (and, in large or class-action suits, may not even know he's a plaintiff). In such cases, politely break the news and terminate care in some reasonable fashion.

A child psychiatrist was one of many clinicians sued as part of a large multi-plaintiff action against dozens of doctors, therapists, and hospitals. One child-plaintiff's mother was unaware that she and her daughter were suing the psychiatrist until she called to make an appointment for the child, saying "You're the only doctor who ever really helped her." He declined, and his attorney made a note of the compliment.

If a patient verbally threatens to sue, assess the situation (e.g., is he psychotic? angry about a therapy issue?) and decide whether or not continuing treatment may be imprudent for either of you. Don't assume that you must keep treating the patient for his or her well-being. Therapists are rarely irreplaceable; they need not tolerate personal threats.

Be Honest

Some clinicians are tempted to alter or hide patient records when a lawsuit seems imminent (or even after it is filed). Don't do it.† Any change in the record at this point will be seen as self-serving, even if there is no attempt to hide the alteration. Hiding or destroying relevant information is probably illegal, especially if it is part of a hospital or agency chart or it is changed/destroyed for the purpose of deception. If your conscience isn't sufficient to discourage such action, remember that 1) the plaintiff may already have a copy of the original record and 2) modern forensic science is very good at exposing fraudulent documents.

* You *are* insured, aren't you? In this column, I take the simplistic position that you have malpractice insurance and regularly review your policy to be sure it covers everything you do. It is interesting to talk philosophically about "going bare," but I don't recommend it. Clinicians who believe they are adequately covered by employers or government indemnity should be certain they have coverage that puts them, not the organization, first (see below). Therapists who believe they practice under some form of government "immunity" should know that plaintiffs' lawyers have made a science of finding ways around immunity statutes.

† Some lawyers and malpractice carriers believe that a carefully written note after, for example, a patient's suicide can be helpful in a later lawsuit. One should be sure such notes are accurately dated and timed and are objective rather than appearing obfuscating or defensive..

Dr. Reid is a forensic and clinical psychiatrist in Horseshoe Bay, Texas, and a past president of the American Academy of Psychiatry and the Law. He maintains an educational website, *Psychiatry and Law Updates, at*<www.reidpsychiatry.com> and his most recent book, *A Clinician's Guide to Legal Issues in Psychotherapy*, is available from Zeig, Tucker & Co, Phoenix, AZ. This column contains general clinical and clinical-forensic opinions which should not be construed as applying to any specific case, nor as any form of legal advice.

Your Lawyer

Your lawyer should be one who is experienced in mental health malpractice matters and has a duty to represent your interests before anyone else's. In most situations, you will want a lawyer who is not representing any other defendant in your case (such as another clinician or an agency, clinic, hospital, or employer). Counsel for a public agency, for example, may have no duty to an individual employee, and must always act in the best interest of the agency. The same principle applies to private hospitals, clinics, and insurance companies (with a general exception for lawyers retained to defend you by your own malpractice carrier). If your primary defense is being handled by your employer's attorney, consider hiring a lawyer to monitor that person. The "monitoring" lawyer often need not be intimately involved in the litigation and can keep an eye on your individual interests for a relatively modest fee.

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Fortunately, codefendants (and their lawyers) don't usually sabotage each others' cases, even though they often have differences in potential liability, responsibility, and contribution to damage, and in available money for a judgement or settlement. A hospital or government agency would be ill-advised to alienate its professional staff by blaming everything on one clinician unless he or she really is entirely at fault. The defense lawyers usually work together and share talent and information. There are exceptions, however, and money is a powerful motivator. Defendants accused of criminal behavior or sexual indiscretion, if strongly implicated, should not expect pleasant treatment from their codefendants.

I envy people who can put these matters into their lawyers' and carriers' hands and go on with their lives, secure in the knowledge that someone else will take care of it. Most mental health professionals aren't made that way. It may help to remember that by the time the lawsuit notice is received, the relevant clinical work has been over for months (or years). You are now in the legal arena. Let the lawyers do their thing, help them, and try to avoid second-guessing your clinical decisions.

Help Your Attorney

Your lawyer is likely to ask you to do some of the spadework for your case, such as literature review and researching your records. Following your lawyer's advice comes under this heading as well. Communicate well (and demand the same of your lawyer), satisfy yourself that your interests are being protected, and don't be a *prima donna*. If you believe you are being inadequately represented, take appropriate action; beyond that, don't try to run the show.

Notice Letters

In many jurisdictions, the plaintiff's attorney is required to notify you that he or she is considering a lawsuit. While scary, this is a good thing, since it gives your lawyer a chance to convince the potential plaintiff that it's a bad idea. (This is your lawyer's job; do not try to do it yourself.)

Notice letters often include requests for communication or records. Don't ignore the letter, but do not accede to the requests without a lawyer's advice, no matter how innocuous they seem. Refer all questions, orders, or other communications from the plaintiff or plaintiff's lawyer (including phone calls) to your own lawyer or malpractice carrier. You probably shouldn't even provide the name of your malpractice carrier; let your lawyer or insurance company respond for you.

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You should consider calling your insurance carrier whenever you are associated with a serious adverse event (such as a suicide or other bad treatment outcome, especially if accompanied by criticism from the patient or family). Your policy may require that you not wait for official "notice" if you have reason to believe a suit is likely. Routine notification should not prejudice your coverage or rates, and your local agent can often provide good advice.

Incidentally, in many states a malpractice suit cannot be filed until the plaintiff's attorney submits a report or affidavit from an independent clinical expert who agrees that the allegations have some merit. Don't take too much comfort in this bit of lawsuit "reform," however. A few unscrupulous forensic professionals make their living largely by churning out such affidavits "boilerplate" style.

The Complaint or Petition

The "complaint" or "petition" is the initial legal document that summarizes the plaintiff's allegations. It is terribly discouraging. It doesn't say that you *may* have made a mistake; it says you *did*; there were a dozen of them; they were all whoppers; they damaged the patient horribly; and you were reckless and uncaring in the process. It doesn't mention the times you answered calls in the middle of the night, the hard work you did during that last crisis, or all the other patients and families who appreciate what you've done for them. It doesn't give you any credit for trying to help your patient, but assumes that you had virtually no interest in his welfare. The plaintiff must prove the case against you, but explaining and defending your actions, and convincing the jury that you are not the worst clinician since Josef Mengele, is your job (through your lawyer), not the plaintiff's.

Is that fair? Well . . . yes. Remember that ours is an adversarial system. Assuming the plaintiff honestly believes you were negligent, he or she is entitled (within reason and certain rules) to vigorous pursuit of the claim. By the same token, your lawyer has a duty to defend you with the same vigor. You can usually expect the plaintiff's lawyer to treat you civilly in person (such as at deposition or trial), but that's sometimes just to make you feel comfortable enough to let down your guard. Don't take it personally.

Interrogatories

Interrogatories are formal questions from one side of the lawsuit to the other which must be answered, or any lack of answer explained. The plaintiff will send interrogatories through your lawyer, who will need your help to answer them. Expect questions about the case, but also about such things as your insurance, finances, education, practice, past problems, and other topics. Your lawyer will advise you about questions that need not be answered for some reason (such as those that are unduly onerous) and will help you deal with the others.

Expert Witnesses or Consultants

Clinical expert witnesses or consultants may be retained by either side to review the facts and provide opinions which the lawyers hope will support their cases. The expert for the defense will help assess the merits of your case and may discuss defense strategy. He or she usually has experience with both plaintiffs' and defendants' cases and, although rarely a lawyer, should understand the clinical and legal aspects of your situation.

A good expert works for your attorney, not for you. His or her usefulness depends on experience, objectivity, and credibility. That means the expert may not come to an opinion which supports you, even though your lawyer or insurance carrier is paying (sometimes a lot) for his or her time. Your attorney will use the expert's findings to assess the strengths and weaknesses of your case, plan the litigation, and perhaps assist in settlement negotiations.

Depositions

Depositions ("discovery depositions") are opportunities for each side to discover the strengths and weaknesses of the other's case. The civil system is designed to prevent last-minute Perry-Mason-like surprises. Unless your case is dismissed or settled at an early stage, the plaintiff's lawyer will have an opportunity to ask you questions, under oath and in a setting as binding as a court, about almost anything related to the case except those matters protected by lawyer-client privilege. Your lawyer will have a chance to do the same with the plaintiff. Any potential witness may also be deposed (and usually is), whether he or she has personal observations to share (a "fact witness") or is scheduled to offer expert opinions (an "expert witness").

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Mediation and Arbitration

Mediation and arbitration are formal attempts to resolve legal disputes quickly and inexpensively, sometimes even before a lawsuit is filed. In *mediation*, the parties negotiate much as they would for a settlement (see below), but with guidance from a professional mediator (often a retired judge). Successful mediation leads to an outcome that is acceptable to both sides. *Arbitration* is more "legalistic," usually involving a binding decision by a judge or other official arbiter. While either process may be preferable to a trial, arbitration is sometimes criticized for its win-or-lose outcome in the absence of a court's due process. Some states and malpractice insurance policies require that the parties attempt mediation or arbitration before continuing the lawsuit process.

Settlement

By the time evidence has been exchanged, the experts have rendered their reports, and the fact and expert witnesses have been deposed, the two sides know a great deal about each other's cases. There may be good reason to settle the case and avoid a trial. Trials, after all, are very expensive and bring with them a greater or lesser chance

of losing. A settlement may be negotiated at any time after the suit is filed, even (and not uncommonly) during the trial itself.

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Settlement is a dirty word to many malpractice defendants who want their "day in court," but the fact is, most cases never go to trial. Settlement is not an admission of fault, but acceptance of the chance that a jury (or, less commonly, a judge) will decide against you. Your malpractice policy specifies the extent of your right to refuse settlement. Some give one the right to insist on a trial but limit the carrier's liability to the amount for which the case could have been settled. Read your policy carefully.

Summary Judgement and *Res Ipsa Loquitur*

Your lawyer may try to have the case dismissed at an early point by presenting a judge (not a jury) with evidence that the suit is so obviously groundless that it would be a miscarriage of justice and a waste of time to take it to trial. Motions for this "summary judgement" are often granted for the defendant (assuming the motion has merit). But not so fast—the plaintiff's attorney will be at the same hearing, vigorously opposing your motion.

Very occasionally, a malpractice case is so heavily weighted against the defendant that "the thing speaks for itself" (that's what *res ipsa loquitur* means). If, for example, a surgeon amputated the wrong leg and chose to take the subsequent malpractice suit all the way to trial, the plaintiff's lawyer might skip all the witnesses and simply say, in effect: "Everyone admits the wrong leg was amputated. That's all the information the Court needs to award the patient the money he deserves."

Trials

Settlement is common, but your lawyer will always assume that your case will go to trial. He or she cannot afford to think otherwise, and neither should you.

The case may take years to come to trial. Once it does, the lawyer's demeanor changes dramatically. Everything comes down to a few days of intense effort and rapid decisions about what parts of the now-massive case will be focused upon in the limited time allowed (many malpractice trials are over in a week or less). Much of what you think is important may never be aired in court. Feel free to suggest that certain points be brought out, but trust your lawyer to decide how best to present the case.

Appeals

The losing party may appeal the trial verdict to an appropriate higher court. Appeals courts review only matters of law (e.g., the "technicalities" of the trial process). A jury's or judge's decision of "fact" (such as who did what and to whom) cannot be appealed. There is no jury in an appellate hearing, and witnesses are very rarely called.

The Final Word

I hope we never meet under the above circumstances, but statistics suggest that it could happen. Have a good lawyer and let him or her run the show.