

Title: Ask the Experts: When an Attorney Calls

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Next, this program does not offer CE, however, we will email everyone watching live today a Certificate of Attendance. Certificates will only be issued to those who watch for a minimum of 45 minutes. A recording of the presentation will be emailed to everyone in about two weeks time. The email will also include a copy of the presentation slides. During our time together, you will be on mute.

You can communicate with us using the Q&A box located on your webinar screen. If you have a question for our presenters, we ask that you type them in using that Q&A box on your webinar screen. A link to the presentation slides will also be posted in the chat box. If you miss them, don't worry. We will email them to you along with the recording. With that, I would like to hand it over to our panel of speakers for today.

Speaker: Hello everyone. I'm Alan Nessman with Legal and State Advocacy in practice. We just lost our moderator to laryngitis two days ago. Things may seem a little less organized than usual, but we have a lot of great questions from you. We're going to try and make the introductory stuff short because we have a lot of good questions. Let me start by introducing our speakers starting with our good friends at Allied World who are the risk managers for American Professional which has sponsored this webinar.

Allison Funicelli, we've done several presentations of these ask the experts presentations with her. She's been at Allied World for three and a half years. Both Allison and Cara are assistant vice presidents in the Risk Management Group. Allison has 30 years of experience in the medical professional insurance industry and then-- Allison, did I leave anything out?

Speaker: No, you got it. Don't worry about it. [laughs]

Speaker: Our presenters are so illustrious. They have very long bios. Then Cara is new to us and I think this is our first webinar with her. I've got to meet her a lot at convention. Although she's just recently joined Allied World, she has over 20 years of experience working in healthcare, specifically in the areas of risk, patient safety, insurance claims, [unintelligible 00:03:35] management, health information management, et cetera.

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Then my partner crime, Connie Galietti, has been with APA since 2014. She works with me on a lot of these questions that we answer [unintelligible 00:03:54]. Remember she actually does the lion's share of answering member questions. She cut her litigation teeth as a Deputy Prosecuting Attorney in the sex crimes unit in Indianapolis. That's her litigation background. Before coming to us at APA, we knew her as Executive Director of the Florida Psych Association. She was in that role for 10 years. I'm Alan Nessman and I've been at APA for 22 years. My specialties are insurance, HIPAA, parody, and a lot of these new issues that I'll mention in a second, and before that, I had 15 years as a law firm litigator. Some of my experience on depositions and stuff like that comes from that. Connie, did I leave anything out about you that you want to cover?

Speaker: Nah, that's good.

Speaker: We've been discussing that a lot of our recent webinars both done with our friends at Allied world and the webinars we've been doing in LSA and in practice, have focused on the hot new issues, things like how are practicing psychologists affected in the post Roe v. Wade world, the No Surprises Act, Information Blocking and the Cures Act stuff. We realized that we have a lot of these perennial issues that members still have questions about and we felt like we should get back to some of that. The issues about how to deal with attorneys, how to deal with the legal system, this causes our members a lot of anxiety and our job is to calm people down about this. Once you understand how things work, it does tend to calm people down.

That's the basis of it. We're going to try and have a free-flowing conversation here. I'm still recovering from COVID, so a little COVID brain may be affecting my pronunciation there. We're going to try to have a free-flowing conversation. A lot of good questions have been sent in. We decide we're going to try and get through most of those first before we take questions from the audience. Connie, can you take over with when an attorney calls?

Speaker: Sure. Thank you, Alan. I want to remind everybody because in case we don't get through all the questions today, one of the wonderful benefits you get as a member of APA is access to folks like me, Alan, and other folks of the legal team. We're not leaving you hanging if we can't get through everything today. We put this together. This was a topic of conversation that Allison and Cara presented during convention at the exchange and it was so well attended and it seemed like a lot of issues still needed to get discussed so we thought this would be a great opportunity for us to reach more of you.

The reason it is popular is because you can't always avoid being involved in legal matters with your patient. Even if you don't have anything to do with forensic psychology, there could be some point in your career when you're facing this issue. We're going to go through some of the issues that we've put here on the screen, next slide. We're going to go through the analysis and you'll notice that we've listed a few situations where you might likely find yourself drawn into some legal battle. The analysis that you're going to conduct and the process for deciding how and what you should provide will be pretty much the same. Next slide.

Part of the registration process was your opportunity to submit questions in advance which was really helpful for us in organizing this presentation. We're going to just go through some of the most commonly asked questions and try to get through some of the high-level issues and then leave time at the end. The first one, I think Cara and Allison are going to be taking the lead on these questions.

Speaker: I'm Allison. The first question is, what are some of the preventative measures that we recommend at least from our risk management perspective? The question also asked, are there informed consent disclosures or charting considerations? The first thing as far as from a preventative measure is being open and honest with your patients and clients and disclosing what your office policies are.

We might talk a little bit more later about what do you do as far as can you tell your patients, I don't get involved with litigation. We'll talk a little bit more of that in more detail later. The key is whatever your office policies are, you should give that information to your patients up front and they should sign off of it and they understand what the rules are. Then as far as charting considerations, if you are asked to talk to an attorney on behalf of a patient or an attorney that's opposing on the opposing side of litigation against a patient of yours or former patient of yours, you should document that discussion. That would include any email exchanges. From a risk manager perspective, we say anything of substance you should avoid texting.

If there's texts of substance, that should also be part of your documentation. Then of course don't speak to anybody without permission from your patient because you have to comply with HIPAA. Should I advise my clients not to be subpoenaed? That's what I was saying before. You could technically tell your patient, I don't want to be subpoenaed a court order, but that doesn't mean it's not going to happen.

Unfortunately, patients have the right and if they're in litigation-- if they choose to have their attorney subpoena you or an opposing counsel may choose to subpoena you, whether it's for records or testimony. A court certainly has the right to court order you to produce information or testimony. Even if you tell your clients you can't do it, I won't do anything about it, doesn't mean it's not going to happen. Again, we'll get into more details later about what happens when you do get subpoenaed and do you need to respond? It's up to you if you want to tell them that, it might dissuade them, but it doesn't make it not potentially going to happen.

First contact with an attorney. What are the steps I think that you should follow when you're first contacted by an attorney? We always recommend-- we get questions like this all the time on our risk management helpline for our policyholders. I assume whatever insurance carrier you're insured with, hopefully, you have risk management services available to you. That's what I always say. The first thing is do is call your risk manager or if you have a practice attorney, if you have attorney that's skilled in understanding healthcare law and these kinds of nuances, you can certainly talk to them. This is a question we get fairly frequently on our helpline is what should I do? My first step is contact someone to help you. We don't want to just jump in without having some plan in place before we call an attorney because we don't want to get sucked into information that we might not need to provide or that might hurt your patient. First up is ask for guidance. If you work at an institution, you might have risk

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management services or a general counsel office at your institution that can help you. Certainly, if you're an APA member, you have the services of Alan and Connie's group as well.

Speaker: I'll just add always keep HIPAA at the forefront when those calls come in from an attorney. Often the guidance we give is when an attorney calls sometimes there's that fear and ultimate, oh my gosh, what are they calling for? Don't feel pressured to respond at that moment. I think is the best tip that we can give away is also being mindful that that first call, even though they might be calling on behalf of someone you're working with, you don't want to disclose that there is a relationship because you don't know if you have the appropriate consent from the individual. Again, you can certainly be respectful to that attorney and say, "I, unfortunately, cannot speak to you until I obtain the appropriate consent. You can certainly send your request to me in writing."

The recommendation we give from the risk management side is being mindful of blanket consents that individuals may have signed with their attorneys, especially when they might be involved in litigation that has nothing to do with you. They might have signed that release with their attorney that may be six months ago. It's important for you to make sure that you get your own consent from your client so that they're aware that someone's requesting their information. Then you also have the documentation that it's okay for you to release it. Again, there's no need to respond immediately is the first takeaway when an attorney calls. I see Connie shaking her head, everyone is too.

Speaker: What tricks should we look out for an attorney calls? Because attorneys are tricky people sometimes. I'd be wary of someone who comes out of the gate intimidating, trying to intimidate you and bully you into giving information or you better call me back. Going back to what was just said, you don't have to respond right away and getting that call from an attorney, especially when it's unexpected. Sometimes patients will give you a heads up, I'm involved in this lawsuit or whatever, expect a call.

If it comes from out of the blue, I know it gets the heart rate going and it's like, "Oh, what do I do?" Take a breath, that's fine. If they're intimidating, if they're relentless, if they keep wanting to talk to you and won't take no for an answer, sometimes a good response is, you know what, why don't I give you the number to my lawyer and you guys can work it out and we'll set something up to put them back a little bit, but just look out for the intimidation tactic and don't fall for it.

Another trick would be overly charming and overly sweet. It's a great tactic to try to get information from you because your guard's a little bit down. You just want to be careful not to divulge too much information, especially before you do the analysis. Like, why are they calling? Who do they represent? Do I even have permission for my patient to talk to this person? Just don't fall for that.

Other tricks too is when they call you, say you are treating psychologist, and they start asking you to give opinions about issues towards that ultimate fact issue. Like, are they the better parent or-- you want to be careful not to be drawn into a different role than what you have with that patient. Another tactic is to try to get you really

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fired up and emotionally involved to be an advocate for the patient where it might be easy to lose your objectivity and then you end up in your own set of problems because boundaries are crossed, you've lost that objectivity.

We see this sometimes in folks going through domestic violence situation where the patient does seem to be the victim and things are really unfair. Then they're trying to get you to be an advocate even beyond what you're supposed to be doing with the patient. Just be careful there. Also, it's not really a trick, but one of the things you should listen for when talking to an attorney is, believe it or not, they're not always the smartest ones in the room. You guys are when it comes to mental health and the care for your patient and your code of ethics, your rules.

They may not understand the patient privacy issues, the HIPAA issues. You have to be prepared to educate them and if they don't seem to really understand, that's just a red flag and you might want to step back a little bit and maybe even give one of us a call about how you proceed with that. Is there an ever situation where you would not reach out to the client? Cara, Allison?

Speaker: Yes, I would say there's not any situation that I can think of from a risk standpoint. You always want to make sure that your client is aware, especially if they're calling about them. Making sure that that-- I always say with an attorney contacting you, remember they're representing a person, so whether that's your client or if it's a divorce or custody situation, they might be representing the other parent. Again, you always want to make sure that your client is aware that this attorney has reached out to you because ultimately the client can tell you to speak to them or not, you need their permission. Allison, I don't think there's any situation I can think of where you wouldn't inform your client.

Speaker: No, not really because you don't want to violate HIPAA. There's all sorts of rights. I think you have to be careful. If you have some weird situation where you're really not sure, again reach out and ask somebody to help you answer that question. If you think that you have some situation that you think might fall into, I don't need to talk to my patient first.

Speaker: We get this question a lot. Psychologists think that it wouldn't even be helpful for them to be involved. Sometimes honesty is the best policy. I can think of an example of calls we get where the client's attorney really wants a psychologist to talk about how great of a parent they would be when that's not your role. Sometimes, again, with permission, a call to that attorney saying, "Look, I can't help you because I can't offer this information." They might feel and realize you're not really going to help and that might get you out of their crosshairs for a while.

We also get that when a patient is involved in a lawsuit, for example, if one of your patients is suing a former employer for wrongful discrimination and they're claiming that they're really depressed and their mental health has been really impacted and if you are treating, if you've been treating this person for a long time for depression and you can't quite connect the dots, it might be helpful to let the attorney know. Again, it is not your role to tell attorneys what the theory of their case should be, or what evidence they think is good for their case. No matter how strongly you feel about it, if you are compelled or requested to give information, just be prepared to do so.

Speaker: This question comes up a lot, fact witness versus expert witness. The first question is, explain the difference between a fact witness and an expert witness and how do you untangle the boundaries? Once you understand the difference between the two, there's not that much to untangle because they're very distinct roles. Most often if you are being asked to provide testimony in your client's case and it's a case where you treated the client most often, you're being asked to appear as a fact witness.

An important thing to remember is there's the ethical consideration of multiple roles and being the treating psychologists and an expert witness in the case are two different roles and generally psychologists don't play both of those roles. We often have attorneys who think that they can get a twofer because, "Hey, well you're testifying anyway about this client's care and so you can also be our expert." I've done some quick research, and I think one of the reasons for that confusion is that I don't think that same prohibition applies to physicians. I think attorneys may be used to this concept that, yes, the treating professional can also be the expert witness. For psychologists, that should rarely be the case.

Let me talk a little bit more about the two different roles. The treating psychologist is a fact witness to talk about their treatment of the patient. An important thing is when you're in that role, you should really be just talking about-- you shouldn't be answering speculative, hypothetical questions that didn't come up in your treatment of the patients. The only opinions you should be giving are the opinions that you had to form as part of your treatment of the patient. By contrast, an expert witness is typically retained by the lawyers to provide an outside expert view of the case. They're usually selected for their expertise and there's a whole process for that.

Part of the thing to think about is that the expert role is a voluntary role. It's an agreement that you'll be the expert in the case. Fact witness less so, as we discussed, you may not want to be involved, but if you're subpoenaed and the client consensual, the court orders it, you generally do have to testify, but you can't-- attorneys think they can pressure you into being an expert. You're not an expert unless you agree to it. As we discussed, if you're already the treating psychologist, in most cases you should not be the expert.

The expert role is a forensic role. In that role, you can provide expert opinions on the key and ultimate issues in the case, such as cause, extent, or impact of the patient's psychological state, and so that's just a very different role. Once you understand that these are very different roles, I think you don't have to worry as much about untangling them because they're just very distinct roles and the fact is you shouldn't be playing both of them.

We had a recent thing where a member had the attorney saying, "Well, it's very inconvenient for us, for you not to be our expert, we're relying on you." I said, "It's going to be very inconvenient for you if you're defending a complaint that you were playing multiple roles." We may get into a little bit of this later, but that's it for experts, I think.

Speaker: Ah, my. This first question. Is it okay to avoid accepting a subpoena? I can't give permission for that. I'm not sure why you want to avoid it unless you just

didn't want to be involved, you're a little afraid of the process, maybe there are other issues but what I can say is that you can require that they serve the subpoena appropriately. Most jurisdictions or I would say all jurisdictions have rules of procedure that govern, what they consider to be appropriate service of a subpoena. I would just make sure that that is done appropriately.

I'd also wonder when you talk about avoiding accepting a subpoena or being involved in any way in a patient's case, you also need to look to whether it's beneficial to the patient or not. If it's an issue where you could be helpful to the patient I don't know that that would be a bad thing to become involved. Just make sure it's done appropriately with the proper authorizations or court order.

The different types of subpoenas, typically subpoenas are issued by the attorneys in the case as part of the discovery process in order to get information. They will send sometimes what they call a subpoena duces tecum which it means you shall bring with you, which is like the records. They either want that sent to them, delivered in some way, or brought with you to a deposition. Then you also have subpoenas to appear for a hearing, et cetera, those are the different kinds.

Every once in a while, you will get a subpoena that was signed by an actual judge or administrative law judge, which can bear the weight of a court order, which could permit you to give information without the patient authorization. If you get a subpoena that you cannot tell the origin of or what it means, please give us a call at the American Psychological Association or your risk managers and we can go through the wording and help you discern what your obligations might look like.

Speaker: Does a subpoena require the psychologist to comply? Under what circumstances can a psychologist quash a subpoena? I'm going to tell you, you should not be doing that on your own. You should be having guidance and counsel. Generally, you have to respond to a subpoena. I think Alan's going to talk a bit or Connie might be talking this a little bit more in detail later. But the thing is, you can't ignore, don't ignore a subpoena. We don't want to be in any kind of contempt.

Again, whether you have a practice attorney that could help you, if you need some advice from American Psychological Association or, again, if you have a malpractice carrier or an institution that you work at, go get advice. A lot of carriers do provide services that will help you in responding to a subpoena. Don't feel alone, don't feel you need to do it on your own and you want to make sure you respond appropriately. Certainly, there are times when an attorney will have the ability to quash a subpoena and you won't have to comply with it. Again, I wouldn't do the legal part of that on your own, I would certainly be seeking advice from an attorney to assist you in that.

Speaker: I'll jump in real quick. Thanks, Allison. She was right, you have to respond, but you don't always have to comply. The difference is, they want all the records of patient X and there's no accompanying permission that allows you to do that. You still have to respond to the subpoena so your response is simply, "I've received your subpoena, I cannot release any patient information without their authorization or a court order." That's your response.

Remember, if you do go to quash a subpoena for any reason, don't expect your patient's attorney to do that on your behalf. You'll probably have to get your own because, again, your patient's attorney represents the patient, not you, so you need someone to represent your interest, even though your interest, in this case, is to protect the information of the patient. Anything else to add to that, Alan or Cara?

Speaker: Yes, I think you covered it all. Just to add, we had one yesterday where the subpoena was texted to the psychologist and it was unsigned. Sometimes you might even just say, this doesn't even seem like a valid subpoena, but to me, more commonly as Connie says, you'll respond saying, "I received your subpoena, but I cannot respond absent to patient's authorization or court order."

If you may see in subpoenas, lawyers when they do discovery requests like subpoenas, they ask for any all blah, blah, blah, they tend to ask for the world. Important starting point is that in this kind of context, normally what they're expecting or what you'll be providing is the patient's record. Instead of having to respond to everything in the kitchen sink kind of request, what you do is you just say once you have appropriate consent to move forward, once you have the patient's authorization or a court order, you can respond and say, "I will provide you with the patient's record."

That's typically what attorneys are expecting in these kind of cases. In giant corporate litigation, you send people going all, screwing all around, looking through every file to try and find other things but generally it's the patient's record that the attorney is looking for and that's the starting part. If you've been seeing a patient for a really long period of time and you have a giant phone book kind of patient record, and really all that's relevant is their mental state due to a car accident six months ago, you might get back to the attorney and you might or even push back and say "What they were doing 20 years ago, isn't that relevant?" In general, attorneys do want to **[inaudible 00:29:59]** We want to see everything, we'll sort it out. Sometimes, I'll say, "Okay, we really just need the most recent stuff."

Speaker: Can I just add one thing?

Speaker: Yes, sure.

Speaker: Which is also when they say they want any and all things, remember that there were extra protections for psychotherapy notes. We want to make sure that we aren't disclosing those unless we have to.

Speaker: It'll get into that in a later question. Yes, thanks.

Speaker: How do we prepare notes when they are subpoenaed? We chose this question because I wasn't sure what it meant by prepared notes. Just touch on the fact that, obviously, you cannot go back and change anything that you have already recorded in your notes. You want to be careful about that. Also, when we talk about whether to redact certain information or only give certain information, you would, again, look to how the subpoena is worded, how the authorization or court order is worded so that you can determine which bits of information they're actually requesting.

Speaker: I can talk about, if you'd like, the summary. Oftentimes, when there are requests for records, we do receive this question, "Can I write a summary?" If a summary is appropriate, you certainly can, but keep in mind that that summary might not pacify the requester and the full record, ultimately, could be requested. With summaries, we're often cautious. We want you to be mindful that that summary needs to be objective, and really, your documentation needs to support what's in that summary because you don't want a summary letter to appear different than what was documented in your chart.

Again, be mindful and think through whether or not that summary can be done within a true objective, the synced picture of the actual record. Pros and cons is taking the time, obviously, to write the summary, is that going to take you more time to then review the record, come up and draft the summary, which ultimately, the record could be requested in its entirety by the requester? Then making sure that your client would also have the opportunity to review that summary to make sure that they're aware of it as well. Those are some considerations regarding drafting a summary that they can suffice, but it doesn't always work because they ultimately want to see, as Alan indicated, that entire record to work on their case.

Speaker: Oh, sorry, Alan. If I could jump in real quick.

Speaker: You [unintelligible 00:33:15]. You might be covering the same point I've covered. Go ahead.

Speaker: Right, because you, also, if you've omitted certain information, either accidentally or not, that could open it up to accusations that you cherry-picked information that would be helpful to the patient, even if it's not intentional, or if it's just because you thought it wasn't as important. That's something you don't want to be cross-examined about because they'll make it look like you are not being forthcoming, and you certainly don't want to risk your own reputation in that respect. Alan, I don't know what you were going to say.

Speaker: I was covering [unintelligible 00:33:52] the parallel point, that attorneys are always interested in contemporaneous documentation. What were you saying about the patient before this lawsuit came up? Once you're aware of the lawsuit, even if you aren't intending to change your records, it may affect what you write down. That's what attorneys love contemporaneous records because you're writing them without knowing these issues that have come up now, you may be feeling things differently, you may be saying things you wouldn't have said otherwise, et cetera.

[silence]

Speaker: Let's talk about psychotherapy notes. First of all, I'm not sure what's meant by informal psychotherapy notes, but the question seems to be can they be held separately from clinical notes? The first thing is, if they're not separated from the clinical notes, they don't qualify as psychotherapy notes. One of the fundamental things about them is that they're separate from the rest of the record. The HHS hadn't defined what separate means, but I always tell people, "If you get hit by a bus,

can someone easily determine these are the psychotherapy notes, this is the clinical record?" It's an interesting thing.

An important consideration is that, and this is maybe the point at which you protect them is that under HIPAA, the attorney needs a separate HIPAA-compliant authorization for the release of the psychotherapy notes. A lot of attorneys aren't dealing with psychotherapy notes much, so they may not know that. Back to what I was saying earlier in the terms of the strategy of telling the attorney, "Here's the patient record," what you might do in that circumstance is you could just say, "I'm sending you my clinical record."

They might not realize that that's not including the psychotherapy notes, but until you have a separate authorization for the psychotherapy notes, you can't release them under HIPAA. Now, the interesting thing is once you get beyond that point, psychotherapy notes are great protection. Connie and I deal a lot with insurance audits and stuff like that. They are always good protection against insurance companies' payers getting the information.

Once you're in the court system, if the patient authorizes the release of them, or if the court orders them, then you can argue that they're not relevant. Outside of the healthcare arena, the protections aren't as strong. Once you've gotten a court order or a separate authorization for them, you could argue that it's not relevant. The general tenure of courts on discovery is if it's potentially relevant, and it's not privileged, the inclination is to let it out in discovery.

Speaker: Then if I could just add because there was a part of there about the EMR. We always tell our policyholders, "One is if you have a paper record, keep it in a separate folder. If you have an EMR, it should be in its own tab that, really, only you, as the provider, should have access to," so that they enjoy that protection.

Speaker: Yes, thanks for adding that. [silence] What should I expect in a deposition? Back in my prior life, I used to prepare people a lot for a deposition. One of the key things is to remember that a deposition is very unlike a conversation with a friend. When you're talking, when you're having a social conversation, it's like a noncompetitive tennis game. You help volley the ball back across the court. You figured you know what the person's asking, and it's a free-flowing conversation. When you're being deposed, it's being recorded, and what you say may be used against your client, could potentially come back to be used against you. It's a very different process.

One of the key things to remember is that in a conversation, you tend to have a free flow, and a psychologist always want to seem smart, so you always want to be able to answer things quickly. In a deposition, one of the key things is take your time. It's not a speed test. The lawyer if they're a jerk can say, "Let the record reflect that Dr. Smith is taking a minute to answer this question." You should take your time. One of the first things to do is make sure that you understand what the question is. If you're unsure, ask for clarification. "Do you mean X or do you mean Y?" If you start answering a question assuming you know what they're asking but they're not, that could actually create confusion in the record.

One of the things is before you answer-- once you decide you understand what the question is, the other thing to do is think out your answer before you start talking. In regular conversation, you start the sentence and see where that train takes you. In a deposition, you don't want to do that. You don't want to wind up down the tracks and realize, "Oh, I didn't mean to say that." Part of the taking your time and being mindful is think through your answer before you speak. These rules really apply when you get to the beat of the thing. You don't want to be obstructionist when they're asking you where you went to school and stuff like that.

Once you get to the key issues in the case, this is where you want to slow down and be careful. The other thing is you only answer the question asked. It's the attorney's job to ask the questions to get the information. The normal tendency is to say-- They asked you, "What was the patient's condition when you first saw them?" In a normal conversation, you say, "This is their condition when I first saw them, but after we started treatment, that this happened, and that happened." They didn't ask you that. You don't need to answer that. It makes the record cleaner for you to be responding to what they're asking.

Again, it's not your job to go where you think the attorney wants to go with it. Let them elicit the information by asking you the questions to get there. Along the lines of what Connie had said earlier, don't be intimidated by pushy or bullying lawyers, but also don't be lulled by the charming, friendly lawyers. That was always my strategy to just seem very relaxed. I'm your friend, you give away the store, and

I'll act like I'm just not excited by everything you just gave away. Those are the basics of depositions. Once you understand that and take your time, it'll go much better. Anybody else wants to add to that?

Speaker: We'll just point out, just from the risk management standpoint, if you do get a request or deposition, turn it over to your malpractice insurer, and chances are, there's someone there that can give you guidance as well. Not something that we do share with our policyholders, but if they do get that request, they're not by themselves. They don't have to face those questions alone. They can get some good advice.

Speaker: I actually just want to add that a lot of these pointers, both on this topic, and on the fact witness versus expert witness, we had done an article earlier called *Providing Information In a Patient's Lawsuit*. If you contact us at praclegal@apa.org, we can send you a copy of that so you don't [crosstalk]--

Speaker: I just put a link to another article in the chat as well, so it'll take you to our website.

Speaker: Thanks, Connie. [silence] Oh, there was a sub-question on that, which I forgot to cover, which is what if you don't know the answer to the question? In a deposition, it is what it is. It's not your job to seem smart or to seem informed. You want to really just say, "If you don't know the answer, you don't know the answer." Another thing is, if you're not sure, it's always good in the deposition to signal your level of certainty, particularly if it's something that happened 5, 10 years ago, your

memory is not all that perfect. It's helpful to say, "I'm not sure this is what I think to the best of my recollection."

That also helps if they're looking through the record and they find a got you thing, then it protects you in case something else comes out and you realize, "Oh, yes." The other thing is, it's helpful to provide information as to your level of certainty, and just being more upfront about what you know, don't know, or are uncertain of is helpful in that process. Oh, and so on this question, what should we answer questions on the ultimate topic? This goes back to the expert versus fact witness.

Typically, an expert witness will be allowed to answer questions about the ultimate topic. What was the cause of the patient's psychological distress? Who's the appropriate parent in this custody battle? If you're talking about custody, you should be following the child's custody guidelines before you're acting as an expert. It would be rare for a fact witness to be answering that question unless maybe if you happen to formulate that opinion as part of your treatment of the patient, but more commonly, those are answered by experts. Next question. [silence].

Speaker: I think this is about the fees. Am I in the right question about getting paid or did we skip over?

Speaker: [crosstalk].

Speaker: No, it was just, "Do you hire a lawyer?"

Speaker: Oh, well, I'm going to say, on that regard, if you have a malpractice policy, which I imagine most of our listeners do, again, contact your malpractice carrier. I think a lot of providers think, "My policy's there if I get sued for malpractice case," or, "I'm named in a licensing board complaint," and we get lots of times of, "I'm not in those situations, but can I get some help?" The answer is usually yes. Just read your policy. Again, if you're not sure, ask your insurance broker, agent, or whatever, or contact your malpractice carrier because these are types of services that you might be afforded without it being a cost to you. Before you start spending money, see if there's someone else that might help you along the way.

If you're an expert witness, no, I doubt that they're going to help you, but if you're a fact witness, and you're called in for a deposition or testimony, at a minimum, you might be able to get some help on how to prep you behind the scenes. Then it may be all the way up to the point of they even will represent you at that deposition. I would go check your resources before you start expending your own money or wandering into territory on your own because you're afraid you can't afford it and you don't realize there's resources. Check that first so that before you go off on your own because you might not have to do that.

Speaker: I would also add that, think about the risk level in the case. If your policy covers it, it's definitely good to check with your malpractice care because they may see some landmines that you don't. If it's one of those cases that causes knots in your stomach and a difficult patient, your borderline patient, where things could definitely come back, invite you, and in the form of a licensing board complaint or a lawsuit, that's when you definitely want to have some help if you can get it.

Speaker: It might depend, too, on what you're doing. If you're a forensic psychologist, you might be used to testifying all the time. That might be something that you don't need to worry about hiring an attorney or involving a malpractice carry every time. For the folks that aren't involved in that type of form regularly, I would go get some advice and some help. Don't feel alone. My thing is always, "Don't feel like you have to be on an island by yourself."

Speaker: Next [unintelligible 00:46:27]. I can take the lead on this one. The question is if you require clients to pay for legal services, which a lot of people have in their informed consent, their business agreement with patients, what do you do if the client doesn't pay your fees? That's not going to be a defense to the subpoena. That's an issue between you and your client. You can't say, "Oh, I can't respond to subpoena because they haven't paid me." You're answering to the legal system and it's just a separate issue. Anybody else want to add thoughts on that?

Speaker: I agree with having it upfront in you, I say, "Business agreement," with your patients at the onset.

Speaker: Yes. [silence].

Speaker: What limitations should I be aware of on billing for the time I spend interacting with the legal system? Can you charge for that time? Generally, yes. You generally can charge for the time. If you are being asked to be deposed. I've had folks say, "How much can I charge?" I think that might be another question coming up, but, "How much can I charge?" I always tell folks, "Whatever you're going to charge, be reasonable." I would say, at a minimum, it's whatever your hourly rate is for your sessions. We also don't want to be in a point where someone is claiming that we're gouging them.

Again, if you're a fact witness, I would be reasonable in your fees. I don't think there's a specific hourly rate. We can tell you what that is. If you are an expert witness, then, usually, people set specific rates, and that's disclosed upfront before they're retained by the attorney that they're being asked to be an expert. Generally, you can charge for your time. That's what I think I defer to the attorneys. I think you can charge, certainly, for your time.

Speaker: Agreed. [silence].

Speaker: When an attorney sends a check with a subpoena, much less than I charge, can I request the difference? I think you can, but again, what Alan said before is, payment isn't necessarily what's going to stop you from getting out of that subpoena. Maybe the lawyers know the better answer, but unless there's a state statute that says specifically they only have to pay a certain amount. I don't think you can't say, "I'm not going to respond to the subpoena because I'm not getting paid what I think I should be paid."

Speaker: Yes, I would add that this varies a lot between states and courts and stuff. Typically, professionals are compensated for their time, but whether that's your full rate or not, I think that that varies. You can consult with the attorney for your patient,

you can talk to the court clerk. There are things like that, but this varies a lot between different courts and different jurisdictions.

Speaker: Can you charge different rates? Generally, you can charge different rates, but again, what we have already said about not getting paid is not always a way to get out of not responding to the subpoena.

Speaker: I think I'll add, too, also, we have received calls when there may be an outstanding balance regarding visits or sessions that have already taken place. Can you avoid responding to requests? The same goes, you can't withhold information because there's an outstanding bill, especially with record requests and things like that. [silence].

Speaker: If a subpoena is received from the opposing counsel of your client in a custody case, who is expected to pay for your time? Generally, I think it's the party that's subpoenaing you, right? If it's the opposing party to your patient's side of the case, it's like their employer, whoever it is that they're assuming and the driver of **[unintelligible 00:50:49]** accident or whatever, generally, the party subpoenaing you is the one that should be paying you.

Again, I think if you're going to be an expert witness, you can work it out with attorneys. Usually, you just tell the attorneys-- when I used to work at a claim department, we would hire experts all the time to defend our policy holders. We would go out and we'd ask the people that act in this capacity as experts, "What are your rates?" If they were too high, we didn't retain them. If they were negotiable, we would negotiate them. I think it also depends on some folks charge a little more if they have a particular area of expertise, I think you just have to try to be in line with what generally other folks are doing. That would be my recommendation.

Speaker: Then, also, consider your time spent preparing and doing all this. If you're in a solo practice and you have to reschedule individuals or take time out of your schedule, those are factors in consideration why you would justify or substantiate your rates. Keep that in mind as well when you're looking at the entire process of being deposed, subpoenas being witnesses, what does that look like to you?

Speaker: Just because they say, "Oh, we only need you for an hour of a deposition," but there's a lot more that goes to that. It's more than an hour. It's **[unintelligible 00:52:16]** and keep that in mind.

Speaker: In contrast to fact witnesses where to what extent professionals get paid that may be controlled by the courts or cut local custom and stuff like that, if you're an expert witness, this is your negotiation. Typically, experts are paid for all the time they spend. I don't think I covered earlier, but people will say, "Oh, well you're also the expert." Well, typically, in most courts, the expert witness has to get qualified, they have to prepare a report, and you charge for all that time. That's something that's a negotiation between you and the attorney that's retaining you. Whereas if you're a fact witness, how much you can be compensated may get controlled by local court rules or how things are done in your state.

[pause 00:53:02]

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Speaker: We've got, under what conditions can a psychologist decline to assist a former client who is being sued or initiates a suit? Again, declining, you can't decline when there is a request for records. As long as you have the appropriate consents, that individual has the right to request their records. You would need to comply with that in accordance with HIPAA and the right to access. As well as, again, we talked about responding to subpoenas or court orders.

Unfortunately, I don't know of any way of getting out of a court order. Maybe Connie and Alan have tips on that, but unfortunately, there may be no way for you to decline being involved because your services may be needed. Does an attorney representing the executor, in this case, a surviving spouse, have the right to request records of a deceased client?

Speaker: I can pick up on that. I'll start and you can-- Under HIPAA, generally, the executor, they go by different terms in different states, but generally, the executor, trustee, whatever of the estate stands in the shoes of the deceased patient. They have the rights to access that the patient would. In fact, that circumstance, they might not even need a subpoena because they're functionally acting as the patient.

Of course, you want to verify their authority, so you want to see a copy of the order appointing them as executor, trustee, or whatever. That's the analysis. It's similar to the situation with people who are represented by a guardian and things like that. You want to make sure that you made a good faith effort to determine that they are in fact in this legal capacity representing either a deceased client or a disabled client.

[silence]

Speaker: What is the most common error a psychologist commit when attorneys call? Just like we said earlier, it's not taking that breath. Not taking that moment to just stop and think through how you're going to respond. As Connie, I think, had said earlier, don't feel that you have to be compelled to answer right away. Most of the time, someone's leaving a message, that gives you an opportunity to go seek some guidance before, or at least, if you feel like you do it on your own, just take a moment to think about what you're going to say, what you're not going to say, confirming that you have permission from your patient, talk to your patient, all those things.

If you happen to answer the phone and it's a live person on the other end wanting to talk to you, again, just say, "Unfortunately, I can't speak to you right now. If you want to speak to me, send me what you're requesting in writing. If you're representing somebody, have them sign an authorization so I can confirm or deny if they're my patient," et cetera, so you don't feel that you have to be compelled to answer right away.

I think that's, sometimes, we get calls of, "What do I do in this situation?" Then we give them advice. They say, "What if I already did something?" [laughs] Well, we can't take back what you've already done. We'll see if we could work around what you already did, if possible. It's better, again, to ask for that advice before you feel that you have to-- Don't feel the pressure that you have to speak to that attorney right away. [silence] How do you protect yourself from liability?

Again, I think as long as you have a good game plan and you've got permission from your client and all the tools and things we've said in this presentation today, I think if you take all that under advisement and you go in and you're talking to that attorney and just, factually, assume you have permission, and you're going to talk to the attorney, you just factually talk to them about what's consistent with what you've documented in the records, right? We want to avoid things where we throw other providers under the bus. We want to avoid things that we might-- I call shooting yourself in the foot and saying things that might put yourself in a liability situation.

Especially, I think, in those cases where we have parents arguing for custody or things like that, we want to make sure we stay neutral and we don't take sides. I know, sometimes, we feel one party is better parent than the other, but that's not our fight to have. That's for the courts to figure out. Again, I think the best thing to do is to just stay neutral and stick to the script of your documentation.

Speaker: Before we do the next question, I think we maybe at the time when our people who run the show need to wrap things up, is that the case? Usually, they do two minutes of housekeeping at the end.

Speaker: I'd say maybe one more minute and then we can wrap [crosstalk].

Speaker: We have one last round in which we can.

Speaker: We already talked about this before. You don't necessarily need to. There was one question in the Q&A, though, I wanted to talk about real quick because one person asked it. What if it's a former patient that's 10 years in the past, records are gone? How do you respond to an attorney or a subpoena who wants their records when they don't exist anymore, which happens, right? You're legally allowed to get rid of the records after a certain point.

Speaker: For my perspective, and Cara can certainly jump in from a risk manager perspective, my thing would be you just disclosed you have no records, and there's been such time that's passed that you don't have anything to say. You just don't have anything because we don't want to just rely on whatever we happen to remember from 10 years ago or however many years ago. Also, if we haven't seen this client in that many years, we don't even know what's going on in their life, what their current condition is, what's happened to them since then. I would just say, "Unfortunately, I have no records, and therefore, they've been destroyed. I have nothing to add." Cara, if you think of something I've missed there.

Speaker: No, just be familiar with your state statutes on record retention so that you know how long that is. Crossing over on the retention is to keep track of those records and when you're destroying them so that you know that date range. That would be, like Allison said, you'd respond that. "Those records were destroyed in accordance with the retention guidelines," and leave it at that.

Speaker: Keep a log of what you destroy so you could affirmatively say that's what happened as opposed to, "I can't find them, therefore, they must have been destroyed." We don't want to have you have a missing document charge.

Speaker: Now, I think we need to let the-- do the final housekeeping announcements.

APA: Thank you all so much for your insights today and thank you to all of our listeners for your participation. Thank you to the American Professional Agency for making this webinar possible. A recording of this presentation will be emailed to everyone in about two weeks' time and that email will also include a copy of the slides. As soon as the webinar has ended, a short survey will appear on your screen. We ask that you take the survey and give us your feedback. Thank you so much, again, for your attention, and to our fantastic panel, and we hope you all have a wonderful rest of your day and a great weekend.