TESTIFYING IN COURT OR AT A DEPOSITION

written by Richard Leslie | March 1, 2023

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Mental health practitioners must be prepared to testify in court or at a deposition, under oath. Although some practitioners may not like to testify, and may find it disruptive to their practices, there is sometimes no choice. The patient may be pursuing a lawsuit where the mental or emotional condition of the patient is relevant, if not critical. There are numerous other ways that practitioners can find themselves in court or at a deposition. The "success" of the practitioner often hinges on the degree of preparation of the practitioner. In many circumstances, the preparation may be done by and with the lawyer for the patient, although this is not always the case. Sometimes, the preparation will be done with the assistance of the practitioner's attorney. Practitioners may be considered "successful" if they emerge from the process with their integrity intact and with the patient not being surprised by, or disappointed with, the practitioner's testimony.

Mental health practitioners must be sure of what they know, clear about what they don't know or should not say, and confident that their records will be helpful. If the records are an accurate reflection of the treatment rendered, and the practitioner's testimony is consistent with the records, the practitioner will be less vulnerable under cross-examination. One interesting scenario that sometimes arises is where the practitioner determines that there is an error in the treatment records. The practitioner might first discover an error when reviewing the records after being served with a subpoena for records and for testimony at a deposition, or the error might be discovered before the receipt of a subpoena, such as when a request for the records comes from the attorney representing the patient. Often, the patient's attorney is going to be the first to receive a copy of the records in preparation for the practitioner's later testimony. The records will usually be shared voluntarily with the patient's attorney, with the proper authorization of the patient.

If changes are made to the records, the practitioner would, of course, make it apparent in the records that changes were made on a specific date. Therapists sometimes make the "fatal" mistake of trying to change or alter the records without detection by others and without the intent to disclose that changes were made. If caught, this action can lead to significant negative consequences – not the least of which is a complaint to the licensing board – and eventually, the imposition of disciplinary action against the licensee. The decision for the practitioner is whether to make a change in the records upon discovery or to leave the records unchanged. Informing the patient's attorney (and/or the practitioner's attorney) of the error is usually helpful with respect to making that decision.

If the attorney for the adverse party discovers that a change in the records was made after the practitioner received a subpoena, the attorney will likely try to exploit this knowledge, and try to make the practitioner look bad at the deposition or at trial, and try to make it look like the practitioner has

done something wrong or unethical. The attorney for the patient may be able to counter these negative assertions by establishing that once the error was discovered in preparation for the testimony, the error was corrected and the correction was well-documented – showing that there was no intention to deceive. Errors can be corrected well before a subpoena arrives if the practitioner periodically reviews records – but that is often an unrealistic expectation for most practitioners. It is easier to simply take care when making entries to the records. It is important to remember that consultation with an attorney can assist in making a decision in particular cases as to whether a correction should be made.

Suppose that the practitioner is cross-examined and it is revealed that their advertisements or curriculum vitae contain false or misleading information (including exaggerations) and their truthfulness is thereby called into question. Suppose further that the jury comes back with a smaller than expected verdict (award of monetary damages) for the patient/plaintiff, and several jurors blame it on the practitioner's lack of credibility. The lesson to be learned is simple – don't let an untruth, of any dimension, undermine your entire testimony and thus the patient's case. Attorneys will argue that if the practitioner would lie about something tangential or minor in nature, they might lie about something more meaningful to the patient. With respect to keeping "good" records, I remember one situation where several jurors told the plaintiff (the patient) that they awarded her less money than they otherwise would have because her therapist did not have records that supported the testimony given by the therapist. If the mental or emotional injuries were as substantial as the plaintiff alleged, surely the clinical records would have reflected that – but they did not. This kind of poor documentation can lead to a complaint or a lawsuit from the disgruntled patient. Careful documentation of records can be helpful to the therapist and to the patient alike!

One of the thorny issues that a practitioner may face takes place when the patient is claiming injuries (both mental and physical) as a result of an auto accident, or the result of malpractice by a surgeon, or perhaps the result of a work related injury. What if the practitioner is likely to be cross-examined about the fact that the patient was in mental health treatment prior to the incident that is the subject of the lawsuit? Will the practitioner be pressured by the patient's attorney to minimize the earlier treatment in order to help the patient establish significant harm from the defendant's negligence? Will the practitioner be able to withstand such pressure? What if the therapist is asked to apportion the percentage of harm that was caused (or the extent of aggravation) by the incident and the "pre-existing" mental or emotional condition that first brought the patient into therapy or counseling? These can be troubling and difficult issues and may require knowledge and testimony about the difference between an inactive pre-existing condition and an active or symptomatic pre-existing condition.

Usually, the opposing attorney will pursue a variety of strategies to make the patient's witness (the practitioner) look bad, or at least to impeach their credibility. Practitioners are often warned, in preparation for testimony, that they should not attempt to verbally duel with the opposing attorney, While cross-examination of the practitioner may make it seem as though the practitioner may have done something wrong, the patient's attorney will often be able to offer a simple explanation (either in a closing argument, or through examination of the practitioner on re-direct) for the therapist's conduct or testimony. The pressures on the practitioner can come from either attorney. The attorney for the patient

may prefer a certain kind of testimony, and may push the practitioner in that direction. Practitioners must be clear on what they know and what they do not know, and must testify to the truth – as they see it (in their professional opinion). Practitioners should not guess at answers, and should consider saying that they do not know – if that is the best answer. If practitioners want to give more thought to a particular answer, they can ask the attorney to repeat the question.

Reviewing the treatment records is an important part of preparation. If preparation for testimony is thorough, the practitioner will likely discuss the contents of the records with the attorney for the patient. Depending upon the degree of preparation desired by the attorney for the patient, the therapist will usually speak or meet with the patient's attorney before testimony is given. In addition to talking with the attorney, it is likely that there will be some conversation between the practitioner and the patient or client regarding the testimony. In all of these encounters, practitioners have to be clear about what they are willing to say, must not be unduly influenced by the patient or the attorney for the patient, and must tell the truth. Sometimes, the truth may not be beneficial to the patient's case. It is usually better for the patient to know this in advance, rather than to first discover it at the trial of the matter or at the deposition.

Representation of the practitioner at a deposition may be necessary. Under the CPH professional liability policy, there is coverage for the reasonable legal expenses incurred by the insured for an attorney's assistance in connection with a deposition and for the attorney's appearance at a deposition, if necessary, to represent the interests of the practitioner who is compelled to testify at the deposition. I am aware that there are times when use of this coverage is not necessary and that the individual practitioner can make a decision regarding representation on a case by case basis. In complicated, bitter cases, where confrontation appears certain, representation will likely be necessary, and certainly wise. In other cases, the practitioner may feel comfortable about testifying without representation after talking with the patient's attorney. Again, the patient's attorney will often help to prepare the practitioner, since the attorney wants the witness to do well and to adequately cope with cross-examination. The practitioner may, of course, consult with their own attorney at any time.