

# An Outline of Commonly Encountered Litigation Issues For Mental Health Professionals (And How to Navigate Them)

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Below is an outline, written by [Attorney John M. Cox](#), that identifies common litigation issues for mental health professionals and provides some guidance on how to navigate them. This was originally presented to the American Association for Marriage and Family Therapy in 2015 and specifically addresses questions/issues that often arise in connection with litigation involving a mental health professionals' client which can impact the professional's practice. If not handled carefully, these situations could lead to exposure for a licensing board complaints. The outline below has been modified slightly to apply to all mental health licensures [and thus is not specific to only marriage and family therapy licensees]. The topics addressed generally apply to the spirit of all licensing board rules for mental healthcare professionals.

It is always advised to know your state regulations and to consult an attorney in your specific state for individualized issues related to your professional liability risks. As a CPH & Associates mental health professional liability policyholder, you are entitled to 2 hours of attorney consultation per policy year related to malpractice risks you're concerned may result in a claim. To leverage this resource, you need to call CPH & Associates and provide a brief explanation of your situation and we'll be happy to connect you with an attorney so you may receive advice on your issue. If it is a situation you think *MAY* result in a claim, we do ask that you fill out an "incident report" upon scheduling this attorney consult.

Nonetheless, as a frame of reference, please enjoy the outline below for some general guidance on mental health professional risk management related to commonly encountered litigation issues:

## 1. Request for Information / Confidentiality Considerations

- Always obtain a signed written consent from the patient or the patient's parent/guardian/legal representative to release information prior to release of any record(s).
- Maintain up to date information regarding those persons with legal capacity to consent (in the case of minor clients) to release information within your treatment file.
- If patient is a minor and custodial rights are in question, make sure reasonable efforts are conducted to ensure that the requesting individual has the right to consent to the release.
- Maintain a consent/waiver form within your office practice for ready access.
- If a request for release is from your patient, or your patient's parent/legal representative, have patient verify their request by requiring a *written* consent to the release (always maintain a copy of written release in client's treatment file).
- If request is from a third party (such as an attorney issuing a subpoena), require a signed consent to release signed by the patient or patient's legal representative prior to any

- release of information.
- Review your state board ethics rules and any applicable national ethics rules governing your profession prior to ever releasing records without a written consent/waiver, or consult a qualified attorney. Generally a release of records or information should never be done to a third party in the absence of an emergency situation without valid signed consent (potential examples could include if there was a credible risk of imminent peril to client or credible risk of imminent peril by client toward a third party).
  - Do not issue “advisory” or “opinion” letters regarding a client/patient which is intended to be/or which you should know could likely be used in litigation, or to an attorney in a third party litigation context (divorce, custody, parental rights termination) even if client has consented, as your involvement in authoring same will likely be deemed to violate your applicable board rule that restricts therapists from crossing over into a forensic evaluation role.
  - If treating more than 1 patient (such as a husband and wife) and one seeks the records which contain separate and joint confidences, require a consent to release from *both* prior to releasing records, **especially** if litigation has evolved,
    - If both will not consent, carefully redact any separate confidences/notes relating to non-consenting client’s treatment in any joint session, as well as any sessions/notes relating to the treatment of the non-consenting client in any individual session (and carefully review your state’s board rules on this subject while you are doing so and prior to final release of materials).
  - Keep in mind that many state board rules require that a valid written consent and request for records from a patient/client (or legal representative) must be satisfied in a specific period (for example, within 15 days from receipt of written request in Texas), and failure to strictly comply with this prescribed time limit may in itself be a board violation for which discipline is assessed if a client or a client’s authorized representative files a board complaint.

## 2. Request to Testify / In Court

- General Rule: Client confidences are shielded from testimony unless a valid written authorization exists to waive confidentiality. If no written waiver is in your possession, therapist must assert therapist-patient privilege to protect client confidentiality. The same rule applies regarding production of any documents or information within a treatment file.
  - Scenario 1: Subpoena arrives from attorney representing your client, seeking client’s treatment file and requesting to discuss your treatment.
    - Response: Contact patient and/or attorney issuing subpoena, advise you do not have a written consent/waiver to either release treatment file or discuss treatment. Upon receipt of same from your patient/patient’s representative, disclosure is authorized.
  - Scenario 2: Attorney representing your client’s husband subpoenas your appearance and your treatment file for your client (the wife) in a court hearing in a

divorce case. Your client does not consent to same, and there is no written waiver in your file permitting disclosure of client confidentiality.

- **Response:** Contact attorney for husband and advise that you do not have an authorization, and your client will not grant same. Request the subpoena be withdrawn. If he agrees to do so, seek confirmation that he is withdrawing the subpoena **in writing** prior to failing to appear in court (and maintain such confirmation in your file). If he refuses to do so, then you still must appear in court, with your subpoenaed file, but once at the courthouse your obligation is to assert the therapist/patient privilege to resist testimony (or file contents production) pursuant to the therapist-patient privilege.
- When subpoenaed to court, always advise your liability carrier of this situation and/or consider retention of qualified personal counsel to assist you in court.
  - Attorneys can be bullying and harassing over the phone and at the courthouse, and you need an ally in your corner as well to help you uphold your duty to protect confidences, or else it could become the subject of a later board complaint and discipline, if a confidence is shared without express written permission or Order of a court.

### **3. Request to Testify / Depositions**

- General Rule: The same rules apply to depositions as apply in court testimony (See II. A. above).
- Depositions have the same “force and effect” as court testimony.
- When serving in the role of a treating therapist, always remember that voluntary testimony in litigation, whether in a deposition or in a courtroom (absent a court ordering the testimony) could cast you in a forensic role which will put you at risk of being disciplined if a board complaint is filed.

### **4. General Tips for Providing Testimony in Court or in Deposition**

- Retain legal counsel either through your insurance carrier or through your own selection to help you navigate through the process, and to help you protect your client’s confidences if no waiver/consent granted in order to protect against the risk of a licensing board violation.
- Always tell the truth! You are under oath.
- Listen closely to the question.
- Tell the lawyer you do not understand if the question is unclear; require the lawyer to re-ask/re-phrase the question if vague, ambiguous or confusing.
- Answer based only on your personal knowledge because it is sworn testimony.
- Answer only the specific question that was asked-do not elaborate or drift outside the boundaries of the question.
- Do not “guess;” it is sworn testimony and you absolutely should not “guess” or speculate to a sworn answer.

- Do not answer a question that you know is properly the province of another witness (for example, if the question relates to medication options, defer that question to the psychiatrist or medical witness, or if there is not one then do not answer that question because it is outside of your professional expertise).
- Do not allow an adverse lawyer to “lead” you into what he wants you to say-assert your response based on your own personal knowledge and experience/training as a professional therapist.
- The very same rules apply to depositions as to court appearances.
- If you give a sworn deposition, most jurisdictions allow a prescribed time period (such as 20 days) after receipt of the written transcript to make changes/corrections to your testimony, if necessary. Refer to the Rules of Procedure in the jurisdiction you are testifying in, but usually the court reporter will provide you with the applicable rule.
- Read your deposition carefully prior to a court appearance. If your testimony during deposition deviates regarding a particular issue or subject from your testimony in court, you will need to be prepared to explain the reason for the difference on cross examination.

## **5. Subpoena / Responding to Subpoenas**

- A subpoena is an order of the court compelling your attendance at a deposition or in a courtroom to testify.
- A subpoena duces tecum is an order compelling you to appear and produce documents/tangible things within your possession. The requested documents must be reasonably specified.
- Service of the subpoena on a therapist:
  - When the subpoena is served, close attention needs to be paid to date, time, court, and requested information (is the subpoena for testimony only or does it require file production/copying as well).
  - DO NOT IGNORE! Either :
    - Contact issuing attorney to reach agreements/compromise and/or receipt of valid written consent
      1. If successful, confirm same in writing and maintain confirmation of the written agreement in your file.
    - Contact your liability insurance carrier or a qualified attorney to assist you in the response/appearance so you are in a position to protect your clients’ confidences and avert the risk of exposure for a board complaint.
- Testimony:
  - Arrange for written consent from client prior to testimony; or
  - Assert privilege due to lack of signed written consent.
  - If judge in a hearing or trial decides your testimony/file contents are not privileged at law due to the nature of your patient’s legal claims (example: patient is seeking mental anguish in the litigation), then the judge can carve out exceptions to your assertion of privilege. Allowing the judge to do so, and a judge’s order of same, will

protect against a board complaint if your file is produced per that order, or you are ordered to testify, even if written consent is not obtained.

- Compliance by the therapist with a court order compelling testimony or ordering production of file contents *will not* subject a professional therapist to an enforceable board complaint for disclosure of confidential information.

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**About our Guest Author:** John M. Cox is a member of the American Bar Association (Tort and Insurance Practice Section; Section of Litigation), State Bar of Texas, Dallas Bar Association, Texas Association of Defense Counsel, the Defense Research Institute, and the CLM Alliance. He practices in the areas of complex/catastrophic personal injury defense, wrongful death and survival actions, products liability, premises liability, professional liability and malpractice, medical, pharmacy, and mental health professional liability and malpractice, transportation (trucking) and automobile accident litigation, environmental litigation, commercial litigation, insurance coverage litigation, construction litigation, administrative law, and consumer law. For more information on John M. Cox & his Dallas-based firm, [click here!](#)

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