

What To Do If A Lawyer Contacts You

By Lustbader Law Firm

This article is written by David Lustbader of Livingston, New Jersey. It grew out of a discussion during a Medical Protective Risk Management Seminar at which Mr. Lustbader spoke.

Several times a year, a doctor asks how to handle requests by an attorney for records, reports or testimony. The attorney contacting you will always have interests different than your own. The attorney will want to obtain maximum information from you, pay as little as possible, and be least inconvenienced. It is necessary that a doctor be aware of his or her rights, as often requests are made that are unreasonable or excessive. The following discussion is based upon my experience, New Jersey State Dental Board regulations and New Jersey Court rules. I assume the obligations of a doctor outside of New Jersey are similar. The following is intended to be a guide to protect yourself when dealing with an attorney (other than your assigned attorney in defending a case). If the attorney is not agreeable to your suggestions, you should contact your own attorney to intervene to make sure your rights are protected.

A. Malpractice Cases

1. It is fairly common that when a patient comes to an attorneys' office seeking to sue you, the attorney will obtain an authorization and send a letter to you for your records. In New Jersey, the State Board requires you to send a copy of your records if requested. You must also send a copy of your x-rays if requested. You are entitled to make a reasonable charge for copying based upon the amount of information required. I have often found that attorneys at this point really do not need or expect the x-rays. If you send a copy of the chart with a note saying the x-rays are available for copying if desired, that is often the end of it. It will avoid your spending unnecessary time copying x-rays which the attorney at this point does not need. Unless you were treating the patient for an automobile or workers' compensation accident involving dental injuries, the reason the attorney is requesting your records is to review them to see if a malpractice case can be brought against you.
2. You are not required to prepare a narrative letter. You should not do so. Many doctors think if he or she prepares a detailed analysis, the attorney will be persuaded not to file a suit. This is false. Preparing a detailed letter will only create a document that will be used against you later. Undoubtedly, some obscure point will be left out of your letter. The attorney will later argue that you never did it or said it because it was not in your letter. You should not prepare a narrative.

3. You should advise the attorney what your copying charge is and request a check in advance before the records are released. A reasonable charge for retrieving a chart and copying some paper records averages \$50 to \$75. If x-rays are requested, the charge should be increased accordingly. Unless you collect the money in advance, often you will not get paid. It is important to chart the date of sending the records out and the name and address of the attorney to whom the records are going. Keep copies of any letters received. You have no obligation to discuss the case with the attorney and should not do so. At this point, you do not know what the attorney's theory is or why a lawsuit is being contemplated. Until you know this, it is impossible to properly explain your position.
4. Never send the original of your chart or x-rays to the attorney. I have had cases where the attorney calls my client's office and creates the impression of great urgency and the originals are sent out. Sometimes the originals are lost and they are needed for the defense of the case. Other times, the records are not returned and a great deal of time and effort is spent trying to get them back. The New Jersey State Dental Board allows a reasonable amount of time to provide the materials. I assume other States allow similar reasonable times. There is no requirement to supply the materials the same day or the next day. If the patient or the attorney shows up in your office demanding the records, under no circumstances release the originals. If a photostat of the treatment record can be made, it can be given to them at that time, but be certain to chart the date and to whom the materials are given. Sometimes it is necessary to document when the patient was first contemplating a malpractice case for the Statute of Limitations defense. Obviously an attorney's request for records establishes that the patient is considering a malpractice case. If the first attorney turns down the case, and the patient finds a second attorney, it may be important to document when the first attorney had contact to show when the Statute of Limitations should have started to run under the Discovery Rule.

B. Non-Malpractice Cases

1. Sometimes an attorney will contact you because the patient has been involved in an accident and the attorney is bringing either a personal-injury case or a workers' compensation case. Often this can be corroborated because you are being paid by an automobile insurance carrier or a workers' compensation carrier. Sometimes a malpractice case is also being contemplated, but this is usually not the case when an accident occurred.
2. The same rules apply to the release of records. The same suggestion for obtaining payment in advance applies.
3. The attorney probably will want a narrative report to use in negotiating with the insurance company and for the lawsuit. Confirm with the attorney that he or she

- is not considering suing you but is asking for your help for the patient's lawsuit. Under these circumstances, request payment in advance from the attorney for your narrative report. There is nothing wrong in doing this. If you send out the report with the bill, unfortunately some attorneys will not pay promptly or wait until the case is over to pay you. It is common practice for the attorney to pay the expenses of a personal-injury lawsuit from his or her law office and then be reimbursed when the case is over. The amount of your charge for the narrative report depends upon the complexity of the case, the extent of the treatment, and your time in preparing the report. In New Jersey, a reasonable charge for a narrative report discussing an accident and related treatment usually is in the range of \$400 to perhaps \$750.
4. Most personal-injury cases are not settled until the actual time of trial. The attorney will contact you in advance of trial, asking you to be available to testify in Court on a particular day. Many cases in New Jersey are adjourned several times. Many cases are settled on the actual day of trial or after trial begins but before your testimony might be needed. The problem arises when you are asked to set aside a half-day to come to Court, you do so, and then the attorney tells you a day or two in advance that the case is settled. You have now lost that time and your patients have been terribly inconvenienced.
 5. New Jersey for several years has allowed videotaping of witnesses. In New Jersey, you may advise the attorney that you decline to come to Court, but you would like to be videotaped at a mutually convenient date. Often a doctor will schedule the videotape at 5:00 p.m. or at the end of patients' hours. Sometimes a doctor will schedule the video on a day off. This can be negotiated with the attorneys so it does not intrude into patients' hours.
 6. You should establish your fee in advance and tell the attorney who wants to take your videotaped deposition that the fee is payable in full in advance before you block out the time. This avoids problems of last-minute cancellations where the attorney does not think you should be paid.
 7. The same rule applies if the attorney wants a regular deposition from you that is not being videotaped for trial. Always obtain your money in advance. When calculating your bill, remember that you should charge for your preparation time in reviewing the case, your time in meeting with the lawyer before the deposition, and your actual deposition time. Most doctors charge on an hourly-rate basis with a minimum of 2, 3 or 4 hours.
 8. Always insist that the lawyer meet with you in advance to review the case. You will want to know what the issues are, what the anticipated questions are, what you should review and what questions the lawyer on the opposing side is anticipated to ask. Do not allow the attorney to tell you that he or she will meet with you 15 or 30 minutes in advance of the deposition and that is all the time

that is required. If that happens, you are the one who will look bad in the deposition, as you will come across as unprepared, hesitant and unfamiliar with the issues. I usually find reviewing the case with a treating doctor for a deposition not involving alleged malpractice usually takes 1 to 2 hours.

C. What to do if you Receive a Subpoena?

1. You cannot ignore a Subpoena. If you do, the lawyer can have you held in contempt of Court and arrested.
2. In New Jersey, a Subpoena must give you reasonable notice. A Subpoena cannot be served on you in the morning to appear in Court in the afternoon. If the other attorney insists on issuing a Subpoena, you should contact your own lawyer and have your lawyer intervene to negotiate reasonable terms for your being in Court.
3. In New Jersey, if a doctor is subpoenaed, the doctor can only be compelled to testify about fact information. Examples of this are the history, the examination, what was done, and why was it done. A Subpoena cannot compel a doctor to give an opinion, *i.e.* was the injury related to the accident, the prognosis, and any permanency. A lawyer who subpoenas you will probably attempt to obtain this information from you to help the case, even though you are not compelled in New Jersey to give it. In New Jersey, a lawyer can only obtain opinions from you if you voluntarily give them. The attorney must negotiate a reasonable fee with you that you should collect in advance.

Conclusion

1. There are always conflicts between the interests of a doctor and the interests of an attorney (except your own assigned attorney in defending you in a case).
2. You are required to supply a copy of the chart if asked (never the original).
3. You are not required to prepare a narrative report or give expert opinions unless satisfactory payment arrangements are made.
4. A Subpoena can compel you to go to Court but only give fact information. This generally will not help the attorney too much, as your opinions are necessary to the personal-injury lawsuit. It is rare that an attorney will subpoena a doctor to come to Court, knowing that he cannot obtain all that is necessary for the case.
5. Always collect your money in advance. If you have any questions as to what is reasonable, speak to your colleagues or an attorney who handles litigation.



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Hopefully the above will minimize your time away from the practice for legal matters and provide a way to protect yourself when you do become involved in a Court case.