A TEACHING RESOURCE
FOR PSYCHIATRY RESIDENTS

VIEW FROM THE JURY BOX:
Clark v. Stover

A Psychiatric Malpractice Mock Trial

THE LITIGATION PROCESS
SUMMONS AND COMPLAINT

The Summons and Complaint is the set of documents that is served on the defendant(s) to initiate a lawsuit. These documents may also be called a "Notice" or "Petition." Until an individual has been properly served with the Summons and Complaint, he or she has not been "sued." There are different means by which one can be served, depending upon the jurisdiction. In some states, service of the Summons without the proper Complaint is proper service. Do not assume that you have not been properly served just because you were not personally handed a Summons and Complaint.

The Summons is a court mandate that informs the defendant that a civil action has been commenced against him or her and requires the defendant to appear in the case and defend.

In a malpractice lawsuit the Complaint generally outlines the patient's allegations against the defendant healthcare professional, and may name other defendants. The Complaint will require a formal answer that will be prepared by the named defendant's defense attorney. There are time restraints for answering a Summons or Complaint. The defendant must file an Answer within the time requirements set by law in the jurisdiction where the lawsuit is filed, or an extension for filing the Answer must be requested and granted.

If you receive a Summons and Complaint, the first thing to do is pick up the phone and call PRMS and ask to speak with a claim examiner. Do not email a lengthy explanation of what occurred. Your claim examiner will obtain some initial information and ask you to forward a copy of the Complaint. Do not send it without first speaking to a claim examiner. It is imperative that you notify PRMS immediately after you are served with the Summons and Complaint as they must be responded to within a given period of time (typically 20-30 days) lest a default judgment be entered against you. UNDER NO CIRCUMSTANCES, should you attempt to respond to the Complaint yourself.

As a condition of coverage, policies managed by PRMS require you, the Insured, to notify the insurance company (by contacting PRMS) as soon as possible of any suit or claim against you. You are also required to cooperate with your insurer in the defense of the suit. In that vein, you are prohibited from admitting liability, which you would do if a default judgment were entered against you. PRMS has the right and duty to defend you in a lawsuit, even one that is groundless. If you fail to timely notify us this may be

considered a breach of your insurance contract. One of the rights PRMS may have in such a situation is to refuse to pay the judgment against you or help you to challenge the default judgment.

The fallout from a default judgment can be calamitous. You may find that the plaintiff has filed a lien on your property, or seized your bank accounts, or reported the judgment to credit agencies. But none of this needs to happen. As unpleasant as it is to be sued, the easiest and the best thing to do is call PRMS, report the claim to us, and work with us and your attorney to get it resolved.

Once your coverage is confirmed, the examiner will assign an attorney to defend you. PRMS' panel attorneys are experienced medical malpractice defense attorneys in private practice with specific expertise defending psychiatrists. One of these attorneys will be selected to represent you at PRMS's expense.

When your attorney contacts you, please make yourself available to talk with him or her privately, without interruptions or distractions. Remember, not only is your conversation with the attorney confidential and privileged, but you are talking about a confidential relationship between yourself and your patient. Protect your attorney-client communications from eavesdroppers while fulfilling your obligation to protect your patient's privacy by discussing his care where you cannot be overheard. Be ready to discuss the patient's care and the incident that is the subject of the suit. If you are the custodian of this patient's records, have the chart copied and send the copy to your attorney. It is imperative that you be completely candid with your defense attorney. He or she cannot provide the best defense for you if there is information that you are withholding or if you alter the facts. While a bad fact pattern may make a case more difficult to defend, it may be impossible to defend if your defense attorney is blind-sided with information during discovery or your malpractice trial.

FREQUENTLY ASKED QUESTIONS

After receiving notice of the lawsuit, I reviewed my medical records and I'm not happy with some of my documentation. What should I do?

There is no such thing as a perfect record and when viewing your care through a "retrospectroscope" it is very easy to find flaws in your documentation. Perhaps your session notes are scant, or you used abbreviations that you understood at the time, but can no longer recall. Perhaps you discover that the medications and doses reflected in the notes do not correlate with the patient's prescription records. In the worst case scenario, you may discover that the patient's chart has been lost, destroyed, or irreparably damaged.

Once you have received notice of a lawsuit, do not make any alterations to your records. This includes attempting to recreate missing records. Defense attorneys understand that there is no such thing as a perfect chart, and are prepared to defend a doctor's care even when faced with less-than-ideal documentation. What they cannot defend is an altered chart. Any indication that your record has in any way been altered will call into question every statement that you've made and will irreparably damage your credibility. Regardless of the intent or rationale, changing, editing, re-writing, or otherwise altering

the original record will not only negatively impact the defense of your case, it is also a crime in many states, punishable by a stiff fine and/or potential jail time. In addition, alteration of medical records is a basis for revocation of a medical license.

If this is not discouragement enough, alteration of your medical records t may also void your insurance coverage.

Advise your attorney of any concerns you have regarding your record and follow the advice you are given. In the meantime, learn from the experience and improve your documentation for your current and future patients.

I see that my patient has not hired an attorney and is instead representing himself. Clearly this suit is completely without merit so can I just ignore it?

Absolutely not. Although a "pro se" case (a case where a plaintiff appears on his own behalf and is not represented by counsel) is often a sign that a plaintiff could not find an attorney who would take the case and that the case may ultimately found to be without merit, the pro se plaintiff will still be allowed to proceed with his or her case at least initially. Bear in mind also, that judges will often allow a great deal of latitude to pro se plaintiffs so as not to appear to deny them access to the legal system. Until the case is dismissed, you should proceed as you would were the case filed by an attorney.

I have a friend who is an attorney. Can I hire her to defend in my lawsuit and have PRMS reimburse me for the attorney's fees?

Under your insurance policy, you are entitled to a defense of the claims against you. PRMS works with an extensive network of attorneys across the country who have proven expertise defending psychiatric malpractice cases. Your claims examiner will assign one of these attorneys in your state to defend you at our expense.

How long will it take to resolve my lawsuit?

The short answer is, "It depends." If the lawsuit is truly deficient on its face, your attorney may successfully move the court to dismiss the case against you in just weeks without any discovery (the process during which disclosure of relevant documents and information possessed by parties to an action are exchanged). However, most cases do involve at least some measure of discovery which, depending upon the number of defendants, the number of experts needed, scheduling and many other factors over which you and your attorney have little or no control, may take anywhere from a few months to a year or more. Once discovery is complete, depending upon the case load of the court, and other factors such as the need for a hearing on pre-trial motions, there may be an additional delay of several months before a case actually goes to trial. In the event that you and your defense attorney determine that the case should be settled, efforts will be made to do so expediently once discovery is complete.

How much time will this require of me personally?

You will be asked to meet with your attorney multiple times. There will be an initial meeting, when you and your attorney will discuss your background, the patient's care, and the incident that is the subject of the Complaint generally. Later, your attorney will need you to help respond to interrogatories, which

are written questions answered under oath. Your deposition testimony will require preparation with your attorney, perhaps in multiple sessions, as well as the day or days of the deposition itself. You may be required to attend mediation or court-mandated settlement conferences. Finally, should your case go to trial, you must be present for jury selection and each day of the court proceeding.

Both your insurer and your attorney are sensitive to the fact that every moment you devote to the defense of your suit is one that could have been spent doing something else. They are also aware that you did not ask to be sued and to give up so much of your time. Your attorney will make an effort to accommodate your schedule, but the reality is that much of what needs to be done has to happen during business hours.

If you purchased insurance coverage through PRMS, your policy includes a provision for reimbursement of a portion of the earnings you lose due to time spent defending your case. Ask your PRMS claims examiner for details about this provision. We are here to help you and answer your questions and concerns. Do not hesitate to call-800-245-3333.

What effect will this suit have on my insurance rates?

If you have just been served with a suit, it is far too early to predict the ultimate outcome with any accuracy. Your underwriter will review the case periodically as it progresses. If you have questions about your rates or the effect of a suit on your future coverage, please call your underwriter at (800)245-3333.

I'm worried about protecting my assets. What should I do?

While your concerns are certainly reasonable, if you have just been served with a suit chances are you are getting a bit ahead of the process. Your appointed defense counsel and claims examiner will work together throughout the life of the suit to evaluate your potential exposure, and will notify you promptly if they determine that your personal assets may be at risk. If you are advised that your potential exposure exceeds the limits of your insurance policy, you should consider consulting a personal attorney to address protection of your assets.

It's obvious the lawsuit is meritless, rather than having PRMS incur attorney fees, can I just call the other attorney or the court and explain the situation?

While it is understandable to think that a common-sense explanation from you will resolve a misunderstanding, the realities of the justice system frequently run counter to common sense. Moreover, if you act without notifying your insurer, you may jeopardize your coverage altogether. Remember, your policy prohibits you from admitting liability or compromising the insurance company's right to defend the case. An innocent comment in a conversation between you and the plaintiff's attorney or court may have this effect.

Most plaintiffs' attorneys will refuse to speak to you at all, but a crafty plaintiff's attorney may manipulate a conversation with you in such a way that you divulge information that you shouldn't, or unwittingly make admissions that may adversely affect your defense and compromise your insurance coverage. You must remember that as a party to a lawsuit, everything you say can be used against you. Without realizing it, you may identify potential witnesses against yourself or suggest additional

defendants. Of all potential results, the one outcome of a conversation with plaintiff's counsel that is highly unlikely is a spontaneous, voluntary dismissal.

It is equally unwise to contact the court. Although common sense may suggest that a simple phone call to the court to explain your side of the case may cause a judge to dismiss the Complaint, there is no mechanism in court procedure for such a dismissal. Instead, you are likely to end up frustrated but without your desired result. Just as your office staff screens your calls, so does the court staff screen calls to judges. If you call the court you are unlikely to get any further than the judge's law clerk, who may sympathize with you but is not permitted to give you any legal advice. You will probably be advised to contact an attorney and file a written response.

With whom may I discuss my case?

Few events are more stressful than learning that you have been sued. All of a sudden, your professional judgment and capabilities are under attack and your reputation and livelihood are on the line. Given these circumstances, you may feel inclined to discuss your care with a fellow clinician. While this is understandable, it is also unwise. You should only discuss the case with your attorney and your PRMS claims examiner.

Now that you are a party to a lawsuit, you will be required to respond to a number of requests for information during the process of discovery. You can expect to be asked (more than once) for the names, addresses, and phone numbers of anyone with whom you have discussed the case or the underlying treatment. Unless your discussions are protected by a legal privilege, such as the attorney-client privilege, you will also be asked to describe what was said, and the person you were talking to will certainly be interviewed. Consequently, any questions or concerns you might raise with another clinician regarding your care and treatment of the patient and whether you made the right clinical decisions would be fully discoverable and could be repeated in court. Your defense counsel can further address this issue.

RISK MANAGEMENT TIPS

Contact your professional liability insurance company representative as soon as you receive a Summons or Complaint. A default judgment can be entered against you if there is not a proper and timely response filed on your behalf by your defense attorney.

Do not answer the Complaint on your own.

Do not contact either the plaintiff directly or his/her attorney. Be aware that any information imparted to anyone except your defense attorney and your professional liability insurance company representative can be used against you later and/or may form the basis of a breach of confidentiality suit.

Confine your discussions about your lawsuit. There is a natural inclination to want to discuss your lawsuit with colleagues, family members and/or friends. Reviewing a course of treatment with a

colleague may result in an individual being called as a witness in your trial, or conversely, preclude the defense from calling that individual as a witness. Discussions with anyone other than your attorney and professional liability insurance company representative may be discoverable and subsequently used against you.

Establish a written policy for responding to a process server who enters the office and what steps to follow if any legal documents are found on the premises or are received by mail, fax, etc. This policy should be reviewed with office staff during orientation and regularly thereafter.