

## **Legal Letters by Andrew Agatston -The Legal List (8.28.12)**

### **“The Legal Tug-of-War Over Therapy/ Medical Records”**

Much of the following fact pattern actually occurs in one form or another, and variations on the following theme have probably occurred at your CAC, therapy or medical office. Sometimes all of it can happen at once! This exercise is designed to explore responses to records requests that are not your basic, straightforward matters that are easily addressed by your CAC.

It is important to realize that even records requests that are beyond basic can still be resolved in-house, without need to resort to your legal counsel. Indeed, responding efficiently and professionally to records requests with legal help should be part of your well-oiled machine.

However, once there is a hint of opposition to records being produced to one party or another in a matter where litigation is pending, the information related to the request should be promptly forwarded to the competent and qualified counsel of your organization's choice. Your counsel may get involved and spearhead the response, or she may not, providing you with tried-and-true instructions to handle the matter on your own. The important issue is to make sure there is not some legal issue that is lurking in the shadows that should be addressed and that support someone's objection to the release of the records.

In today's example, I will detail a hypothetical case where the records request was directed to a therapist in private practice, but it can just as easily be sent to a CAC's therapist, or an MD.

Assume a therapist who is counseling a minor child, and whose natural parents are embroiled in a divorce and custody case. Since the divorce case is yet to be decided, both parents have existing legal rights and responsibilities toward the child. Additionally, assume there are temporary arrangements put in place by the trial judge in the divorce matter, entered by a court order. The therapist knows this because an Order was sent to her as part of the records dispute.

But allow me to step back and detail the type of correspondence and information that might be sent to the therapist as part of this hypothetical case, and then a proposed response.

### Letter from Mom's Attorney

The therapist is sent a letter from mom's attorney via regular U.S. mail. It indicates that copies of the letter have also been mailed to opposing counsel, the guardian ad litem, and the mom.

The letter encloses a copy of a Court Order related to issues that include temporary custody. The order is 6 pages long, and long on legal-speak. Mom's lawyer says in the letter that he objects to certain therapy information-sharing plans that he anticipates dad's lawyer will request.

If such requests for information-sharing from dad's lawyer come, mom's lawyer would like the therapist to first speak to the guardian ad litem to determine GAL's recommendation whether or not such information-sharing activities should occur.

### Letter from Dad's Attorney

In a letter dated one day after the letter from mom's attorney, dad's attorney sends a letter to the therapist via regular mail and via fax. It is copied to dad's attorney and the GAL.

The letter is two pages long and contains the lawyer's legal analysis of certain portions of the order on temporary custody; it cites a statute that the lawyer interprets to mean that dad has certain legal rights in this therapy matter; and it cites certain activities of the mom that dad's lawyer says indicates evidence of parental alienation by her.

Ultimately, the letter demands that any information-sharing between dad and the therapist occur.

The guardian ad litem does not send any correspondence.

### Initial Thoughts

This is an example of a records request/information request that I would want to be brought in on. It has the markings of dueling lawyers -- which in and of itself is not necessarily concerning, because that is the crux of our adversarial system.

But it has one other mark: both lawyers have advanced legal positions that they say correctly support their respective client's cause. And their respective legal positions are diametrically opposite to the other!

A therapist is an expert in counseling, but a legal lay person. Yet, she is being asked to determine which of these opposing legal viewpoints advanced by lawyers is correct.

### Response Plan

Step one in the plan is for the therapist/CAC/organization to contact the lawyer to notify her that a legal matter is brewing. The always-reliable manner of immediately contacting the lawyer is already in place as part of the standard procedure in these matters.

Once contact is made, there is a discussion of what information was received by the therapist. It is important that therapists and others who receive records demands through letters, authorizations, subpoenas and court orders know exactly what they have received. I don't say this to belittle, but to make the point that court orders have different rules and responses than subpoenas which have different rules and responses to requests than productions of documents which have different rules and responses than HIPAA authorizations, etc.

These vehicles to demand records can be misidentified by the recipient, so with my CACs I just tell my folks to refer to them as "ticking time bombs" that are ready to explode until an adequate legal response is made.

Once a phone inventory of what was received is made, then the inventory of documents received is sent to the attorney for review. If, for any reasons, the therapist misidentified one of the documents, then the lawyer simply lets the therapist know the difference and how to properly identify the distinction.

There are a variety of ways a lawyer for a CAC or therapist can respond to this hypothetical case, but here is one:

I want to review all of the documents, and if any of the documents refer to statutes or cases, I want to pull and read those statute and cases. I'm going to write on a legal pad the legal positions of all involved lawyers, and then I'm going to compare those positions to how I interpret the specific laws and cases they cite.

I'm not going to "grade" the lawyer's interpretation at this point. Rather, I want to see whether there is truly a dispute, or whether the lawyers are actually saying the same thing in different ways. If it's the latter, then it will be easy for me to get the lawyers on a phone conference to reach an agreement. (If there's a GAL, she will need to participate.)

If it's the former, then a different strategy is triggered. I call the lawyers separately and tell each who I represent, and that I received a bunch of documents that I am in the process of reviewing, and that I will be sending each a joint letter with our response. I tell them I will do this promptly so nothing in the case is delayed, but also more importantly to adhere to our desire that the child's therapy is not compromised.

In today's hypothetical, there is a GAL. My view of a GAL's role is tied directly to the court. She advocates for the child's welfare, and the child's welfare is a critical matter of concern for the court. In this case study I am bringing in the GAL (she was copied on both letters anyway).

My letter response will be addressed to all three. It has a brief intro of why I'm here (to respond on behalf of the therapist to conflicting requests), and then sets forth my interpretation of the lawyers' conflicting positions.

Next, it briefly and generally sets forth the therapist's position on the matter. I think this is important, but some lawyers may have different views.

For me, I want to make sure that each lawyer knows that my therapist stands immediately ready to resolve this dispute, which is in the best interest of this child. Next, if for any reason my letter is going to be used as an exhibit in a future court hearing, or if the letter is going to be shown to the therapist while she is on the witness stand, then I want to make sure that the therapist's truthful and sensible position of just trying to do the right thing in the face of conflicting demands is known to the court or to a jury.

Next, I'll summarize my view of the lawyers' competing positions to show that, in fact, the therapist is between a legal rock and a hard place. Finally, I'll make my request on behalf of the therapist, engaging the lawyers and GAL to conference and reach an agreement. I tell them we stand ready to offer input if requested. And finally, I state that we stand ready to comply with any agreement reached by them in a prompt manner.

Important caveat: If I believe that one side is correct on the law rather than the other because a statute or a case is clear on this point, then I state it in the letter, inviting each to correct me if they believe I am mistaken.

Your lawyer may have variations on this response, or a completely different one. The key is to consider the interests of your therapist and your CAC, while following the law.

Best regards.

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