

A quarterly newsletter designed to address legal and risk related issues that psychiatrists encounter.

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*In Session with Allied World* is published in support of the American Professional Agency's psychiatrist insurance program, exclusively for members of the American Psychiatric Association.

Dear APA Member,

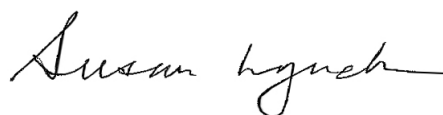
I am pleased to be a contributor to the *In Session with Allied World* newsletter. As a Senior Claims Analyst in the Medical Liability Claims unit and as a member of the Allied World Claims team, I manage professional liability claims and potential claims made against psychiatrists.

Following an initial report of a claim from a policyholder, our unit investigates the matter and selects appropriate defense counsel. We work closely with the policyholder and his/her attorney to assess the facts of the case and formulate an appropriate defense, seeking expert opinions and evaluating liability. We manage claims from their inception through final resolution - either through dismissal of the action, through trial or, if warranted, negotiating settlement on behalf of policyholders.

I have fifteen years of insurance experience, which has included handling claims filed against psychiatrists, psychologists, mental health counselors, and marriage and family therapists. I am a licensed insurance adjuster in twenty states. I also have worked as a grant writer and in the social work policy field and I obtained my Masters in Social Work from the University of Connecticut. My background helps me understand the complexities of claims involving psychiatric and mental health treatment and the issues which you may encounter.

Our team is here to assist and to work with defense counsel to successfully manage concerns that you may face in the legal arena. It is my sincere hope that we will provide information to you in future editions of *In Session* which will aid you in your daily practice.

In the event that you are ever faced with a claim or potential claim, our team looks forward to working with you through the process. If you have any questions, I can be contacted via your agent, The American Professional Agency, Inc.



**Susan Lynch**  
Senior Claims Analyst  
Allied World National Assurance Company

## Preparing For Your Day in the Deposition Hot Seat



By Holly S. Bell

Norman, Wood, Kendrick & Turner

I do not have to tell you that psychiatry is not an exact science. Psychiatry is a field of medicine in which precise prediction is impossible given that patient care and treatment so heavily rely upon the history and information provided almost solely by the patient seeking treatment. I also do not need to impress upon you that we live in a litigious society. Our societal tendency is to place blame on others when there is an unexpected or bad outcome. As such, it is highly probable that you may find yourself in the deposition “hot seat” at some point during your practice. Keep in mind that this deposition hot seat is usually at the head of a conference room table opposite an attorney who may *try* to come across as your friend (but, rest assured, is not). It is this attorney’s job to elicit sworn testimony which can be used against you at trial as a means to convince a jury that you are to blame for what happened to his/her client and your patient.

You might be asking, “What is a **deposition**?” A deposition is a means by which attorneys can gather information and develop facts about a lawsuit. It is part of the pre-trial discovery phase during the course of a lawsuit. An attorney representing a plaintiff (patient) in a lawsuit cannot talk directly to a defendant (psychiatrist) who is represented by an attorney (and vice versa). Therefore, one of the ways to find out what information the defendant has and what the defendant will say at trial is to take the defendant’s deposition. A deposition is when the deponent is verbally asked questions while a court reporter transcribes everything that is said in the room.<sup>1</sup>

A deposition differs from **interrogatories**, another form of pre-trial discovery, in that interrogatories are *written* questions prepared by a party directed to another party or witness. When you answer interrogatories, you sign, swearing under the pains and penalties of perjury, that the answers provided are true and accurate. Just as with deposition testimony, it is important to have representation prior to answering interrogatories. It is not advisable to submit answers which have not been reviewed and discussed with an attorney representing you.

If you are the defendant being deposed, your attorney will be present during the deposition; however, most if not all of the questions will be asked by the plaintiff’s attorney. That is not to say that if there are attorneys representing other parties who are present during your deposition that they cannot ask you questions – they can. Questions asked and your responses will be transcribed by a court reporter.<sup>2</sup> You will be sworn in at the beginning of your deposition, so your answers will be given under oath. There will be a written record of your sworn testimony, and that testimony can be used later at trial in court.<sup>3</sup>

The testimony you give during a deposition will follow you throughout the entire course of litigation and beyond, and your deposition testimony will be used at trial to call into question your credibility if your trial testimony varies in any way from your deposition testimony. Deposition preparation is critical in defending a lawsuit, and without question, taking adequate time away from your daily practice to meet with your attorney to prepare for your deposition will serve you well in the event that you are testifying at trial and you are being questioned on the witness stand.

Keep in mind that the plaintiff’s attorney (or at times, another defendant’s attorney), may be looking for you to be inconsistent in your testimony at trial with your prior testimony at deposition. It is important that you not only have reviewed the written transcript of your deposition testimony prior to appearing at trial but also when you are on the witness hot seat, that you ask the attorney to review your transcript, at least the portion thereof, that is being examined at the time. Testimony, either at deposition or at trial, is not a quiz and you cannot be expected to remember everything you testified about at a deposition months or perhaps years prior to trial. However, not requesting to see the written transcript can lead you down a difficult path that can be problematic to the defense of the case.

Many defensible cases have been lost in deposition. Bear in mind that you can also be deposed as a fact (or a non-party) witness in a lawsuit in which you are not involved.<sup>4</sup> You can later be added as a defendant to that lawsuit and no matter if you are a treater, uninvolved with the care at issue or are a non-defendant witness, it is essential to be prepared for your deposition. Further, depending on the type of case and jurisdiction, if you are disclosed as an expert witness, you may also be deposed. This article will focus on tips if you are ever a defendant and are in the deposition hot seat. These same tips can also be helpful if you are a non-party witness.

### Tips When You are in the Deposition Hot Seat

**Tell the truth.** The one principle that you cannot go wrong with and that is not up for debate is to tell the truth. This is the single most important rule to remember and follow. At the start of the deposition, you will have taken an oath to tell the truth, the whole truth, and nothing but the truth. In fact, not telling the truth is how things can go terribly wrong for a witness. As I stated above, your deposition testimony does not go away and you will be reminded of this testimony if you stray from it.

Telling the truth, at all phases of the litigation, ensures that your story stays the same. The bottom line is that a consistent and truthful story equals a credible witness.

#### **Deposition is not the time to tell your side of the story.**

As a psychiatrist, part of your role is to teach and educate your patient and his family about the specific psychiatric condition or diagnosis, as well as treatment options. As a result, taking on that teaching role is natural and you may feel the need to educate the plaintiff's attorney who is asking you the questions in the deposition — or you may feel the need to explain yourself. Undeniably, you need to tell "the whole truth" and answer questions fully and completely, but once you have done so, stop there. *Do not volunteer information that is not requested in the question and do not elaborate.* The deposition is the plaintiff's attorney's time to find out everything he/she wants to know from you. It is not your time to detail your side of the story. If the plaintiff's attorney asks for the information, then give it. As long as you do this, then

when telling your side of the story at trial, which will inevitably include information not developed at your deposition, the plaintiff's attorney cannot successfully challenge you on this "new information" if he/she did not ask for it. What jurors do not take too kindly to is when they sense that the defendant is playing games or was hiding information from the other side. Accordingly, be responsive with complete answers, but unless a question specifically calls for it, save the teaching and educating role for the jury.

**Remember that YOU are the expert in psychiatric medicine.** The plaintiff's attorney may be trained, experienced and skilled in the legal process, including taking depositions, but you are the expert in the subject matter upon which you will be deposed. That is not to say that the plaintiff's attorney will not attempt to make you feel inferior or try to convince you that an answer you have given is nonsensical with the hopes that you will

back off of, or better yet, change your answer. However, keep in mind that you are the expert in psychiatric medicine and you were the one who was present taking care of the patient, and not the plaintiff's attorney.

*Many defensible cases have been lost in deposition.*

**Do not speculate.** Under no circumstance should you ever speculate during a deposition. Nothing positive can come from it. In fact, it is likely that speculating will lead to the plaintiff's attorney impeaching you at trial, which will result in you losing credibility with the jury. Furthermore, speculating does not fit with the most important tip: telling the truth. While you may find it difficult to admit that you do not know the answer to a question asked, rather than speculate, it is better to simply respond, "I don't know." There is absolutely nothing wrong with an "I don't know" answer if you truly do not know.

Please note, there is a difference between speculating and providing a judgment. An attorney cannot ask you to speculate, but he/she can ask you for a judgment. If you have a judgment about what is being asked, then the truthful answer is to give your judgment. However, if you in any way have to guess about the answer, then the truthful answer is something to the effect of, "I don't have a judgment. I would only be guessing."

**Think of the deposition as a chess match instead of a tennis match.** Plaintiff's attorneys often times will try to get the defendant witness relaxed, comfortable and turn the deposition into a friendly conversation with the hopes that the witness will forget that they are adversaries, so that the attorney can elicit testimony from the defendant that is favorable to the plaintiff. The plaintiff's attorney was not your friend when he/she sued you and is not your friend in the deposition. You might be thinking, "Why is she telling me this? That is obvious!" Well, there are very skilled attorneys who are masters at making defendant witnesses forget this very obvious fact. Notwithstanding, it is imperative to be calm and respectful in your answers.

*It is important that you are represented by counsel at your deposition.*

Think of the deposition as a chess match instead of a tennis match. Allowing the plaintiff's attorney to turn a deposition into a tennis match means a more rapid pace of question and answer, which leads to rushed, thoughtless and careless answers, as well as misunderstood testimony — all of which can affect the witness' credibility. However, if you approach the deposition as a chess match, it allows you to maintain and feel in control. This establishes credibility and assists you in speaking the truth. In order to treat the deposition as a chess match, you need to listen, pause to understand, formulate your answer in your head, and then speak it.

Listening to the question is a key component of being a credible witness and preventing misunderstandings. You cannot possibly provide a truthful answer if you have not listened to the question. Furthermore, witnesses have a tendency to anticipate where the question is going and answer before the attorney has completed the question, so it is crucial that you listen to the entire question before stating your answer, so as to avoid misunderstood testimony. After you listen to the whole question, pause and restate the question in your head. Make certain that you understand the question asked, and ask for clarification if you do not understand what is being asked. Once you understand the question, formulate the "whole" response in your head. Thinking through your

response before speaking ensures that you are answering the question fully and completely, but without volunteering information that has not been requested.

Witnesses often may feel uncomfortable pausing and think that they need to respond to the question immediately. While a pause may seem long, in reality, it is not. The written transcript will not reflect a pause. If the deposition is videotaped (referred to as an audiovisual deposition), then the video will reflect a pause, but pausing can actually lend credibility to the witness because it tends to show that the witness is being thoughtful in his/her answers. The last step is to speak it — say the "whole" truth answer that you have formulated in your head.

**Bring representation.** Whether you are a non-party witness<sup>5</sup> or are a defendant, it is important that you are represented by counsel at your deposition.<sup>6</sup> Representation will allow you to be prepared prior to your deposition and your attorney will typically be present while you are questioned. If you are unrepresented by counsel prior to receiving a deposition subpoena, it is advisable that you contact your insurer. Plaintiff's attorneys will not discourage you from appearing at your deposition unrepresented by counsel. In fact, it often is preferable for them if you are unprepared and unrepresented at deposition. Again, they are not your friends; counsel is highly recommended.

## Risk Management Services

For members of the APA who are Allied World policyholders, we provide:

- 24-hour risk management hotline access.
- Risk management seminars.
- Individual CME Education through our relationship with Medical Risk Management, Inc.
- Access to our library of risk management resources.

## Conclusion

Telling the truth, only answering the questions posed, keeping in mind you are the expert in psychiatry, only testifying as to what you know, and thinking of the deposition as a chess match are important tips to keep in mind when you are deposed. These tips are not intended as a complete and exhaustive list, but rather, are some suggestions to keep in mind in the event that you are deposed. It is also important to be thoroughly prepared by an attorney representing you in advance of your deposition. Finally, while I hope you never find yourself in the unfortunate position of being a defendant in a lawsuit — which will inevitably lead to your deposition — I hope the above tips prove beneficial in preparing for your day in the deposition hot seat.

## About the Author



**Holly S. Bell** is a partner at the law firm of Norman, Wood, Kendrick & Turner in Birmingham, Alabama. Her practice is devoted primarily to the defense of medical malpractice and nursing home malpractice claims. Ms. Bell defends hospitals,

nurses, physicians, psychiatrists, nursing homes, home health companies, and other healthcare providers. Ms. Bell received her law degree from Cumberland School of Law at Samford University and her B.S. degree in Psychology from the University of Alabama. She is a member of the Alabama State Bar, the Birmingham and American Bar Associations, the Alabama Defense Lawyers Association and the Defense Research Institute.

**Note:** Our next issue of *In Session* will feature an article highlighting the anatomy of a civil lawsuit.

## Culture Corner



By **Kristen M. Lambert**, Vice President, Healthcare Risk Management and **Jota Shohtoku**, Vice President, General Casualty (Asia Pacific Region), Hong Kong Branch Office

Psychiatrists often encounter patients and family members from diverse cultures and backgrounds. Although there are many differences and variations within a culture, we will feature different cultural groups which may be of interest to you in your daily practice as well as some relevant legal issues which you may encounter. It is important not to stereotype a person from a specific culture into thinking he has the same beliefs as someone else from that same culture. Learning whether a patient considers himself typical or different from others in his cultural group is important as there are many factors which influence how an individual views his own culture/beliefs. You may never encounter some of the featured cultures in your practice; however, we hope you find the information on the featured cultures interesting nevertheless. In this newsletter, we feature the Japanese culture.

## Japanese

It has been several months since the devastating earthquake and tsunami that impacted Japan. Many of us saw the wide-spread destruction and how the Japanese were affected by this disaster. Family relationships are very important within the Japanese culture. One can only imagine the impact of a disaster of this magnitude either on a person who directly experienced it or on a person who lost or had family members displaced as a result. Cultural sensitivity and understanding of the Japanese culture is important when providing mental health treatment.<sup>7</sup>

**Major Language/Dialects:** Japanese Americans who are first generation (*Issei*) predominately speak Japanese while second generation (*Nisei*) are typically bilingual with later generations speaking only English.<sup>8</sup>

**Nonverbal Communication:** Typically polite and shy, Japanese Americans do not tend to disagree or ask questions. Expect little eye contact, especially with authority figures. The elderly may nod in a positive manner but this is not indicative of their understanding or agreement with what is being presented or communicated to them.

**Tone of Voice:** It is seen as polite to speak in a soft voice. Disagreements and conflicts are avoided. Expressions of anger or loss of temper are believed to reflect negatively on the individual, family or company.

**Consents:** Treatment should be explained clearly and when discussing consent, elicit feedback to determine understanding on what is being communicated to the patient (or surrogate decision-maker). Patients may feel uncomfortable asking questions or questioning treatment methods. As such, emphasizing important details is key. Older generations may consent to treatment due to the fact that you are the healthcare professional.

**The Family Unit:** The Japanese culture is family-oriented. In older families, members have defined roles. Responsibility, obligation to the family, helpfulness, and harmony within the family unit are seen as important. Typically, the father is the head of household and is the major authority for decision-making. Women are involved in the decision-making process but males (usually the eldest male) tend to be the family spokesperson. At home, mothers often assume a good deal of child-rearing duties and, as such, children may be much closer to their mothers than they are with their fathers. In older generations, gay and lesbian relationships may not be generally accepted and may be seen as a shame or disgrace to the family.

**Work and its Impact on the Family Unit:** Historically, fathers worked long hours during the week and often had to attend work functions on the weekend. This put a strain on the family unit. This traditional model is changing but is still seen among older generations. In addition, many Japanese companies send their employees away for three year work assignments in a foreign nation (referred to as *Tanshinfunin*) leaving

their families behind in Japan. In the past, the employee was offered the option of bringing their families along on the assignment; however, companies are cutting back on expenses and this is less common today. A work assignment such as this could certainly have a significant impact on family relationships.

- *The Concept of Karoshi:* The Japanese have a specific term for deaths that appear to be caused by overwork — called *Karoshi*.<sup>9</sup> This is an issue specific to the Japanese (and Korean) population. In Japan, it is common to work late hours. If you are new to a company, you are typically expected to stay at the office until your boss leaves.

**Concept of Health:** Good health may be seen as taking care of oneself. Balance between self, society and the universe is typically believed to be in direct correlation with good health. The roots of this mindset likely come from the Shinto and Buddhist religions, which are commonly practiced among the Japanese.

**Mental Illness:** Mental illness may be thought of as a loss of mental self-control caused by evil spirits, punishment for previous behavior, or not living a good life. Loss of mental self-control may be seen as an issue with a person's will power. Patients may be seen by their families as not trying hard enough to overcome their illness. A delay/avoidance in seeking treatment is common as there is often a social stigma and sense of causing shame to the family. Mental illness is often not believed to be a real illness. (See Lipson and Dribble).

- *Depression:* Depression may not be expressed by a patient due to fear of family stigma or shame.
- *Suicide Rates:* The Japanese “boast” one of the highest suicide rates in the world. This is mainly because it may be seen as easier to “save face” and commit suicide rather than to face one's problems. “Saving face” is a concept of heightened importance in Japan (and Asia). Figures show that 30,093 people committed suicide in 2007 leaving the country as the most suicide-prone anywhere in the developed world.<sup>10</sup> Of the total, 71% were men, and people in their thirties are the most likely to commit suicide. Work-related depression is emerging as a major issue.

In June 2011, Japan's government issued its annual policy paper on suicide prevention which indicated that survivors of the earthquake and tsunami need

long-term mental health treatment. It said that survivors may be undergoing shock, stress, depression from overwhelming losses and also may feel guilt for escaping death. More than 23,000 are still missing and an estimated 91,000 are still living in evacuation shelters.<sup>11,12</sup>

**Spousal Abuse:** Recently, spousal abuse has become a public issue in the Japanese culture. It was not considered to be common public knowledge in previous generations. Spousal abuse more often takes the form of mental rather than physical abuse, as Japanese men tend not to be physically aggressive.

### About Our Co-Author



**Jota Shohtoku** was born in Japan and lived there until the age of three. Since then, he has moved around the world quite frequently with stops in the United States, Malaysia, Singapore, United Kingdom and now Hong Kong. Jota's responsibilities as Vice President, Head of

General Casualty (Asia Pacific) include oversight of Allied World's General Casualty business in the high-growth region of Asia and introduction of new products into emerging markets. Prior to joining Allied World in 2010, Jota was Vice President, Deputy Manager (Liabilities Group) of Chartis Asia Pacific where he was responsible for driving profitable growth in the region. He has been a member of the China Council for International Cooperation on Environment and Development (CCICED) Task Force on Economic Instruments for Energy Efficiency and the Environment, and was a panel member of the United Nation's Environment Programme's Business and Industry Global Dialogue. Jota received his Master's Degree in Environmental Science and Management from the University of California, Santa Barbara, and a Bachelor's Degree in Civil and Environmental Engineering from the University of Edinburgh. The majority of Jota's immediate family members are now living in Osaka, Japan and he returns to visit with his wife and son, as well as for business, frequently.

## Claims Perspective



### Navigating the Unfamiliar Waters of Subpoenas for Treatment Records or Testimony

By Susan Lynch, Allied World Senior Claims Analyst

There is a knock on your door. Upon answering, you are surprised to find a messenger or sheriff delivering a legal document — requesting your signature. What happens next? In this installment of "Claims Perspective," we will attempt to demystify the potentially anxiety-producing experience of being a non-party witness related to your psychiatric treatment of a patient.

At some point in your career you will likely receive a subpoena ordering you to produce a copy of a patient's treatment record or to give live testimony regarding your treatment of a patient. The subpoena may be issued in the course of litigation brought by or involving your patient. Examples of legal actions where psychiatric records may be relevant are employment cases, auto accident and other types of injury claims, as well as divorce or custody actions. In these instances, you may be designated as a fact or non-party witness in the litigation.<sup>13</sup>

A non-party subpoena matter is not considered a claim under many professional liability policies as it does not involve allegations of wrong-doing related to your treatment of a patient. However, some policies, including Allied World's policies, provide coverage for attorney's fees (up to a specific dollar amount) for non-party representation. As such, we recommend that you seek the legal representation provided under this coverage. Our claims staff can identify attorneys with the appropriate expertise in your jurisdiction.

A subpoena for patient records might simply be for the purpose of information gathering. However, while it may appear that producing patient records might be innocuous, doing so without legal representation may pose some risk.

Your response to a subpoena depends upon the individual circumstances and the laws in your particular state. Failure to respond to a subpoena — or responding inappropriately — can subject you to court sanctions or may expose you to a breach of confidentiality claim. In most cases, physicians cannot release records without the consent of the patient. In certain situations, even if the subpoena is accompanied by a signed authorization from the patient, there may be clinical or legal reasons to withhold the records. In addition, many states have heightened regulations regarding the production of psychiatric or mental health records as they are often highly confidential and sensitive in nature. These records often cannot be produced absent patient consent or court order. Accordingly, due to the many legal and ethical issues involved with the release of confidential records, working with an attorney to determine your rights and obligations is crucial.

Sometimes a subpoena will order you to provide deposition or trial testimony. We strongly recommend that you are represented by an attorney whenever you provide deposition or trial testimony pertaining to your treatment of a patient. Again, Allied World's policies provide resources to help you retain an attorney and appropriately respond to the subpoena. Your attorney can help you prepare for testimony and anticipate questioning by the attorneys in the underlying lawsuit. Such preparation may prevent you from unintentionally providing an opportunity for another party - including your patient - to find reason to bring a lawsuit against you.

While every situation is different, it is important that you protect yourself from violating patient confidentiality, releasing records without proper authorization, or exposing yourself to further litigation/legal action. Our claims staff deals with these situations every day. We can offer you the resources and support you need to navigate these unfamiliar waters.

Please note that the next issue of *In Session* will provide a claims perspective on what a psychiatrist can expect if he or she is named as a party to a lawsuit.

If you receive a non-party subpoena for records or testimony, fax or mail a copy of the subpoena to The American Professional Agency, Inc. who will forward the information to Allied World's claims department. A claims analyst will review the information and contact you directly to explain the coverage provided under the specific terms of your insurance policy.

### Terms to Know:

A **subpoena** is a writ or process in equity, equivalent to a summons in an action at law, through which a party is subjected to the jurisdiction of the court.<sup>14</sup> If you do not comply, you may be subject to penalty.

**Subpoena duces tecum** — requires you to appear and bring something with you (such as the patient's treatment records or billing records).<sup>15</sup>

An **administrative subpoena** is issued under the authority of a federal or state governmental agency having investigative and enforcement authority.

*A subpoena may require a physician to:*

- produce treatment records, charts, billing records, telephone records, or stored electronic information
- testify at a deposition, trial or hearing.

## Doctor, Can We Be Friends?



By Kristen M. Lambert and Claire Zilber, M.D.

Online social media is everywhere. Between 2007 and 2010, the use of social media increased 230%. In 2010, 47% of U.S. adults reported visiting Facebook in the last 30 days.<sup>16</sup> Obviously, as the population becomes more comfortable with online media, these statistics will only continue to increase.

The question is, as a psychiatrist, what are the risks involved if you participate in online social media? One must consider the inherent ethical and legal issues when deciding whether to engage in online social media. We will address some of these concerns, including confidentiality, professionalism, boundaries and standards of care.

### Confidentiality

#### Communication With Patients In An Online Venue

If you are communicating with a patient by email or other online technology, ask yourself, how private and secure is the technology?

#### *Facebook is:*

**Public by default but a user can limit content to friends only.** Did you know that Facebook can update your settings when you download an App on your smart phone? This update can allow all users to view information posted on your Facebook page. While your home computer may have privacy settings in place that limit who can see your profile, your phone may not have these same settings, thus allowing patients and

everyone else to view the contents of your page. It is up to you to ensure that your settings are private so that your personal information is not accessible to everyone, including patients.

**Not confidential.** If you decide to communicate with a patient via Facebook, it is not confidential. The Loyola University School of Medicine cited a study by the American Academy of Matrimonial Lawyers which found that Facebook is a contributing factor in 1 out of 5 divorces in the U.S.<sup>17</sup> Even though a patient might believe his/her Facebook account is private, it is quite possible that unauthorized persons can access it. Therefore, if you are communicating with your patient via Facebook, bear in mind that he may not have shared with others that he has sought treatment. Consider how this would impact the patient if his spouse found out about psychiatric treatment when he did not wish to disclose. Keep in mind that someone other than the patient may be on the other end of the computer screen receiving your message. So, while using Facebook is becoming the norm for many providers, using Facebook to communicate with patients should not be entered into lightly.

#### *Twitter is:*

- **Public by default but messages can be made private.**
- **Not confidential.**
- **Can be hacked and may not be secure.**

Twitter is another form of social media which is steadily on the rise. It also has its share of risk management issues. Consider that a few years ago several high profile figures, including President Obama and Paris Hilton, had their accounts hacked.<sup>18</sup> While you may believe your account is secure, in reality, it may not be. Further, Twitter has also recently been in the news and, bear in mind, that once a message is transmitted there is no way to “take it back.”

#### **Communication About Patients In An Online Venue:**

Whether you are blogging in an online venue or having a discussion with a colleague in person, it goes without saying that patients are entitled to confidentiality. As in all aspects of communication concerning patients, you must always remain in compliance with HIPAA privacy rules. This holds true whether communicating in written, verbal or electronic form, including the use of online social media. Online chat rooms have beneficial aspects, particularly for those in remote areas. However,

engaging in this form of online social networking has its share of risk management issues. If you engage in online blogging concerning a patient, are you altering information so that no other person could identify the patient? Further, ask yourself whether you are adhering to your ethical obligations before you post/write in an online forum. Concerning case publication, the APA indicates that, "Clinical and other materials used in teaching and writing must be adequately disguised in order to preserve the anonymity of the individuals involved."<sup>19</sup>

If you do not adhere to your ethical obligations, keep in mind that you can be reprimanded by the board of medicine in your state and have your license suspended or revoked. In April, 2011, a Rhode Island physician was reprimanded by the state medical board and her privileges were revoked due to posting information online about a trauma patient. The physician did not include the patient's name; however, sufficient information was conveyed such that others in the community could identify the patient. This was the first case that the Rhode Island medical board has heard concerning a physician's use of social media.<sup>20</sup> As this is an evolving issue, it is expected that more caselaw and board of medicine actions concerning social media will develop in the years to come.

## Professionalism

Physicians are held to a higher standard. What you do in your free time not only reflects upon your personal reputation but also your profession's reputation. The American Medical Association has developed a policy for physicians regarding the use of social media.<sup>21</sup> The policy is designed to help physicians maintain a positive online presence and preserve the integrity of the doctor-patient relationship. It is important for you to review this policy when engaging in any type of social media.

If you are employed by a healthcare organization or physician group, it is important to know your organization's policy regarding online social networking. Although this is an issue of emerging concern, many healthcare organizations are either in the process of developing policies regarding social networking or already have

one in place. For example, Tufts Medical Center is in the process of preparing a policy and Children's Hospital Boston this year published its social media policy.<sup>22</sup> As such, it is important that you verify your organization's policy prior to engaging in any online social networking.

Social networking has become the norm for many; however, if you are engaging in Facebook or some other social networking website, keep in mind that what you post reflects on your reputation, both personally and professionally. A study at the University of Florida evaluated the Facebook profiles of 501 medical students and 312 residents, of which 44.5% had Facebook profiles. Among those with Facebook profiles, 37.5% made their accounts private and 33% were psychiatry residents. 30% of the profiles exhibited unprofessional conduct such as overt sexuality, foul language, substance intoxication and patient privacy violations.<sup>23</sup>

What you write is memorialized and can follow you around for years. As the saying goes, what you post online does not disappear; it goes on forever. Consider if you are engaged in

a lawsuit or are acting as an expert witness in a case. Anything you ever posted online, even in years prior, can be used against you. Keep in mind that in litigation, attorneys monitor and obtain access to private social networking content. Skilled attorneys will conduct research on you before initiating suit, when the suit is going on and all the way through the trial. It is important to be cognizant of this when posting online.

## Boundaries

As indicated in the Spring 2011 *In Session with Allied World* article, Boundary Violation Issues and Risk Management Concerns In Psychiatry, "Anything that occurs that might blur or confuse the professional relationship between the doctor and his patient is fraught with peril."<sup>24</sup> This also holds true in a social networking context. Always remember, a patient is not your friend... he is your patient. Advances in technology do not change your duty to maintain professional boundaries with your patients. As you would maintain appropriate professional boundaries with your patients off-line, the same should hold true in an online context. Not

maintaining appropriate professional boundaries opens you up to liability and board disciplinary action.

When a patient sends you a “friend” request on a social networking site, one has the option to accept, decline or ignore. Accepting a patient’s request to become a “friend” blurs professional boundaries. If you “friend” a patient, you lose any privacy regarding personal photos or comments you have on your Facebook profile.<sup>25</sup> It may also create confusion regarding the treatment setting if the patient sends you a treatment-related message on your Facebook page. If you decline the request, you protect professional boundaries and confidentiality, confirming your professionalism, but you risk hurting the patient’s feelings and stirring up a transference response. This issue should be addressed in treatment. You may also choose to ignore the request; however, by choosing to not directly address the invitation to cross a boundary, the psychiatrist may be missing an important opportunity in the patient’s treatment.

## Standard of Care

No matter which type of online venue you use, the standard of care must be adhered to. The standard of care varies from state to state, but, in general, a physician must practice with the degree of care, knowledge, and skill ordinarily possessed by other physicians in similar situations. Whether you are engaged in Facebook, emailing with a patient, telepsychiatry, or online prescribing, you must ask yourself if you are complying with the standard of care at all times. There are many factors to consider in each online forum.

**Emails:** Patients may agree to communicate online without considering whether you are using an encrypted email system. The physician is responsible for being the guardian of patient confidentiality. Further, how do you ensure your patient is the one receiving your email? You should consider these issues when determining whether emailing patients works best in the treatment context.

Another important factor to consider when emailing patients: is the email being sent to a work account? Recently, a California Appeals Court decision found that an employee’s communication with her therapist may lose protection under patient-therapist privilege when there is a transmission from a workplace device.<sup>26</sup> So, in the event that you are emailing patients, it is important that it be to their personal (and not their work) account as there may be no reasonable expectation of privacy.

**Telepsychiatry:** Another online venue that has risk management considerations is that of telepsychiatry. Telepsychiatry is beneficial in many parts of the country, particularly in rural, remote areas. It allows patients access to psychiatric treatment they may not have had without the service. However, there are also issues to consider prior to engaging in this type of practice. How are you assessing the patient for aspects of the examination that require physical contact, such as vital signs and examination for dystonia? What systems do you have in place if the telepsychiatry encounter suggests that the patient is experiencing a psychiatric emergency? In addition to verifying that your facility has adequate policies and procedures to ensure that the telepsychiatry examination adheres to the standard of care, you must comply with your state’s regulations with respect to telemedicine.

**Online Prescribing:** With respect to online prescribing, you can face liability and coverage issues as well as board disciplinary action if you prescribe in a state in which you are not licensed. In addition, the same concerns regarding standard of care that were discussed above in the telepsychiatry section are present here, particularly with regard to those parts of the clinical encounter that rely on visual examination (for example, assessment of tremor or tardive dyskinesia) and physical examination (for example, vital signs or examination for dystonia).

## Allied World's Experienced

**Claims Team:** As the largest insurer for mental health providers, Allied World's analysts understand the intricacies of psychiatric claims, including the unique challenges associated with patient complexities, patient rights and various state regulations. Possessing both the legal and clinical backgrounds that are critical for handling psychiatric claims, each team member has extensive experience handling psychiatric claims.

### Here are some quick guidelines for a physician who engages in social networking:

- 1. Be Aware of Patient Confidentiality.** Simply because you are communicating in an online setting, does not waive your responsibility as a physician. You must adhere to your ethical and legal responsibility to maintain patient confidentiality.
- 2. Patients are not your friends.** As such, do not accept friend requests from patients.
- 3. Monitor your web presence regularly.** Conduct an internet search of your name. Does content appear that you do not want your patients, colleagues, employers or others to see?
- 4. Doctor's forums:** do you really know who you are communicating with? Remember that a doctor's forum is not private. As such, do not communicate about a patient, co-workers or a hospital.
- 5. Keep in mind that every conversation on a social network is recorded electronically and can surface in the future.** The internet is forever and what you blog/post/write can be seen by individuals down the road.
- 6. You are never truly anonymous on the web.**<sup>27</sup> Even if you use an alias, your post can be traced to you.

### Conclusion

While this article touches upon risk management issues to consider when engaging in online social networking, it does not constitute an exhaustive list of everything to consider. It is important to consult competent counsel concerning these complex issues. If you have questions or concerns in response to this article, and you are an Allied World policyholder, our risk management hotline is available to you whenever the need arises. We also continue to provide educational sessions on this topic. Please contact us if you have any questions.

### About Our Co-Author



**Claire Zilber, MD**, is a Board Certified psychiatrist in private practice in Denver, Colorado. She graduated from Jefferson Medical College in 1988, completed her residency in adult psychiatry at the University of Colorado in 1992, and completed a two-year

course in Psychodynamic Psychotherapy through the Denver Institute of Psychoanalysis in 1994. Dr. Zilber specializes in combining psychopharmacology with eclectic, psychodynamically informed psychotherapy to treat anxiety and mood disorders, improve adaptation to chronic illness including HIV/AIDS, and address problems with identity and unresolved grief. She has been chair of the Colorado Psychiatric Society's Ethics Committee since 2003. She writes an ethics column for the CPS newsletter, for which she has received the American Psychiatric Association's Carol Davis Ethics Award on three separate occasions. Dr. Zilber has been a faculty member with ProBE (Professional Problem Based Ethics) since 2009.

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# 2011 Upcoming Speaking Events

*Kristen Lambert will be speaking at the following events:*

<b>North Carolina Psychiatric Association</b> Annual Meeting	<b>September 16, 17</b>	<b>General Member Session (9/16)</b> <b>Residents Session (9/17)</b> <b>Asheville, NC</b> Topic: "Ethical and Legal Considerations in the Age of Social Networking"
<b>Washington State Psychiatric Association</b> Fall Meeting	<b>October 15</b>	<b>Seattle, WA</b> Topic: "Legal and Risk Issues in Clinical Documentation"
<b>ASHRM</b> Annual Conference	<b>October 19</b>	<b>10:00 – 11:00 a.m.</b> <b>Phoenix, AZ</b> Co-Presenting with Kelley Woodfin, R.N., B. S. DFASHRM, CPHRM and Dawn Cushman, Esq. Topic: "Legal and Risk Considerations: Managing Age-Related Psychiatric Behaviors in LTC Residents"
<b>AACAP</b> Annual Meeting	<b>October 22</b>	<b>Toronto, Canada</b> Topic: "Legal and Risk Considerations in the New Age of Technology"
<b>Queens County Psychiatric Society</b>	<b>November 8</b>	<b>Queens County, NY</b> Topic: "Life After Residency: Legal and Risk Considerations When Setting Up a Private Practice"

If you have a topic of interest, **please contact Kristen Lambert at (857) 288-6036.**

# 2012 Upcoming Speaking Events

Kristen Lambert will be speaking at the following events:

**Oklahoma  
Psychiatric  
Association**  
Annual Meeting

**March  
31**

**Norman, OK**  
Topic: "Legal and Ethical Considerations  
in the New Age of Technology"

## End Notes

### Preparing For Your Day in the Deposition Hot Seat

<sup>1</sup> Although this article focuses on your day in the "hot seat," bear in mind that, more often than not, your attorney will also have the opportunity to take the plaintiff's deposition.

<sup>2</sup> Depending on the court reporter's training, he/she may be recording the testimony and will later transcribe what was said in the room. This document will be in written form and is referred to as a deposition transcript.

<sup>3</sup> The deposition may also be videotaped, and as such, the recording can be used at trial.

<sup>4</sup> A fact witness or non-party witness is someone who may have knowledge about the allegations at issue, may have been involved in treating the patient or may have some other type of information which one or some of the parties believe is worth exploring in deposition. There are occasions where a treating physician who is originally not named in the lawsuit, testifies at deposition and is later added to the case as a defendant. While the non-party witness may originally be just that, he/she may later end up a named party to the suit. Thus, it is important to have representation when you are a fact witness.

<sup>5</sup> As indicated earlier, a non-party deposition is when you appear at a deposition as a witness and are not a named party in the lawsuit at issue. Some examples of when you may be subpoenaed to appear at a deposition include: if you are a prior or current treater, if you had some other involvement with the patient/plaintiff, if you were a witness or were involved in a curbside consultation concerning the patient/plaintiff. The plaintiff's attorney may call you as a witness as he/she is attempting to build his/her case against the named defendant(s) or you in the event that you are later named as a defendant during the course of the litigation.

<sup>6</sup> For more information, refer to, "Navigating the Unfamiliar Waters of Subpoenas for Treatment Records or Testimony," page 7.

### Culture Corner

<sup>7</sup> <http://www.everyculture.com/multi/Ha-La/Japanese-Americans.html>. "Countries and the Cultures. Japanese Americans."

<sup>8</sup> Lipson, J., Dribble, S., Minarik, P. (Ed.). Culture & Nursing Care: A Pocket Guide. USCF Nursing Press (1996), 18: 180-190 (G. Shiba, R. Oka).

<sup>9</sup> Nishiyama, Katsuo, Johnson, Jeffrey. "Karoshi- Death from overwork: Occupational health consequences of the Japanese production management." <http://www.workhealth.org/whatsnew/lpkarosh.html>

<sup>10</sup> Lewis, Leo. "Japan gripped by suicide epidemic." *Times on Line*. <http://www.timesonline.co.uk/tol/news/world/asia/article4170649.ece>

<sup>11</sup> "Japan Disaster Victims Face Mental Health Crisis." *San Francisco Chronicle*. June 10, 2011. [http://articles.sfgate.com/2011-06-10/world/29641650\\_1\\_japan-highest-suicide-rates-mental-health](http://articles.sfgate.com/2011-06-10/world/29641650_1_japan-highest-suicide-rates-mental-health)

<sup>12</sup> Hosaka, Tomoko. "Japan disaster victims face mental health crisis." *Associated Press*. June 10, 2011. [http://www.google.com/hostednews/ap/article/ALeqM5h2xqNSKRUGH1yGFQ\\_hh5tngnkfvw?docId=c75b4f6c5b1040d58540fb76ebc4d063](http://www.google.com/hostednews/ap/article/ALeqM5h2xqNSKRUGH1yGFQ_hh5tngnkfvw?docId=c75b4f6c5b1040d58540fb76ebc4d063)

### Claims Perspective

<sup>13</sup> For more discussion on fact witness/non-party witness refer to "Preparing for Your Day in the Deposition Hot Seat," page 3.

<sup>14</sup> Ballentine's Law Dictionary, LexisNexis (2010).

<sup>15</sup> *Ibid*.

## Doctor, Can We Be Friends?

<sup>16</sup> Diana, Alison, "Social Media Up 230% Since 2007," *Information Week*, June 28, 2010. [http://www.informationweek.com/news/software/soa\\_webservices/225701600?queryText=social+media+up+230%25](http://www.informationweek.com/news/software/soa_webservices/225701600?queryText=social+media+up+230%25)

<sup>17</sup> Loyola University School of Medicine. "Don't Let Your Marriage be Among the 1 in 5 Destroyed by Facebook." [http://www.loyolamedicine.org/Medical\\_Services/Features/Facebook\\_VS\\_Marriage.cfm](http://www.loyolamedicine.org/Medical_Services/Features/Facebook_VS_Marriage.cfm)

<sup>18</sup> Goochild, Joan, *CSO: Security and Risk*. "Social Media Risks: The Basics." <http://www.csoonline.com/article/print/529764>

<sup>19</sup> American Psychiatric Association. *Principles of Medical Ethics*, Section 4, Article 3

<sup>20</sup> Conaboy, Chelsea. "For doctors, social media a tricky case." April 20, 2011, [http://www.boston.com/lifestyle/health/articles/2011/04/20/for\\_doctors\\_social\\_media\\_a\\_tricky\\_case](http://www.boston.com/lifestyle/health/articles/2011/04/20/for_doctors_social_media_a_tricky_case)

<sup>21</sup> AMA Policy: Professionalism in the Use of Social Media. <http://www.ama-assn.org/ama/pub/meeting/professionalism-social-media.shtml>

<sup>22</sup> Conaboy.

<sup>23</sup> Thompson, et. al. "The Intersection of Online Social Networking with Medical Professionalism," *Journal of General Internal Medicine*. 2008; 23(7): 954-7

<sup>24</sup> Rubin, Jonathan. "Boundary Violation Issues and Risk Management Concerns in Psychiatry," *In Session with Allied World*, Spring, 2011: 1(1), 3

<sup>25</sup> Although Facebook is specifically mentioned as it is the most widely used social networking site, the same principles hold true on other social networking sites.

<sup>26</sup> *Holmes v. Petrovich Development Co., LLC*, 191 Cal.App.4th 1047 (2011).

<sup>27</sup> Berkman, Eric, "Social Networking 101 for Physicians." *Mass Medical Law Report*, October 19, 2009, <http://mamedicallaw.com/blog/2009/10/19/social-networking-101-for-physicians/>

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