
British Psychoanalytic Council

4.5d Guidelines on writing reports for solicitors



Solicitors sometimes ask psychotherapists for reports on patients, e.g. when the patient is pursuing compensation, bringing a legal case against another person, or defending a case themselves. Think carefully even about agreeing to state that a patient is or was in therapy (see later section on possible unintended outcomes). There are three different situations when a solicitor asks for a report:

1. A report provided by a psychotherapist as an expert in his capacity as the patient's therapist. This is typically in relation to one of their patients with whom they have had a considerable amount of contact. They may be asked to provide a report on, for example, the patient's current emotional state, previous emotional states and how that might have affected a particular incident or may affect his/her future conduct.
2. A psychotherapist may be approached to provide an independent expert opinion. This may be in relation to a patient with whom the psychotherapist has had no previous dealings and therefore he/she is able to give an independent assessment.
3. As a citizen, you may be a witness to certain facts. This might be in relation to a crime or an incident which gives rise to a civil claim, such as a road traffic accident. Other examples include the patient telling you about a crime soon after it was committed or using the time of their session as an alibi. In these situations you might be approached by a solicitor or the police (see 'Other similar circumstances' below).

If you agree to write a report, your legal duty is to assist the court and this duty overrides any obligations which you may have to your patient or the solicitor instructing you. You may be called as a witness, and questioned or cross-examined on your report in court. The fact that you are approached by one particular party in no way means that you should angle or alter your opinion or report in favour of the particular party. It is important that you maintain your professional independence at all times and that you give an accurate and unbiased opinion of the facts that you are asked to assess.

In respect of the first situation described above, registrants are reminded that any acknowledgement that a patient is in therapy with them (or an ex-patient was in therapy with them) is a serious disclosure and should only be given after careful consideration.

Do I need to comply?

Solicitors' letters can be couched in legal sounding language, and can look and sound demanding. Some therapists have mistakenly believed, from the tone of a letter, that they are legally obliged to provide a report. You DO NOT need to comply. This is true even if the patient has given their consent. Furthermore, *if the client has not given consent, complying*

would breach confidentiality. You can, if you wish, write back refusing the request. If in doubt, seek advice rather than comply.

You may wish to discuss the matter with your patient. Depending on how you work, you could treat the matter as a boundary issue, exploring the meaning of how the request originated. Alternatively, if you are refusing to write the report, you may wish to explore with your patient the potential unexpected detrimental effects. Please bear in mind that if the request comes by way of a court order/witness summons, then you may be obliged to assist—please see below in relation to court orders.

What problems could arise if I write a report?

Most therapists are not trained in the ways of the court. It is important to remember that your report may be used in the resolution of a dispute, and that there are usually two sides to the story. Your report can be used primarily to support or discredit your patient's case, depending on which party instructs you to prepare the report. However, the other party will have access to your report, and may use it to support their own case.

Possible unintended outcomes include:

The opposing lawyer could use your report as 'evidence' of the unreliability of your patient, based on their 'need' for therapy.

If you have any details wrong, a lawyer could seriously undermine your report. This could have profound effects on the patient's trust in therapy, as well as on the legal case.

If your report sparks interest, you could receive a subpoena to testify, or a court order to provide records of therapy. Hereafter, more personal information than you intended could be revealed. Please note, however, that such a subpoena could be obtained even if you have not agreed to write a report.

If the patient is still in therapy, the report could affect the dynamics of the therapy. Also, your report may be severely challenged as biased, or your therapy seen as 'coaching' the patient.

Think carefully even about agreeing to state that the patient is in therapy. Even such a simple statement can have the above effects.

Patients may have considerable difficulty in seeing these problems for themselves. They could have an unconscious reason for asking for a report, such as a wish for revenge or self-harm. They may harbour omnipotent phantasies that all will be well. They may have overly positive transferences, and believe that neither you nor their solicitor can do anything that will cause harm.

You also need to consider the nature of confidentiality in psychoanalytic work. Because the patient's consent to your report can have many meanings, some psychoanalytic psychotherapists believe that providing any information to a third party is essentially a breach of confidentiality. (Please see below in relation to court orders.)

How should I proceed if I do decide to write a report?

If you have valuable evidence and decide to write a report, good practice includes:

Checking that the patient has given written informed consent for the report. Registrants are however reminded that many psychoanalytic psychotherapists would take the view that it is questionable whether a patient in psychoanalysis or psychoanalytic psychotherapy could be expected to give truly informed consent and, indeed, may later regret their agreement to do so.

Any decision to report should be based on best endeavour to address possible consequences including that in some circumstances the treatment may be damaged beyond repair.

Obtaining details of who is requesting the report, whom they are representing, why they are asking for a report, exactly what information they are seeking, and how they propose to use the report.

Unless you are experienced in the law, seek guidance on how to write a report. As outlined in the introduction, distinguish between whether you are writing a 'witness statement,' i.e. providing factual evidence, or 'expert evidence,' i.e. providing professional interpretation of the facts on someone you know, or an 'independent expert report,' i.e. providing professional interpretation of facts on someone you do not know. Note that there are model layouts for 'expert reports' (see Jenkins, 2000), and expert witnesses are increasingly expected to have special training, and not be the therapist to the patient concerned. There are specific rules for expert witnesses giving reports and evidence in court proceedings, in accordance with the Civil Procedure Rules (CPR). These provide for the way in which it needs to be set out, the details that must be included and the steps that need to be taken in relation to a report. The solicitor asking you to write the report should provide you with a copy of the appropriate provisions of the CPR.

If you do write a report, the simpler the better. Remember that reports are for the court, not another therapist, and simple everyday language will probably have a better outcome than psychoanalytic terminology; it can be helpful to check your report – in confidence and anonymised – with a senior colleague. Formal requests from courts may give little notice; have your report ready where possible. Avoid medical diagnoses unless you are medically qualified, since your credibility could otherwise be questioned. Be brief, clear, concrete, and factual. Clearly distinguish between:

Factual information that you can verify: e.g. attendance at a session on particular day. Only include things here that you have directly witnessed.

Reported information: e.g. what your patient told you, such as their account in therapy.

Your professional opinion or understanding of events, or of your patient. Unless you are writing an expert report and have been trained for this, it may be better to limit anything in this category. This may go against the grain, as it means omitting psychoanalytic understanding. However, this is where your report could be interpreted in ways you had not intended.

Other similar circumstances

Police. If the police request a statement, you do not have to comply, however emphatic the request. Essentially, this is similar to a request from a solicitor, but as a citizen and ethical practitioner, you should have due regard for legal process. If the Police have a warrant or court order then you will be legally obliged to comply. If they do not have a warrant or court order then you should consider the position carefully and you may want to seek legal advice. Bear in mind that it is a criminal offence to obstruct a police officer in the execution of his duty.

Being subpoenaed / Court order for access to records. Legally, you must comply. However, you can often limit the information you give, and rarely need to submit all your notes even if this is the original request. It is a good idea to seek legal advice before acting. If you receive a witness summons you may make an application to set it aside. This involves going to the Court and explaining why you say you should not be compelled to give the evidence requested or to produce the documents concerned. You are strongly advised to seek legal advice if you would like to challenge a witness summons or other court order.

Request under the Data Protection Act 1998 (DPA). Under the DPA individuals can make a request for access to certain personal data held about them. A solicitor could make a request on behalf of their client (your patient). You must comply with the DPA, but you do not need to write a separate report. You are strongly advised to seek legal advice if you receive a DPA request.

Obtaining further information

People you can consult:

You are strongly advised to notify your Professional Indemnity Insurer that a request has been made, in case of later legal action. They may in addition be able to provide guidance including e.g. financial assistance with report writing; note that there are lawyers who specialize in psychotherapy report writing.

Any of the Ethics Committees of the Member Institutions of the BPC or the BPC Ethics Committee.

Your own solicitor, the solicitors used by your MI or the solicitors used by the BPC (you will need to pay).

Books:

Bond, T. & Amanpreet, A. (2005) *Therapists in Court. Providing evidence and supporting witnesses.* London: Sage.

Jenkins, P., Keter, V. & Stone, J. (2004) *Psychotherapy and the law. Questions and answers for counsellors and therapists.* London: Whurr.

Jenkins, P. (2002) *Legal issues in counselling and psychotherapy.* London: Sage.

Levin C., Furlong A. and O'Neill M.K. 'Confidentiality: Ethical Perspectives and Clinical Dilemmas' The Analytic Press 2003

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