

# Attorney Contacts, Subpoenas, & Testimony - How Having a Legal Proceedings Consultant Can Protect Your Institution

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UW Medicine, Health Sciences Risk Management

2020 Seattle Regional Healthcare Compliance Conference

Health Care Compliance Association, June 5, 2020

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"Marcia, do we have anyone in legal who's  
fluent in both 'Mumbo' and 'Jumbo'?"

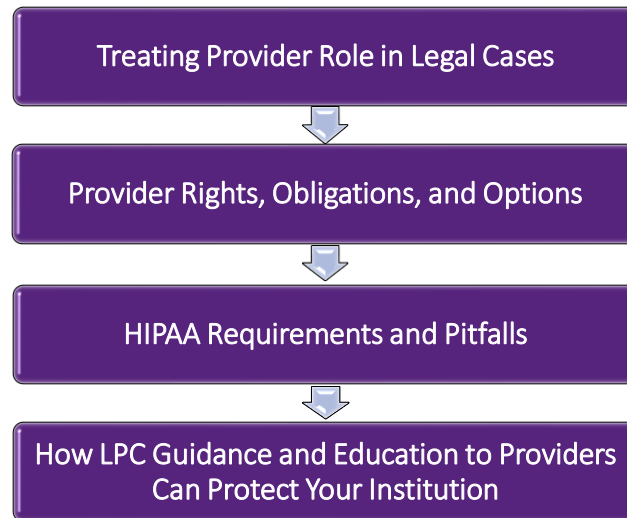
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## Program Objectives

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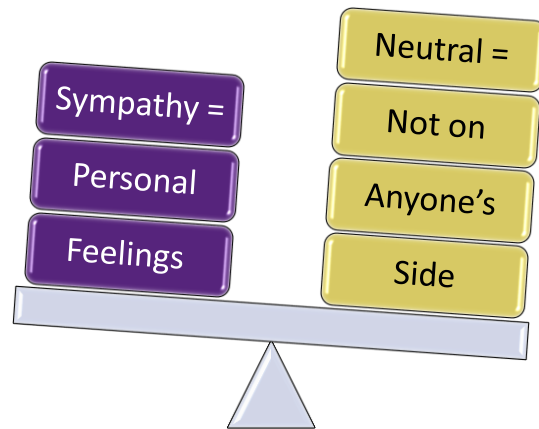
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A large purple rounded rectangular box containing the text "Treating Provider Role in Legal Cases".

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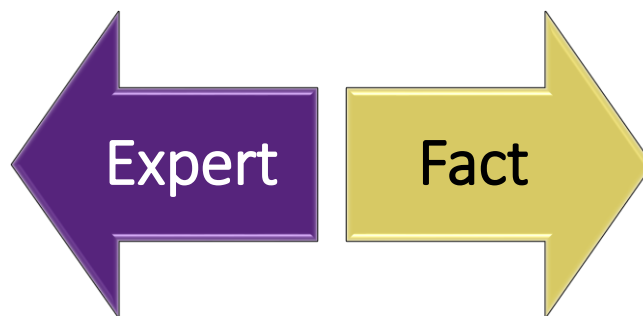
## A Treating Provider is a Neutral Witness



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## A Treating Provider is a Fact Witness



Providers Need to Understand the Difference

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## What is a Fact Witness?

### Treater Role

- Directly involved in event (patient care)
- Testify solely about personal knowledge
- “Eyewitness” to own care/charting (or of those supervised)

### Neutral Party

- To “verify” records to admit into evidence
- Not their job to prove/defend a case
- Ok to discuss medical conclusions

### Fees

- Civil/Divorce: Set by court rule; many attorneys willing to pay more; discuss first
- Criminal/Dependency: Providers typically don’t charge (unless forensic witness)
- Work Comp: L&I has a separate fee schedule

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## What is an Expert Witness?

### Different Meaning

- Providers are “experts” at what they do, but...
- An expert in a legal case has a different meaning
- Attorneys may try to take advantage of provider expertise and claim they are a “medical expert”

### In-Depth Knowledge

- Not directly related to incident (care)
- Offers opinion relevant to their expertise
- Entitled to fees commensurate w/profession

### Retained

- Retained specifically to support one side
- Reviews entire record to form present-day/hindsight opinions
- Must defend those opinions as challenged

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## Provider Rights, Obligations, and Options

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## Provider Rights, Obligations, and Options

What are  
their rights,  
obligations,  
and options?



It depends!

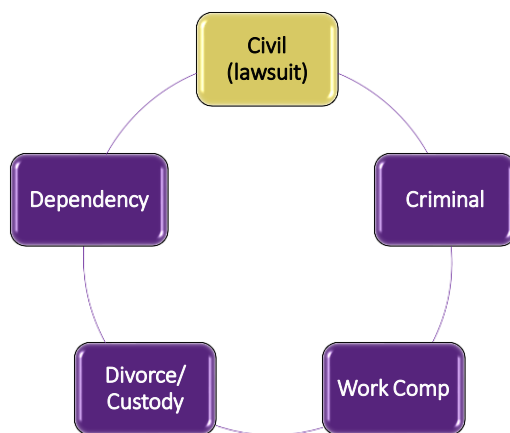
(You knew that  
was coming,  
didn't you?)

Type of case  
Type of request

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## Types of Cases



### CIVIL CASE:

Lawsuits – Personal Injury, Medical Malpractice, MVA, etc.

Person/entity (plaintiff) claims that another (defendant) failed to carry out a legal duty owed.

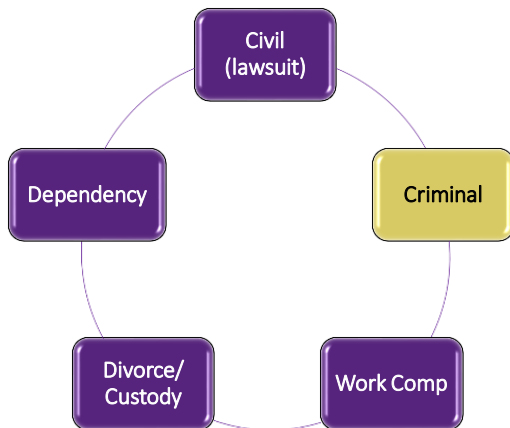
Plaintiff's burden of proof = preponderance of the evidence (51% in their favor / "more likely than not").

May ask court to force fulfillment of the duty or for compensation.

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## Types of Cases



### CRIMINAL CASE:

Plaintiff (gov't on behalf of the people of USA/State/City) prosecutes through applicable Prosecutor's Office.

Prosecutor's burden of proof = beyond a reasonable doubt.

Patient/Victim is NOT responsible for the case. Prosecutor is in charge.

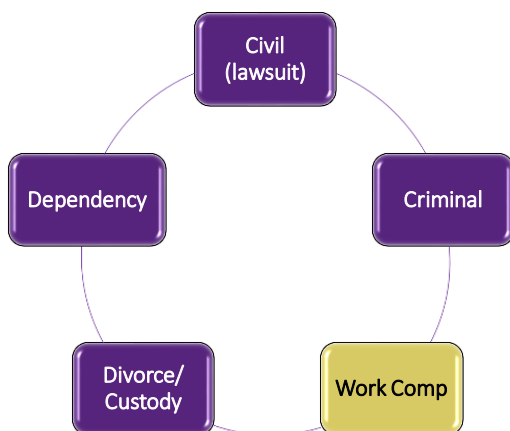
If found guilty, defendant may pay a fine or go to jail.

HIPAA exception MAY apply for child abuse/neglect cases.

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## Types of Cases



### WORK COMP:

**MANDATORY** – State law requires cooperation with state L&I cases.

HIPAA exception (no patient authorization needed except for heightened confidentiality PHI – mental health, STDs).

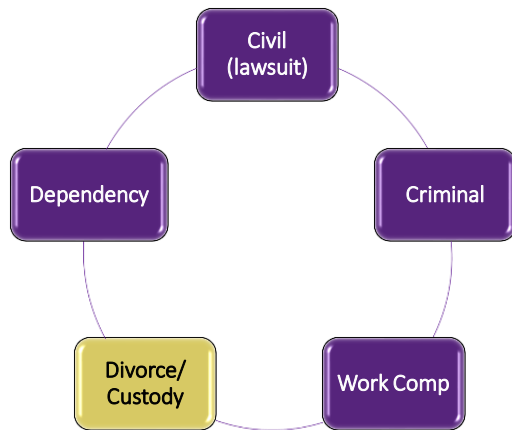
Request the patient's L&I claim form ("SIF-2") to verify (it also includes an authorization which could then cover the heightened confidentiality PHI).

Attorney conferences and testimony requests most common.

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## Types of Cases



### DIVORCE/CUSTODY:

Divorce case = public.

Often very contentious.

Special caution to testify only about the patient or direct, factual observations.

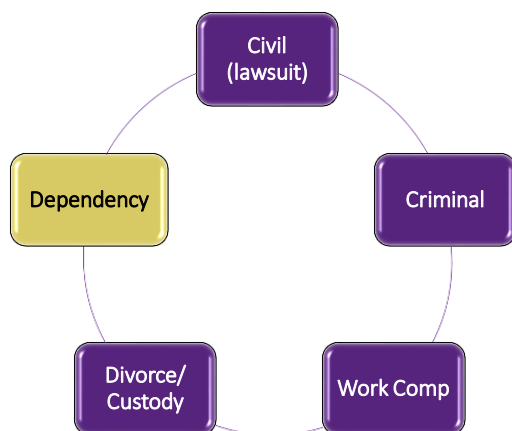
May be difficult to determine who can legally authorize disclosure for a child patient.

May need to request copy of Parenting Plan for a child patient.

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## Types of Cases



### DEPENDENCY:

Juvenile court = not public.

Attorney General (AGO) pursues for termination of parental rights.

May be difficult to determine who can legally authorize disclosure for a child patient.

HIPAA exception MAY apply depending on circumstances. Court Order often provided.

Typically VERY short notice, but goes to stand-by status.

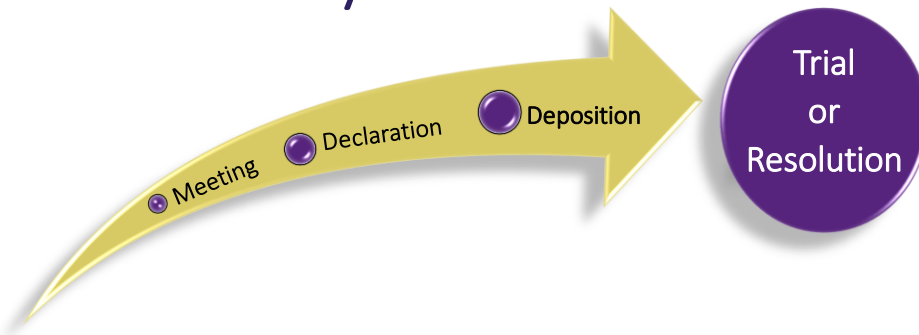
Telephone testimony is frequently allowed.

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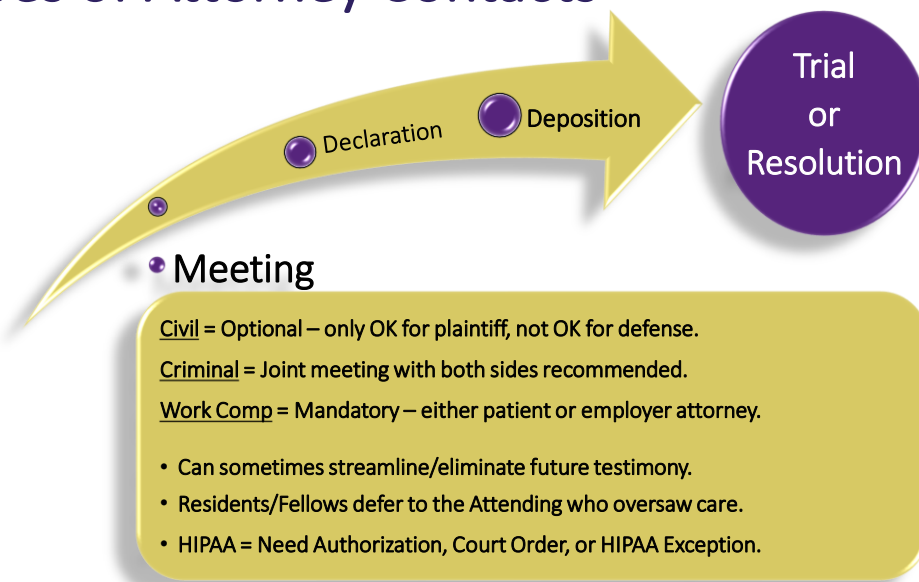
## Types of Attorney Contacts



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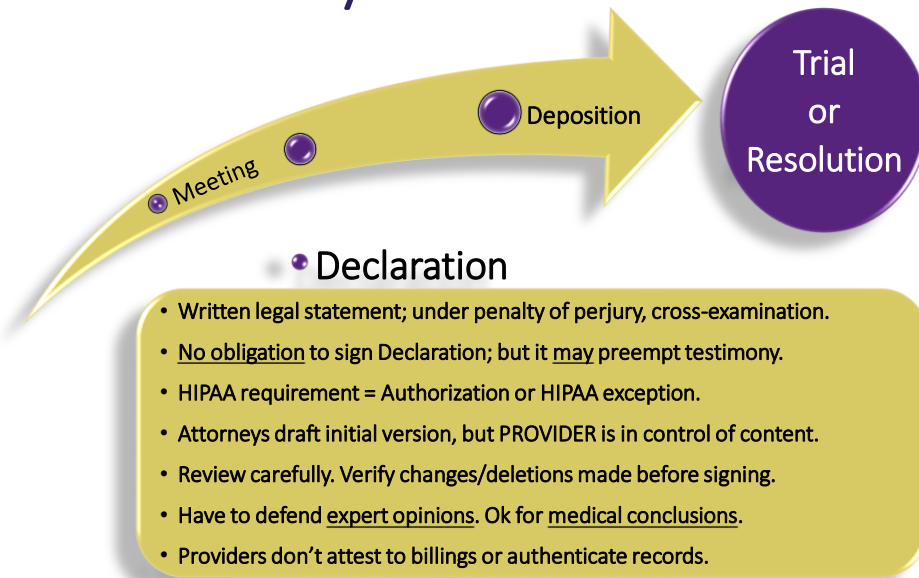
## Types of Attorney Contacts



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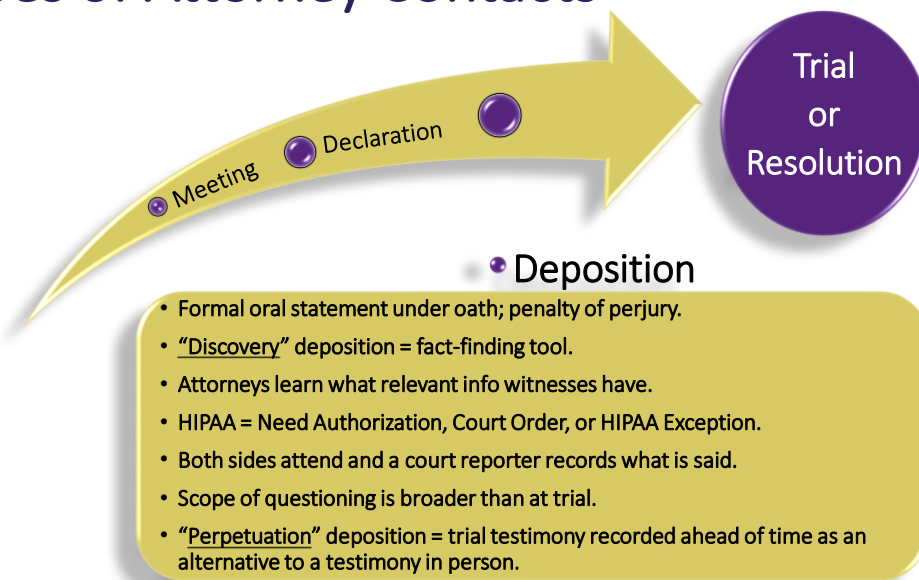
## Types of Attorney Contacts



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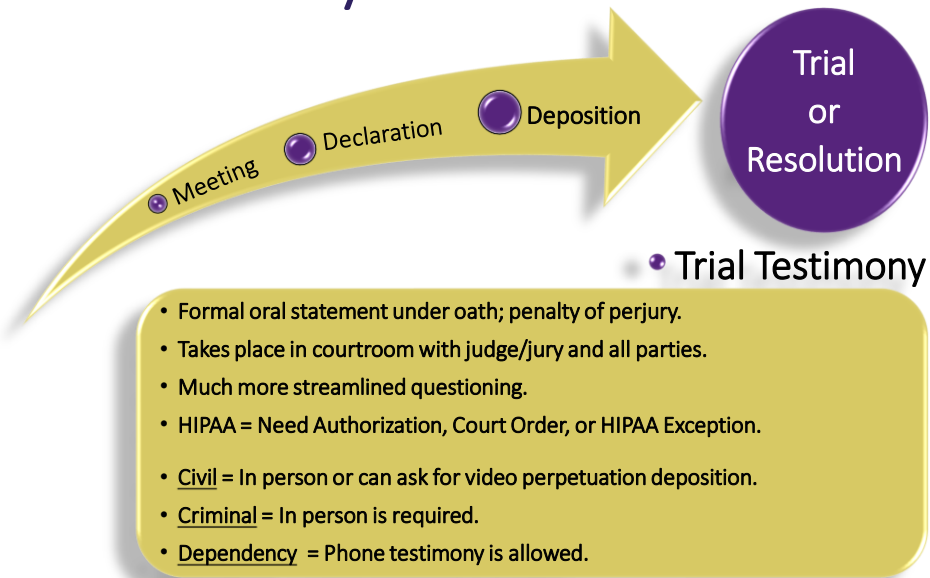
## Types of Attorney Contacts



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# Types of Attorney Contacts



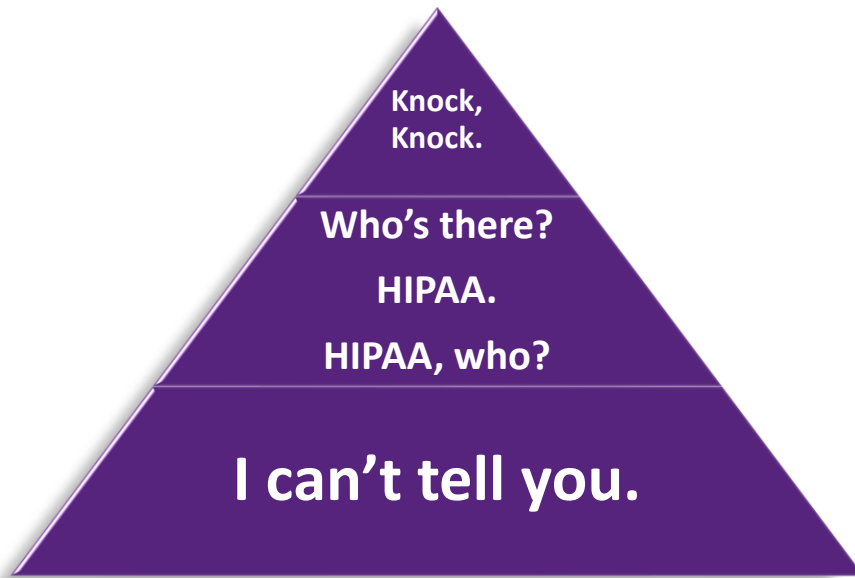
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## HIPAA Requirements and Pitfalls

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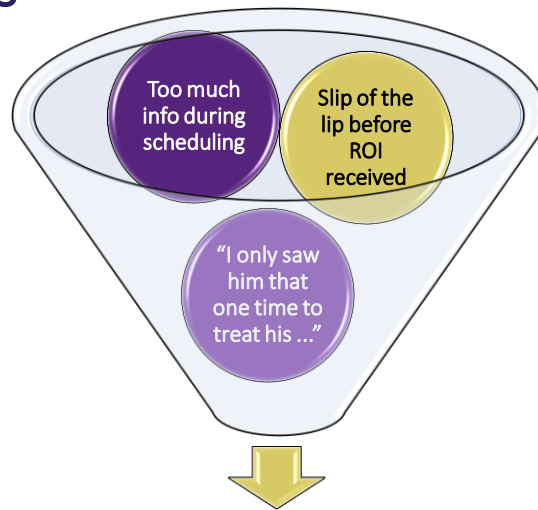
## Why is Ensuring Provider Compliance Important?



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## HIPAA Pitfalls

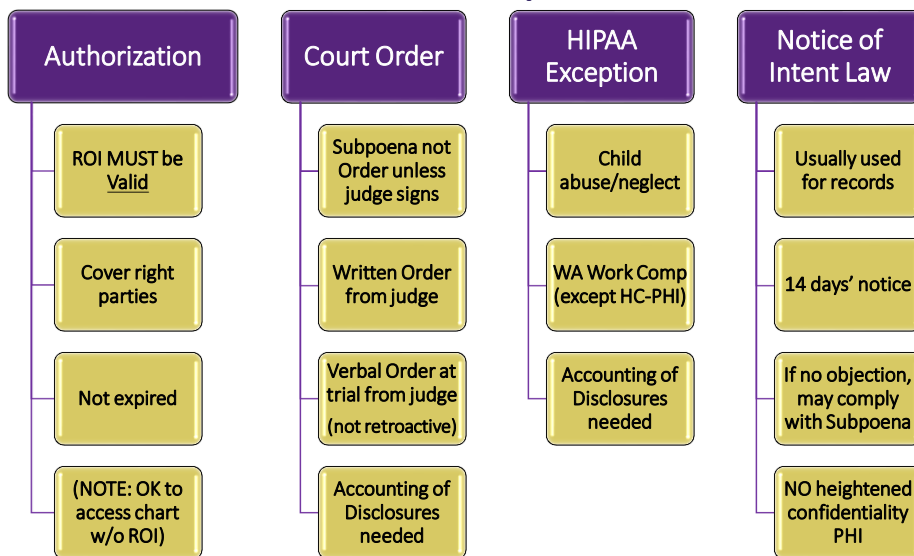


Oops! Inadvertent Disclosure!

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## What Can Meet HIPAA Requirements?



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## How Can LPC Guidance and Education to Providers Protect Your Institution?

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## Providers Need Support

It is important to help providers understand:



**The WHY**

**The process (to demystify it and help them know what to expect)**

**Their neutral role and that they are not a target**

**Their RIGHT to limit involvement to their own care**

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## Providers Need Support

It is important to help providers understand:



**Whether the involvement is mandatory or optional**

**What to consider when deciding to participate or not (if optional)**

**What HIPAA requirements are involved**

**When they should reach out for HELP**

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“Soup of the day? Mumbo Jumbo Gumbo.”

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## Common First Questions

Do I have to do this?

Yes, usually, not always

- It is important for institutions to support their providers regarding legal matters related to patient care and promote an atmosphere of cooperation.

Why?

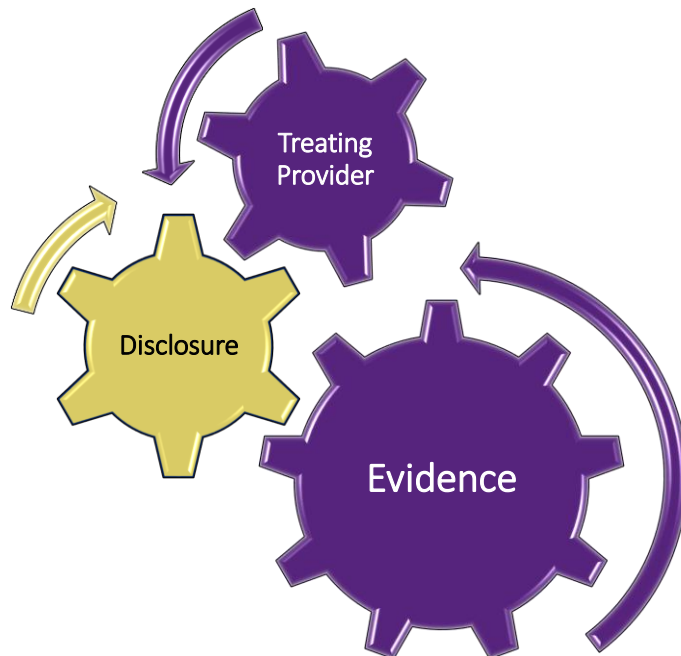
Evidence

- It is also important to understand the WHY.
- Attorneys need provider testimony to submit medical records and treatment info as evidence in legal cases.

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## Evidence



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*"We have testimony that you walk like a duck and you quack like a duck. Tell the court—are you a duck?"*

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## Providers Need to Understand the Terms

### Testimony

- A formal legal statement made by a witness under oath.

### Deposition

- A type of pre-trial testimony where attorneys discover what info witnesses know.

### Subpoena

- A legal document requiring one to appear to testify.

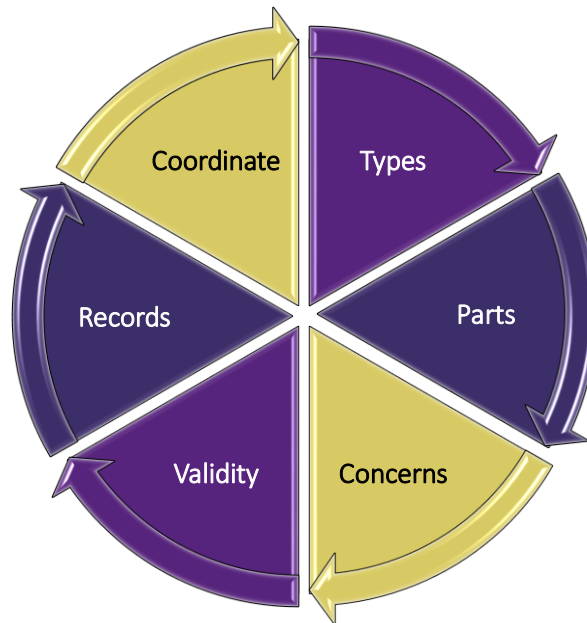
### Declaration

- A written legal statement sometimes used in place of testimony.

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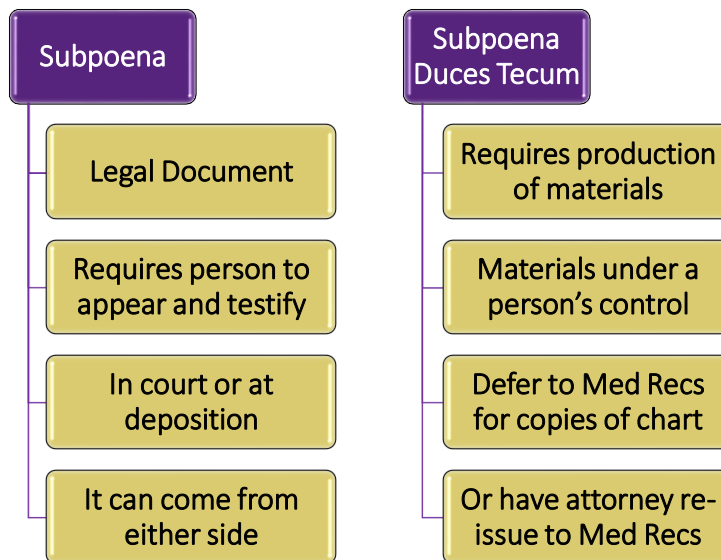
# Subpoenas



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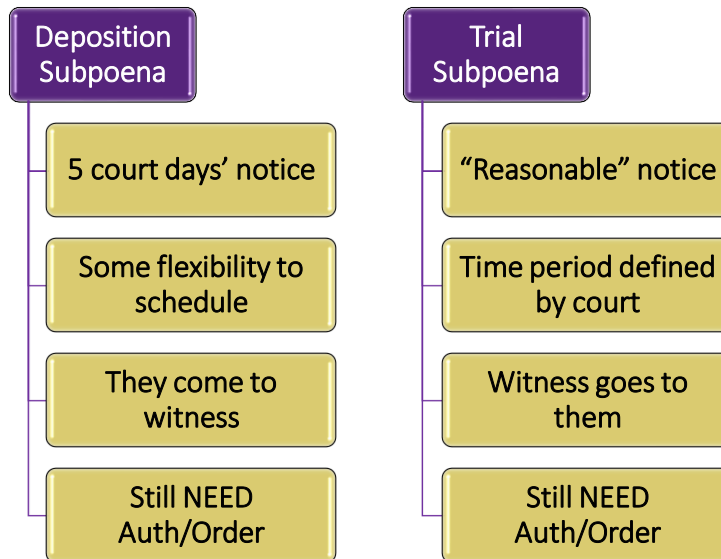
## Subpoena Types



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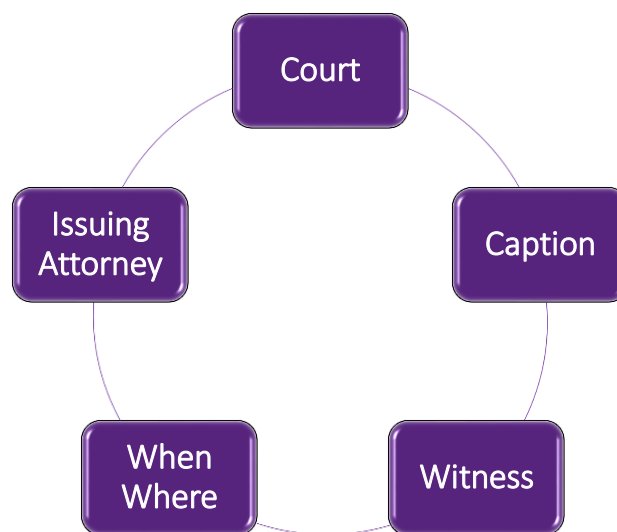
## Subpoena Types



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## Subpoena Parts



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**[SUBPOENA SAMPLE]****SUPERIOR COURT OF WASHINGTON FOR KING COUNTY**

THE STATE OF WASHINGTON, ) No: 18-1-00000-0 SEA  
 )  
 Plaintiff, )  
 vs. ) **SUBPOENA**  
 )  
 JOHN DOE, ) Charge: Assault in the First Degree  
 )  
 Defendant )

TO: Dr. John Smith  
 Harborview Medical Center  
 325 9th Avenue, Box 359735  
 Seattle, WA 98104

Patient Name: \_\_\_\_\_  
 Record Number: \_\_\_\_\_  
 Treatment Date: \_\_\_\_\_

You are hereby commanded to be and appear at the Superior Court of the State of Washington in and for King County on \_\_\_\_\_, 2018, or as directed by the Prosecutor's Office, at W554 King County Courthouse, 516 Third Avenue, Seattle, Washington, where you will be directed to a courtroom of the Superior Court to give evidence on behalf of the Plaintiff in the above entitled cause and to remain in attendance at said Court until discharged. Your failure to appear may be considered contempt of court and may result in your arrest.

**NOTICE: Upon receipt of this subpoena, immediately call paralegal \_\_\_\_\_ at (206) \_\_\_\_\_ or email him/her at \_\_\_\_\_.**

Dated: \_\_\_\_\_, 2018

James P. Attorney, WSBA # \_\_\_\_\_  
 Attorney(s) for the Plaintiff, State of Washington  
 King County Prosecutor's Office  
 Homicide and Violent Crimes Unit  
 W554 King County Courthouse  
 516 Third Avenue  
 Seattle, WA 98104-2385

**SHERIFF'S RETURN**

I HEREBY CERTIFY that I personally served the above subpoena on each person whose name is encircled hereon by (giving him/her a true copy hereof) leaving a true copy hereof at the place of his/her abode with via e-mail in King County, Washington on the \_\_\_\_ day of \_\_\_\_\_, 2018.

**SHERIFF'S FEE:**

Service \$ \_\_\_\_\_ John Urquhart, Sheriff  
 Travel \$ \_\_\_\_\_ King County Sheriff's Office  
 Total \$ \_\_\_\_\_ By \_\_\_\_\_

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**[SUBPOENA SAMPLE]****SUPERIOR COURT OF WASHINGTON FOR KING COUNTY**

JANE SMITH, ) No: 18-2-00000-0 SEA  
 )  
 Plaintiff, )  
 vs. ) **SUBPOENA DUCES TECUM**  
 )  
 JOHN DOE, )  
 Defendant )

THE STATE OF WASHINGTON TO:

Dr. John Smith  
 Harborview Medical Center  
 325 9th Avenue, Box 359735  
 Seattle, WA 98104

☒ You are hereby commanded to be and appear at the place, date, and time specified below to testify at the taking of a deposition in the above case in the presence of a court reporter.

Place: Harborview 325 Ninth Avenue Seattle, WA 98104	Date: _____, 2018	Time: ____ p.m.
--	-------------------	-----------------

☒ You are further commanded to produce and permit for inspection and copying the following documents or tangible things at the place, date, and time specified below:

All medical records, bills, correspondence, charts, documents, notes, memoranda, files, reports, x-rays, film, photographs, diagrams, videotape recordings and any and all other materials regarding the above-named action, in which you have in your possession pertaining to \_\_\_\_\_, DOB: \_\_\_\_\_.

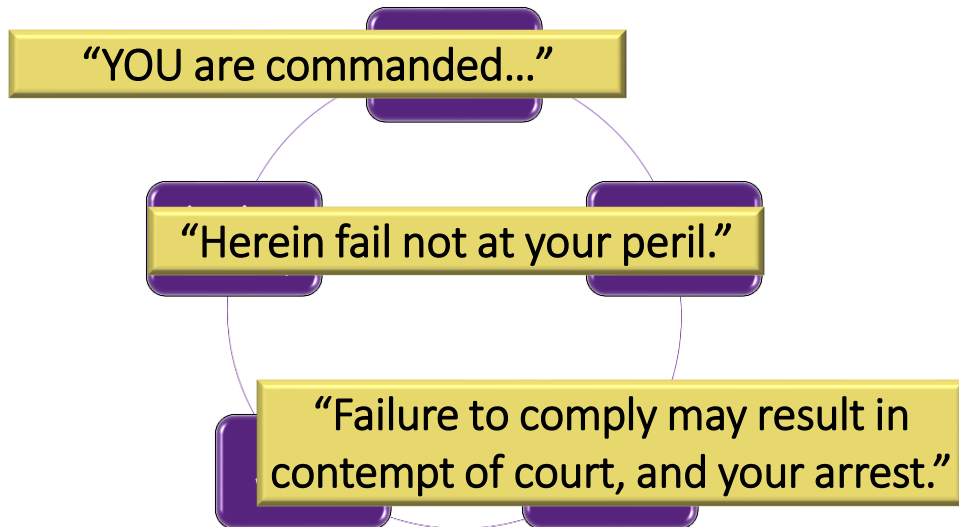
Place: Harborview 325 Ninth Avenue Seattle, WA 98104	Date: _____, 2018	Time: ____ p.m.
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Issuing Officer Signature and Title:  Attorney _____ James P. Attorney, WSBA # _____ MY LAW FIRM 222 Main Street Seattle, WA 98104 Counsel for Defendants	Dated: _____, 2018
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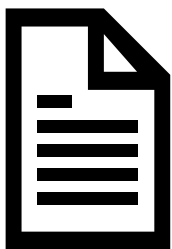
## Subpoena Parts – Scary Language



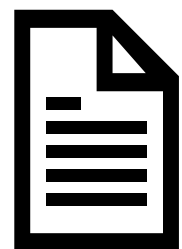
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## Is it a Subpoena or a Lawsuit Against Them?



Providers need to know the difference between a Subpoena and a Complaint/Summons to make sure they and institution receive the appropriate support/protection (and comply with related deadlines)



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## SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

JANE SMITH, ) No: 18-2-00000-0 SEA  
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--	-------------------	-----------------

Issuing Officer Signature and Title: _____ Attorney  James P. Attorney, WSBA # ____ MY LAW FIRM 222 Main Street Seattle, WA 98104 <i>Counsel for Defendants</i>	Dated: _____, 2018
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**“Help! I got subpoenaed!  
What do I do?”**

**How an LPC Can Provide  
Guidance and Reassurance**

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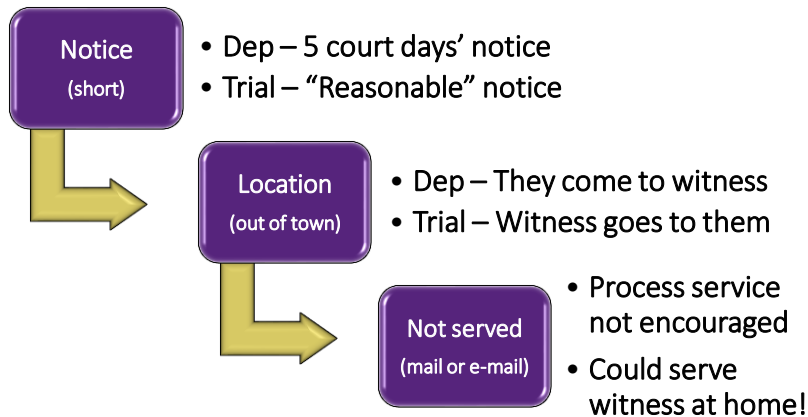
*“The doctor is in court on Tuesdays and Wednesdays.”*

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## What if the Subpoena is Not Valid?

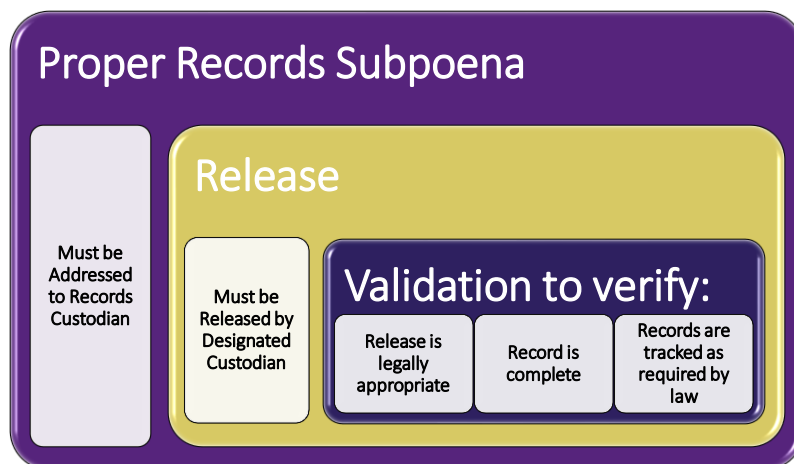


Providers need to understand they cannot ignore!  
 Defects can be resolved by communicating with attorney.  
 Providers can call Risk Management for guidance, if needed.

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## What if the Subpoena (SDT) Seeks Records?

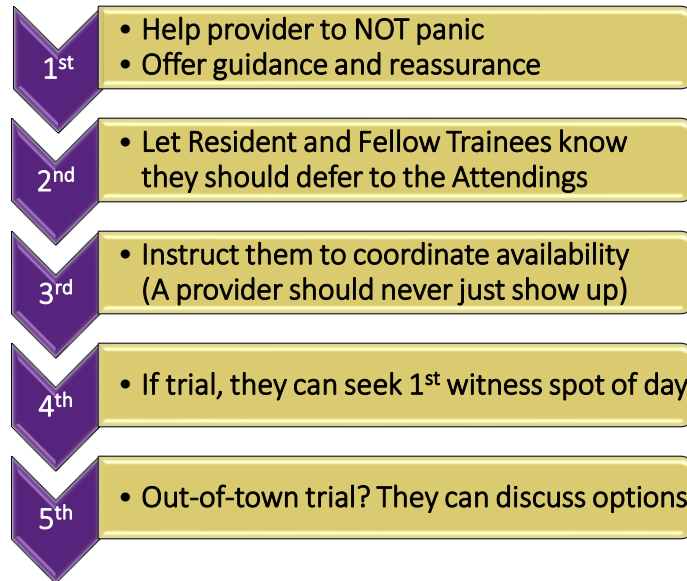


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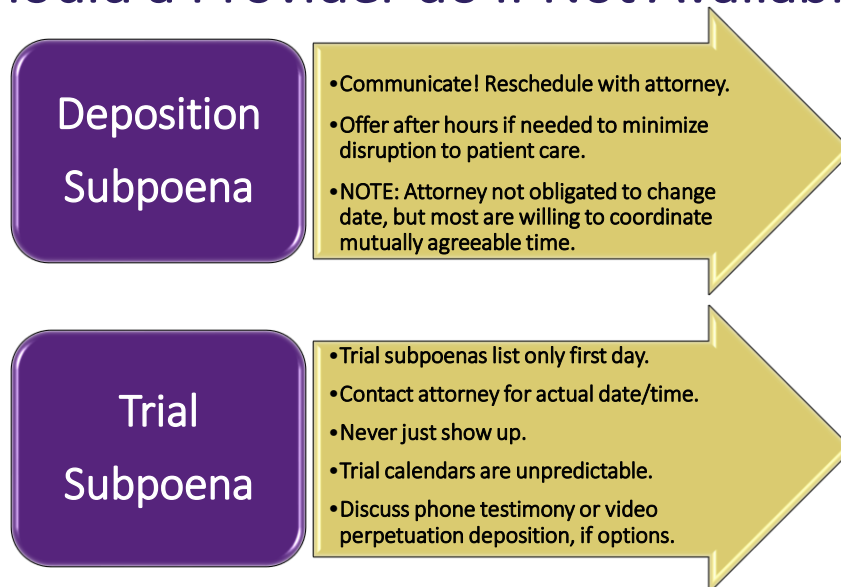
## Now What? What Guidance Can an LPC Offer?



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## What Should a Provider do if Not Available?



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## What if a Patient/Attorney Asks for an Opinion About Care by Another Provider?

# CAUTION

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## Expert Opinions About Others

### Providers Should Be Aware

- Providers should be aware of what they may be getting into
- They may then be properly subpoenaed as expert witness on the case
- They will have to defend those opinions

### Different Views

- Different providers can have different views on clinical care - "What would you have done...?"
- A provider may not have the complete info

### Defer as Appropriate

- Expert questions may be deferred to an expert in the case (if wish to stay fact witness):
- "I am happy to testify about the care I provided, but I am not serving as an expert in the case. I would ask you to redirect your question to a retained expert."

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## Testimony Tips a Legal Proceedings Consultant Can Offer to a Provider

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*"You must tell the truth, the whole truth, and nothing but the truth, pinky swear."*

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## Testimony Tips for Providers



Tell the truth, even if unfavorable to one side or the other.



Answer only question asked; don't volunteer info.



Answer only one question at a time.



Limit testimony to facts of the care you provided or supervised (if wish to remain as fact witness).



Listen carefully to every question. Take a pause.



If you don't understand a question, ask to clarify.



Answer with language you feel comfortable using.



Speak slowly, clearly, and audibly.

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## Testimony Tips for Providers



Neutral Role – Not there to prove/defend a case or take sides; just relay factual info.



If presented with a document, read it carefully before answering.



For hypothetical questions, bring back to actual care.



Don't bring documents not appropriately requested.



Defer questions regarding other providers to them.



Do not guess or speculate. "I don't know" is OK, too!



Objections are routine:  
Deposition - OK to answer  
Trial - Wait for the judge

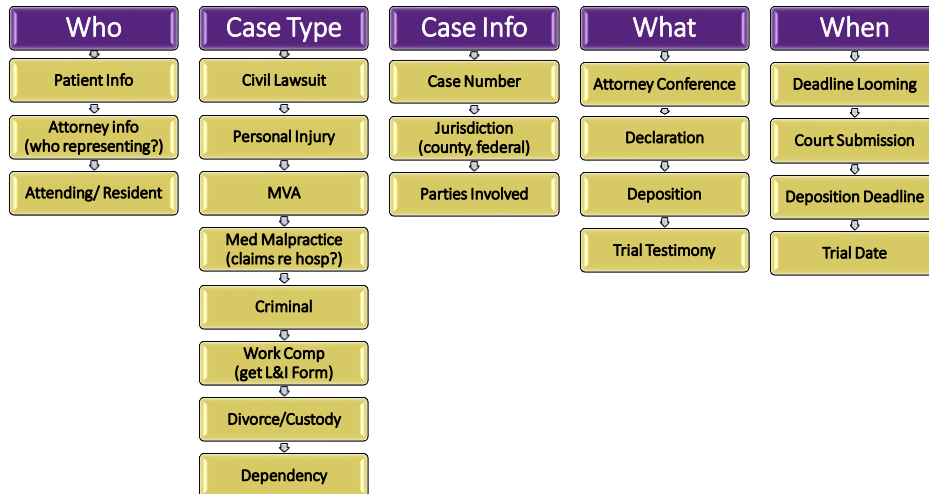


If needed, speak up re inappropriate behavior; your words will be reflected in the written transcript.

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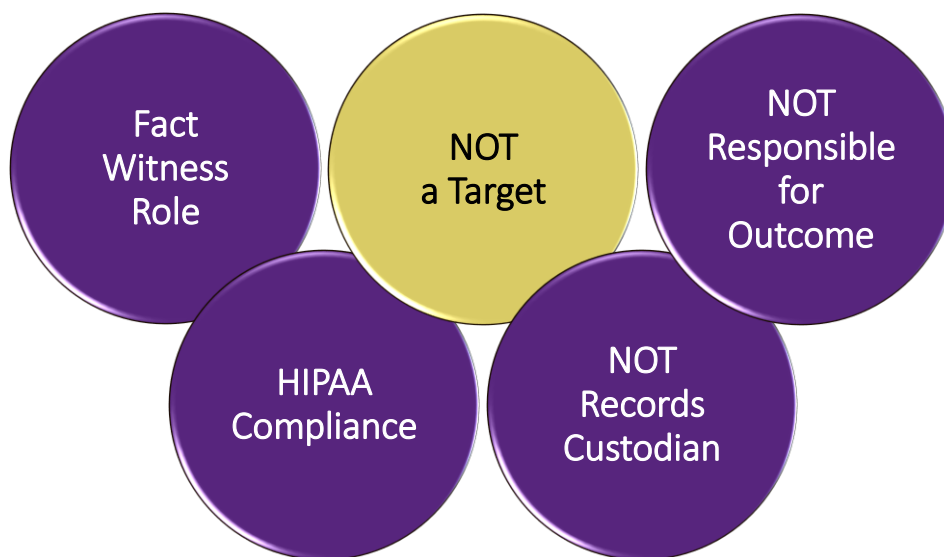
## Helpful Tips for Staff to Preempt Provider Anxiety



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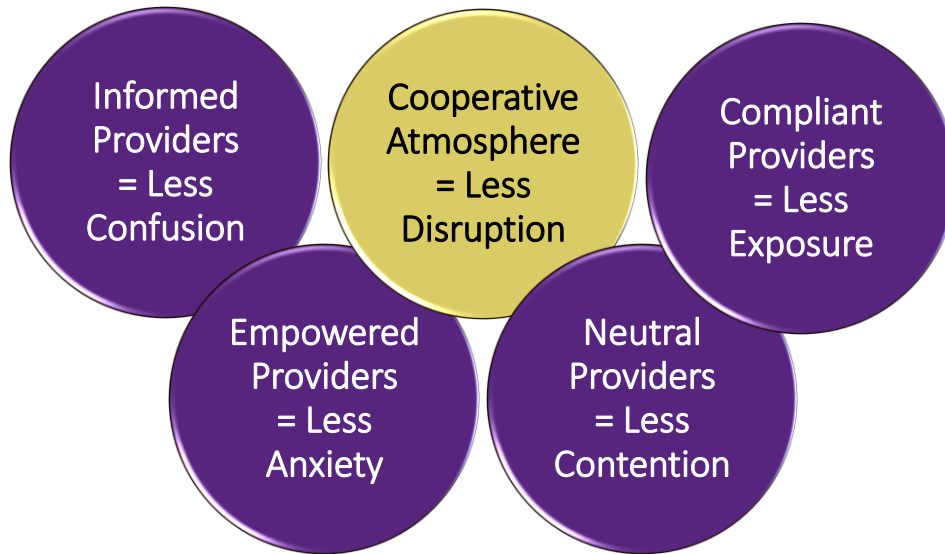
## Takeaways for Providers from an LPC



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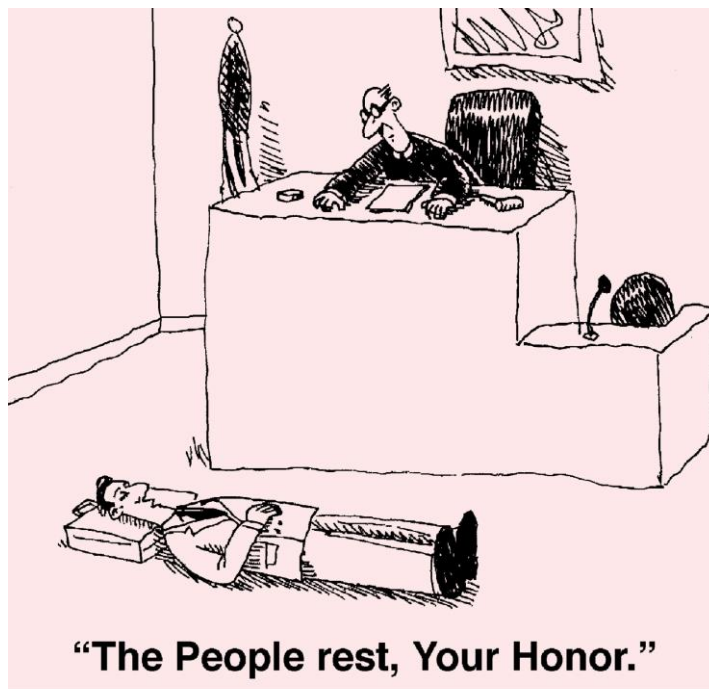
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## Takeaways for Your Institution to Have an LPC



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# QUESTIONS?

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