HOW TO RESPOND TO A SUBPOENA

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This article is designed to be educational in nature. It does not provide legal advice nor is it intended to be or to substitute for the advice of an attorney. Because laws vary from state to state, the reader is encouraged to contact an attorney for legal advice regarding state laws governing professional conduct. Mental health professionals who receive a subpoena, or who are served with other legal process that requires or is likely to require revelation of client records, are encouraged to consult legal counsel, who can review the pertinent law and facts and provide appropriate legal assistance. The author's opinions do not reflect any official opinions or policies of the Georgia Board of Examiners of Psychologists ("licensing board") or the Georgia Psychological Association (GPA) Ethics Committee.

Senior Attorney Amanda R. Phillips, a member of the litigation group for the law firm Morse, Barnes-Brown, & Pendleton, PC in Cambridge, Massachusetts, makes a useful observation: "Most people react in one of two ways when they receive a subpoena: they either ignore it, or they panic. Of these two responses, panicking is the better one because it at least prompts you to call your attorney." This statement is a good adage to remember when receiving a subpoena.

Questions regarding the proper way to respond to subpoenas are among the most common legal questions that initiate ethics consultations. Because most mental health professionals prefer collaborative rather than adversarial ways of working with people, receiving a subpoena can be anxiety provoking for non-forensic practitioners. In addition, receiving a subpoena can sometimes lead to a court testimony which, if not handled properly, can lead to an ethical complaint. As Francis, Oswald, and Flamez (2018, p. 64) point out, "mental health professionals must remember that attorneys represent their clients exclusively and have no loyalty, allegiance, or care about the ethical or legal limitations that govern the counselor. The lack of care or knowledge may expose the novice or unaware counselor to legal and ethical violations."

As always, a legal question requires a legal opinion, which requires consultation with an attorney. In contrast, asking a psychologist for free legal advice is probably worse than asking an attorney for free psychotherapy (Doverspike, 2006, p. 2).

A subpoena must be completed prior to being served (OCGA § 24-13-21[f]). It must state the name of the court, the name of the clerk, the title of the proceeding, and it must state each person to whom it is directed to attend and give testimony or produce evidence at a time and place specified by the subpoena (OCGA § 24-13-21[b]). A valid subpoena must also be served properly. According to OCGA § 24-13-24, "A subpoena may be served by any sheriff, by his or her deputy, or by any other person not less than 18 years of age. Proof may be shown by return or certificate endorsed on a copy of the subpoena. Subpoenas may also be served by registered or certified mail or statutory overnight delivery, and the return receipt shall constitute prima-facie proof of service. Service upon a party may be made by serving his or her counsel of record."

With the assistance of an attorney, one's first consideration would for the attorney to determine whether the subpoena is valid. For example, filing a motion to quash a subpoena must be based on valid grounds, such as in the case in which the subpoena was not served properly. A motion to quash may also be based on technical defects on the face of the subpoena. In general, a court will usually grant a motion to quash to subpoena if it (1) pertains to a lawsuit over which the court lacks subject

matter jurisdiction, (2) does not allow a reasonable time to respond (depending on the jurisdiction, a minimum of 10-14 days), (3) requires production of documents at a location more than 100 miles away, (4) subjects the recipient to undue burden (i.e., excessive time, effort, or hardship required to respond to the subpoena), or (5) requires production of privileged information (although non-privileged information may be required to be produced). In Georgia, "The mere fact of employment is not protected from disclosure" (*Cranford v. Cranford*, 1969, Section 2).

Responding to a subpoena is complicated by the fact that there are actually three types of subpoenas, two of which can be used to order a person to appear in court as a witness to testify and the third type can be used to order a person to testify at a deposition. A *Subpoena to Appear* is used to order a witness to appear in court, but not necessarily to bring documents or records to court. A *Subpoena to Appear and Produce* is used to order a witness to bring along certain documents when the witness appears in court to testify. A *Subpoena to Take a Deposition* is used to order a person to testify at a deposition, at which the sworn testimony of a witness is taken outside of court. As the above examples illustrate, these three types of subpoenas fall into one of two basic categories: A *subpoena duces tecum* (Latin for "bring with you under penalty of punishment") asks you to produce records of documents as listed (i.e., document subpoena), whereas a *subpoena ad testificandum* asks you to appear and give live testimony as a witness (i.e., witness subpoena). The subpoena may not actually state which of these types you are receiving, but it will provide enough information for you to figure it out. In Georgia, the term *subpoena* includes "a witness subpoena and a subpoena for the production of evidence" (OCGA § 24-13-21[a]).

Regardless of the type of subpoena, remember the old adage that a subpoena compels a *response* but does not compel a *disclosure* (Bennett, Harris, & Remar, 1995). If you ignore a subpoena, you can be held in contempt of court. The proper response to a subpoena depends on the origin of the subpoena, in terms of whether it was issued by an attorney or whether it was issued by a court. A court order may compel a disclosure, even if that court order is later used as a technical grounds for appeal (see *Jaffee v. Redmond*, 1996). In many cases, the proper first response to a subpoena is to assert the privilege on behalf of the client. Of course, if your client provides a written authorization for the release of confidential information, then a proper response would be to release the information as authorized by the client. In producing documents, you have to offer the originals unless the subpoena states that copies are acceptable (which they usually are). HIPAA-compliant providers should also document the disclosure in the patient's record (on an Accounting for Disclosures Form).

If your client does not authorize a release of confidential information, then a proper response to a subpoena would be to inform the court that the documents you have been requested to produce contain information that is protected by state and possibly federal laws governing privileged information. It is then up to the court to decide whether disclosure is warranted. If you are court-ordered to testify and/or produce documents, the proper response is to comply with the law. This response is consistent with APA Ethical Standard 4.05 (Disclosures), which in part states, "Psychologists disclose confidential information without the consent of the individual only as mandated by law…" (2017). Similarly, ACA (2014) Ethical Section C.1. (Knowledge of and Compliance With Standards) states that "Counselors have a responsibility to read, understand, and follow the *ACA Code of Ethics* and adhere to applicable laws and regulations (p. 8).

If the subpoena requires you to produce confidential documents at a deposition, you do not have the option of asking a judge to rule on

the disclosure. In fact, if you are being asked to testify as a witness, a judge may refuse to speak with you (on the grounds that you are a witness). Instead, you should contact the party who issued the subpoena. Inform the requesting party that the information sought is protected by confidentiality laws and that you will be unable to produce those documents at the deposition unless you have proper written authorization signed by the holder of the privilege. You must not reveal that the documents contain information regarding mental health or substance abuse services. You must simply state the information is protected by laws governing confidentiality and privilege. The requesting party may then be willing to either (a) provide proper written authorization for the disclosure of information, or (b) withdraw the subpoena and obtain a court order requesting the documents. If the party is not willing to withdraw the subpoena, you must formally contest the subpoena prior to the deposition. To do so may require an attorney's assistance. Another option would be to have an attorney file a motion to quash the subpoena, particularly if it is so burdensome that compliance is almost impossible. This scenario could occur if the subpoena required you to produce documents that you do not have within your possession, custody, or control.

In asserting the privilege on behalf of the client, it is important to point out that the privilege can only be asserted where it exists in the first place. Privilege laws vary from state to state in terms of those communications to which the privilege applies. For mental health professionals in Georgia, communications are privileged for psychiatrists, psychologists, licensed clinical social workers, clinical nurse specialists in psychiatric/mental health, licensed marriage and family therapists, and licensed professional counselors (OCGA § 24-5-501). Interestingly, in one of the oldest mental health privileges in the country, another statutory privilege for psychologists states: "The confidential relations and communications between a licensed psychologist and client are placed upon the same basis as those provided by law between attorney and client; and nothing in this chapter shall be construed to require any such privileged communication to be disclosed" (OCGA § 43-39-16). One would presume that the privilege is not extended to psychology interns, because they are statutorily omitted from OCGA § 43-39-16, whereas they are statutorily included as mandated reporters of suspected child abuse in OCGA § 19-7-5 (i.e., "persons participating in internships to obtain licensing…"). In contrast to privileges extended to psychologists and psychiatrists, a more limited privilege (i.e., "during the psychotherapeutic relationship") is extended to licensed clinical social workers, clinical nurse specialists in psychiatric/mental health, licensed marriage and family therapists, and licensed professional counselors (OCGA § 24-5-501).

There is no so-called "umbrella extension" of evidentiary privilege that attaches to communications with individuals who are not statutorily defined. Evidentiary privilege is *not* statutorily extended to students, trainees, pre-doctoral interns, or other non-licensed practitioners other than clergy.

Licensed mental health professionals who are covered entities are also aware of the special status of "psychotherapy notes" as defined by HIPAA (45 CFR § 164.501). For psychotherapy notes, a specific authorization is needed from the client in order for a covered entity to release protected health information that meets the HIPAA definition of psychotherapy notes.

In addition to the psychotherapeutic privilege that exists for mental health professionals, a relatively absolute clergy-penitent privilege is recognized in all 50 states. In most states, the clergy privilege is statutorily defined in rules of evidence in civil procedure. In Georgia, the clergy privilege is contained in OCGA § 24-5-502:

> Every communication made by any person professing religious faith, seeking spiritual comfort, or seeking counseling to any Protestant minister of the Gospel, any priest of the Roman Catholic faith, any priest of the Greek Orthodox Catholic faith, any Jewish rabbi, or any Christian or Jewish minister or similar functionary, by whatever name called, shall be deemed privileged. No such minister, priest, rabbi, or similar functionary shall disclose any communications made to him or her by any such person professing religious faith, seeking spiritual guidance, or seeking counseling, nor shall such minister, priest, rabbi, or similar functionary be competent or compellable to testify with reference to any such communication in any court. (OCGA § 24-5-502)

Remar and Hubert (1996) describe how mental health professionals (MHP) should respond to requests for production of records, subpoenas, and court orders. The following guidelines are recommended by Remar and Hubert:

> An MHP who receives a subpoena should immediately notify the patient or the patient's attorney. If the patient executes a written authorization for release of the information, the MHP may produce the records. If the MHP is unable to obtain the patient's express authorization, then the MHP should, within 10 days after the service of the subpoena or on or before the time specified in the subpoena for compliance if such time is less than 10 days after service, deliver to the attorney designated in the subpoena a written objection to inspection or copying of the records. (p. 117)

A footnote in Remar and Hubert's (1996) recommendation states that in federal courts, the time period for a response is 14 days. For more information, consider reading "Strategies for Private Practitioners Coping with Subpoenas or Compelled Testimony for Client Records or Test Data" (APA Committee on Legal Issues, 2006) or the more straightforward "How to Deal with a Subpoena" (APA Legal & Regulatory Affairs Staff, 2008). Another quick resource is "Roadmap to a Subpoena" (CPH & Associates & Lane, 2017). Because a subpoena is a legal document requiring a legal response, always consult with an attorney before responding to a subpoena.

Sample Forms

Samples of letters for responding to a subpoena are contained in *Risk Management* (Doverspike, 2015). Some of these forms include Sample Letter for Letter for Response to Subpoena by Psychologist (Form 40), Sample Letter for Letter for Response to Subpoena by Licensed Professional Counselor (Form 41), and Sample Letter for Letter for Response to Subpoena by Licensed Marriage and Family Therapist (Form 42), Sample Motion to Quash by Psychologist (Form 43), and a Sample Motion to Quash by Mental Health Professional (Form 44).

Flow Chart

For a flow chart to use when obtaining legal advice from your attorney, see the link below: https://drwilliamdoverspike.com/files/how_to_respond_to_a_subpoena_-_flowchart.pdf

Acknowledgements

I would like to thank the following individuals and organizations for providing sound legal advice over my 40 years of practice: my brother and corporate attorney, John David Doverspike, Sr., J.D.; attorney and legal counsel, Robert B. Remar, J.D., affiliated with the GPA Legal Services Plan; Eric A. Harris, Ed.D., J.D., Trust presenter, psychologist, and attorney; and Trust Risk Management Services (TRIMS), formerly known as the American Psychological Association Insurance Trust.

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Published 2015 | Last updated 2024

The correct citation for this article is Doverspike, W. F. (2015). How to respond to a subpoena. http://drwilliamdoverspike.com/