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Ethics Column: YIKES! I Got A Subpoena!

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“How do I deal with a subpoena?” This is a predominantly legal question. Subpoenas can be intimidating, primarily due to the potential breach of confidentiality. The therapist or agency “owns” the original patient record; the patient “owns” the information in the record in most circumstances. It is the client who decides as to the release of their confidential records in accordance with state and federal law. A written release signed by the client or his or her legal representative is required to respond to the subpoena with anything other than an appropriately tendered objection. The standard HIPAA release is insufficient.

A subpoena is a court order to produce records, testify, or both. Psychotherapists typically receive subpoenas drafted by attorneys; although it is a “court order,” it is not usually issued by a judge but by the clerk of the court. A subpoena is considered a discovery order rather than an order issued following a court hearing. Failure to comply with, or the making of the appropriate objection to, a subpoena may be considered contempt of court and can result in a waiver of the psychotherapist-patient privilege, for which your client can hold you responsible in a suit for malpractice, among other things.

The American Psychological Association Practice Organization (APAPO) (2008) suggests the release contain the following: What information will be disclosed and to whom, the purpose of the disclosure, and the patient’s or their legal representative’s signature and date. The HIPAA privacy rule has specific requirements that must also be observed (consult HIPAA or your attorney). Always review the records and attempt to consult with the patient about any concerns. The fact that the patient’s attorney tells you something is not a reason to act without your own counsel. The legal guardian of a child or the conservator for an adult may consent also. If in doubt as to who has authority, consult your attorney.

If the client does not consent, without breaching client identity or confidentiality, first inform the subpoenaing attorney you cannot release information and assert the psychotherapist-patient privilege. Second, seek guidance from your attorney, as each court has different rules as to what steps must be taken to assert the privilege and the form in which it must be raised. The judge will ultimately determine whether and to what extent the privilege applies. Your attorney may advise you that a “motion to quash” the subpoena will be required, but most often once the privilege has been correctly asserted, it is up to the parties to convince the judge. Compliance with the order of the judge as to the records or testimony, as long as you have raised the appropriate objections in the correct form, will not violate your obligations regarding confidentiality. Therefore, the therapist should rely on his or her attorney’s advice as to how to proceed, not on the advice of the attorneys to any of the parties.

Finally, never release information without written patient (or authorized legal representative) consent, short of a court order from the judge. Without consent, seek legal consultation before responding to any subpoena or order to avoid potential liability and to ensure that you have done all that is necessary to assert your client’s privilege and discharge your ethical duties. ▲

References

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