



The Subpoena

A subpoena taped to your office door, handed to you by a process server or delivered in the mail, is annoying at best and alarming at worst. It is the first step in a pageant in which you have no choice but to participate. It can be helpful to prepare ahead of time and know what steps to take and when to take them.

Questions about the subpoena and what to do top the list of calls and e-mails to AAMFT's Legal Consultation service. Some MFTs are attempting to avoid being subpoenaed into court by including provisions in an informed consent document advising the client that the therapist will not participate in liti-

gation. While this type of notice to a client may have some limiting effect, whether or not it is enforceable has yet to be tested. Further, it is often the opposing side that issues the subpoena.

An attorney issues a subpoena so that the client's case can be proved by introducing documents or testimony into evi-

dence. A subpoena is a process of the courts, not of the parties. Although a subpoena may be issued by an attorney, it is a mandate of the court, issued for the court.

A subpoena is an order of a sort. The Latin root translates as "under penalty." The recipient of a subpoena is commanded to appear "under penalty" of contempt. Failure to show up and testify, either at deposition or at trial, and/or to produce documents (subpoena duces tecum—"bring with you") can result in an order of contempt against the therapist meaning fines and payment of attorneys' fees.

Do not let the word "order" in a subpoena confuse you or the lawyer issuing the subpoena intimidate you. A subpoena is *not* the type of court order that permits a client's confidentiality to be breached. Therapists are trained to preserve confidentiality. A therapist's first response to a subpoena should be to resist, thereby protecting the client. But the resistance needs to be well thought out and properly executed in order to avoid a finding of contempt.

If you receive a subpoena, read it. If you overcome your aversion to fine print and legalese, the subpoena will tell you the names of the parties, the date, time and place you will need to appear, the name of the lawyer who issued the subpoena, and the location and type of court in which the lawsuit is taking place.

When you have gleaned the basic information from the subpoena and identified which of your clients is involved, determine whether the attorney issuing the subpoena is the attorney for your client or the attorney for the party opposing your client. The identity of the subpoena issuer is significant in regard to protecting your client's confidentiality, and because of privilege that you may be able to invoke on your client's behalf. This is important not only for your client, but also for you since you could be liable to your client for breaching confidentiality and subject to discipline by your licensing board for unethical or unprofessional conduct.

If the attorney issuing the subpoena represents your client, then you can be

confident that the client has waived the “psychotherapist-client” privilege and that you are not breaching your duty to the client by turning over the requested documents or testifying at a deposition or at trial. Your client may just make a request for records under HIPAA’s Privacy Rule and no subpoena will be involved.

If, however, the attorney issuing the subpoena represents the opposing party, the subpoena should have a release signed by your client attached to it. If there is no signed release, you need to protect your client’s confidentiality and invoke the “psychotherapist-client” privilege on your client’s behalf.

Contact information, including telephone number for the issuing attorney, should be contained in the subpoena. Call the issuing attorney and advise that you have received the subpoena but that it lacks a release from the client authorizing you to disclose the confidential information requested. Without that release, you can neither confirm nor deny whether a therapist/client relationship exists.

Some attorneys will acknowledge the privilege and volunteer to secure the appropriate releases. Others will threaten you with contempt for ignoring a court order. That the subpoena is a court order is true, so far as it goes. But in breaching a client’s confidentiality, a subpoena does not offer the therapist sufficient protection.

The absence of a release or waiver of privilege by the client is more significant for the therapist who has been treating a couple or family. The client unit (couple, family or group) holds the privilege and all participants must waive the privilege before the therapist can lawfully and ethically produce documents or give testimony about any participant in the couple, family or group. Without that waiver, law and ethics require an order, signed by a judge, directing the therapist by name to produce testimony or documents.

Such an order protects the therapist in two areas. First, all licensing statutes require professional conduct and ethical practice on the part of license holders.

Those same licensing statutes identify breach of client confidentiality as an instance of unprofessional conduct or unethical practice. Therefore, a therapist who complies with a subpoena without releases or waivers from all clients puts the license at risk for denial, revocation or suspension.

Second, a therapist who breaches a client’s confidentiality without the court ordering the disclosure is at risk for an allegation of malpractice. The therapist owes a duty of confidentiality to the client. The therapist provided testimony or produced documents without a waiver from the client, breaching that duty. The therapist is liable for damage resulting from that breach of duty.

If the issuing attorney threatens contempt or other proceedings, you can assure the attorney that you have no intention of not appearing in response to the subpoena. You are just trying to save time and the expense to you of filing a motion to quash the subpoena based on the existence of the privilege and the absence of a release from your client.

Subpoena served by

mail personal service.

Where are you required to appear: (lawyer’s office) (courthouse)

Are you required to bring documents with you: yes no

When are you required to appear: (date) (time) If you are required to appear with less than one week’s notice, and that presents a problem for you in terms of management of your office and your clients, call the attorney issuing the subpoena and request more notice.

Does the subpoena contain a check for witness fees and expenses: no yes. If the subpoena has a check attached for witness fees or expenses, **do not cash it.** Call the attorney issuing the subpoena and find out how long the deposition or hearing is expected to continue. Request a witness fee in the amount of that number of hours times your hourly fee. This does not guarantee you’ll receive payment, and you cannot condition your showing up on being paid.

Does the subpoena contain a release signed by your client authorizing you to

testify and/or produce documents: yes no. If the subpoena does not have a release, call the client. Get contact information for and permission to talk to the client’s attorney. Call the client’s attorney and report that you have been issued a subpoena and that the client does not appear to have executed a release.

The client’s attorney declines to talk to you or advise you about what to do about the subpoena. no yes. Contact the attorney who issued the subpoena. Report that you have received the subpoena, but that you are licensed by the State and that under your Code of Ethics, without a release or a court order, the therapist/client privilege means you can neither confirm nor deny that a client relationship exists, give testimony or produce documents.

The issuing attorney may suggest that a subpoena is a court order and that failure to comply is contempt of court. Don’t panic. Remind the issuing attorney that you are not threatening not to appear, but you are advising that you intend to preserve confidentiality until you are assured that it has been waived, either by the client or by a court order.

Your license to practice can be denied, suspended or revoked for unprofessional conduct or a breach of the Code of Ethics. Breach of confidentiality is both an instance of unprofessional conduct and a breach of ethics. If you comply with the subpoena without a release or a court order, your license to practice is at risk. Therefore, and as a courtesy, you are informing the issuing attorney that you require protection in the form of either a release by the client or a court order signed by a judge who has reviewed your claim of privilege.

In the event you have additional questions, please take advantage of the AAMFT’s Legal Consultation service. Legal consultation services are provided to AAMFT Clinical Members in legal matters relating to their professional practice of marriage and family therapy. The service includes telephone consultation during office hours (Eastern time). Please call (703) 253-0471 to speak to a lawyer or to schedule an appointment. ○