

How to Deal with a Subpoena: Pointers for Psychologists

Receiving a subpoena, a legal command to testify about a client or turn over client records, is often a perplexing and anxiety-provoking experience for psychologists.

This article addresses many common questions about subpoenas that psychologists raise with the APA Practice Organization. The content pertains to subpoenas involving psychotherapy notes, process notes, client information forms, billing records and other such information. This article does not address psychological test material, which may be subject to additional ethical considerations.



The information here is not intended to provide legal advice or to substitute for the advice of an attorney, but rather to offer information about possibilities for dealing with a subpoena. Where further guidance is needed, psychologists may find it useful to consult with their malpractice insurer, the APA Practice Directorate's legal and regulatory affairs department or a state psychological association representative.

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I just received a subpoena.

What do I do?

You must first understand what the document is requesting of you. Subpoenas often seem to be asking you to testify in person, when they in fact are just seeking documents. Know who you are supposed to deliver documents to, or where

and when are you supposed to appear to testify. Also be sure you're clear about the applicable due date.

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I intend to comply with the subpoena. Should I just turn over the documents or show up to testify, or do I first need my client's written consent?

Turn over the information only if your subpoena qualifies as a court order. In most states, you can turn over the documents or show up to testify without obtaining your client's consent *only* if the subpoena you received qualifies as a court order from a judge, which is rare. Typically a court order will be identified as such on the first page. In addition, the document will be signed by a judge, not a judge's clerk or an attorney. If you are not sure whether the document is a court order, you may contact the court that issued the document and ask to speak to the judge's clerk.

If you don't have a court order, obtain your client's written consent or authorization. If the document is not a court order (the first subpoena you receive in a matter rarely is a court order), you will need to obtain your client's consent or authorization before turning over confidential information. This step is required because most state and federal jurisdictions recognize a psychotherapist-patient privilege that allows the client to prevent confidential material from being disclosed to others. (Some state laws provide exceptions to this rule that allow you to turn over confidential information without the client's consent or authorization in certain situations.) When obtaining this consent, you should tell your client exactly what you have been asked to turn over and that there is no guarantee that the information will be kept confidential.

If you are not covered by the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule, your state may require client consent to be in writing. Staff attorneys for the APA Practice Organization suggest that psychologists obtain their client's consent in writing, even if not required to do so in their state. This will help ensure that your client

is making an informed consent and will provide you with documentation in case you need it in the future. The written consent that you obtain from your client should contain, at a minimum:

- Exactly what information will be disclosed
- To whom the information will be disclosed (for example, to the requesting attorney)
- The purpose of the disclosure (to respond to a subpoena)
- The client's signature and date

If you are covered by the HIPAA Privacy Rule, you must have a "written authorization" that includes several specific items. The APA Practice Organization suggests that you obtain legal guidance in this area. A model form tailored to your state's requirements is included in "HIPAA for Psychologists," the HIPAA Privacy Rule compliance product prepared by the APA Practice Organization and the APA Insurance Trust. (Visit APApractice.org for additional information about this product.)

Talk to your client's attorney. It is also important that you discuss the subpoena with the client's attorney (if he or she has one) after you have received appropriate consent from the client to do so. You should find out whether the attorney intends to oppose or seek to limit the scope of the subpoena, as discussed in the answers to Questions 4 and 5.

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Who gives the written consent if the client is a child?

In situations where the client is a child or is otherwise legally incapable of consenting, you will have to obtain the consent or authorization from the client's parents or legal guardian, although some state laws provide independent privilege rights for minors. Sometimes it is complicated to determine who has authority to consent, especially in child

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custody cases. If it is unclear who has that authority in your situation, you may need to obtain additional guidance, such as from your malpractice insurer or an attorney in your state.

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What if I don't have a court order and the client refuses to give me the consent or authorization or I can't reach the client?

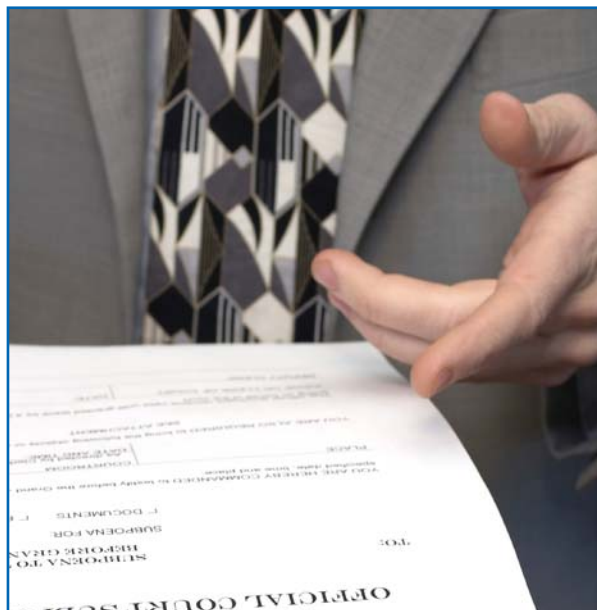
As discussed below, when you cannot get the client's consent or authorization, it usually makes sense to contact the party requesting the information to try to resolve the issue. If that does not work, then you could seek guidance from the judge who has jurisdiction over the subpoena. Each state has its own rules, however, and the APA Practice Organization is unable to provide guidance that works for every state and every situation. If the options below do not fit your circumstances, you should seek additional guidance from your own attorney or other appropriate source.

Option 1. Tell the requesting attorney that you cannot release confidential information without consent or authorization.

In most situations, an appropriate first step is to contact the party requesting the information to say that you cannot release confidential information without the client's consent or authorization. It is important that, when making this contact, you do not reveal that you have ever treated the client, as many states take the position that the fact of treating a client is protected information. In your letter or e-mail to the

attorney, you might indicate that you cannot say whether you have provided treatment to the person named in the subpoena, but if you had, then you could not ethically release such information without an order from a judge or an authorization from the client, neither of which you have. In many cases, the attorney will try to address the problem by seeking a court order or trying to obtain the client's authorization. In some situations, the attorney may decide not to pursue the request for confidential information.

When contacting the requesting attorney, it is important not to reveal that you have ever treated the client, as many states take the position that the fact of treating a client is protected information.



Option 2. Seek guidance from the judge with jurisdiction over the subpoena.

The attorney may disagree with your assertion that you cannot disclose the information, or otherwise insist that you do so. At this point, you may want to seek guidance from the court. You or your attorney could call the court, stating that you wish to comply with the law but that you are ethically obligated not to produce confidential records

or to testify about them, including whether someone is a client of yours, unless compelled to do so by the court or with the consent of the client. You could then ask the court for guidance. Be sure to confirm any guidance received in writing, with copies to attorneys for both sides. If you cannot reach the court by phone, you can contact the court in writing.

Option 3. File a motion to quash the subpoena.

If you seek guidance from the court and get no response, you may need to work with an attorney to file a motion to quash the subpoena. A motion to quash is a formal request to the court that the subpoena be declared invalid or otherwise without legal force. If the client has refused to authorize you to disclose the information, the client's attorney might file this motion, which would relieve you of paying the costs related to such a filing. While working with the client's attorney (after receiving the necessary authorizations from your client) is usually advisable, keep in mind that your client's attorney does not represent you and that your interests and the client's interests may not be the

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same, especially as the proceedings evolve. Moreover, if you have an obligation to the court, and the client's attorney fails to contact the court or file a motion to quash in a timely manner, you may be subject to the consequences of failing to respond. Thus, while working with the client's attorney, it is important that you stay apprised of your own legal obligations and deadlines.

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What if I think disclosure will harm my client or a third party?

There are several options to limit disclosure in such cases. In most cases, these options will be pursued by the client's attorney. APA staff attorneys suggest that you discuss these options with your client's attorney before pursuing them on your own. Be sure to confirm any agreement with the

requestor in writing, with copies to all parties. If the requestor refuses to agree to any of these options, you may need to seek a ruling from the court.

See if the requestor will accept limited information.

The requestor may agree that information about third parties (such as spouses) does not need to be disclosed. Requestors may also decide that they need only information to confirm that sessions took place, and not information that would disclose the purpose of the sessions or their content. The type of information that could fall into this category may include dates of sessions, amount of payment, the fact of payment or insurance company billed.

See if the requestor will agree to restrict who sees the information or how it is used.

The person requesting the information may agree not to release the information to the public and/or to use the information only for purposes of the litigation and return it after the litigation is over.

Ask the court to determine whether the records need to be disclosed.

You could also ask the court through in camera inspection — a review by the judge in chambers — to determine whether the client records are really relevant to the issues before the court and need to be disclosed at all.

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What if I don't want to comply with the request because I think it is too burdensome?

Sometimes psychologists may not want to comply with a subpoena because doing so will take an inordinate amount of time away from their practice. In such cases, you may consider filing a motion with the court to deny or limit the demand because it is unduly burdensome. (Federal Rule of Civil Procedure 45[c][1-3] requires that the party responsible for issuing the subpoena take reasonable steps to avoid imposing an undue burden or expense on the person subject to the subpoena.)

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Jurisdictions vary in terms of the time that a person must be given to reply to a subpoena for testimony or documents.

You may also want to check whether the subpoena you received is invalid, which would allow you not to comply. There are several technical reasons why a subpoena may be invalid. For example, the court does not have jurisdiction over you, the subpoena was not furnished to you in a manner that complies with the court's rules, or the subpoena does not give you enough time to file a motion to oppose it. You will likely need to seek legal guidance to determine whether any of these situations applies.

You cannot ignore a subpoena, even if it has not been signed by a judge. Most subpoenas are not signed by judges, but rather by the attorney who is seeking the documents or testimony.

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I am unwilling to comply with the subpoena in the timeframe requested.

What can I do?

Assuming you have your client's authorization to release the information requested, you can discuss the timeframe with the person requesting the information and see if the date may be changed. If the person will not negotiate on that point, you should determine whether the timeframe given in the subpoena complies with the requirements for your area. Jurisdictions vary in terms of the time that a person must be given to reply to a subpoena for testimony or documents. Some permit only five days, while others may provide 30 days. In making this determination, consider checking the Web site of the court listed in the subpoena, contacting the court directly or contacting your own attorney.

NOTE: This article is not intended to provide guidelines or standards. Legal issues are complex and highly fact-specific and require legal expertise that cannot be provided by any single article. The information in this article should not be used as a substitute for obtaining personal legal advice and consultation prior to making decisions regarding individual circumstances.



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Can I just ignore a subpoena, especially if it's not signed by a judge?

No. You cannot ignore a subpoena, even if it has not been signed by a judge. Most subpoenas are not signed by judges, but rather by the attorney who is seeking the documents or testimony. Nevertheless, you must respond in writing, as discussed above. Failure to do so could result in your being held in contempt of court and having to pay significant fines.

Further guidance on this topic can be found in "Strategies for Private Practitioners Coping with Subpoenas or Compelled Testimony for Client Records or Test Data," prepared by the APA's Committee on Legal Issues (COLI). This article incorporates many of the strategies discussed in that document, found in *Professional Psychology: Research and Practice* (2006, Vol. 37, No. 2, 215-222).

APA Practice Organization members may contact the Practice Directorate's legal and regulatory affairs department at 202-336-5886 or praclegal@apa.org with questions about this article. 