LEGAL ISSUES

How to Handle Subpoenas and Depositions

Learn answers to these frequent questions from psychologists related to providing information in a patient's lawsuit.

This article focuses on the most common scenario in which questions about subpoenas arise: You provided treatment to a patient and subsequently received a subpoena to produce documents and/or testify at a deposition in a lawsuit between the patient and some third party. For ease of reference, we refer to a lawsuit or court case involving the patient, but the advice also generally applies to administrative proceedings and proceedings involving the parents or guardians of a minor patient. The latter half of this article addresses some questions that often arise when a psychologist is subpoenaed for a deposition in such a case.

Frequently Asked Questions About Subpoenas

Am I required to respond to a subpoena?

The basic rule is that while you must respond to a subpoena in some form you should not produce patient files or testify without appropriate consent from the patient or a court order. If you are covered by the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule, appropriate consent means a HIPAA-compliant authorization form. Many lawyers do not understand that consent requirements for mental health information are more stringent than for medical information.

Absent consent or a court order, your response to the subpoena will often be to explain why you cannot provide documents or testimony. But remember that you must provide some type of appropriate response or you could be held in contempt of court or fined.

How do I tell the difference between a subpoena and a court order?

A subpoena is a lawyer's assertion that she/he is entitled to the requested information, while a court order determines that the lawyer is in fact entitled to it.

A court order typically has "order" typed on it and is signed by a judge or magistrate. It will often have verbiage reflecting that one party has brought a motion to compel you to provide documents or testimony, the court has considered that motion and it is now ordering you to provide the requested information. If you are in a court hearing and the judge verbally orders you to divulge information, this demand also constitutes a court order that must be obeyed.

A subpoena typically has "subpoena" typed on it and is signed by an attorney instead of a judge. It may be issued by a clerk of the court.

If you are unsure whether the document is a subpoena or court order, you can contact the clerk of the court that issued the subpoena or, if a particular judge is identified on the document, you can ask to speak to that judge's law clerk.

What is the difference between a subpoena for records and a subpoena to testify?

A subpoena may ask you to produce patient records and/or to testify at a deposition or hearing in your client's case. If you have consent from your client, be sure that the consent covers what the subpoena is seeking. Consent to produce documents, for example, does not give you permission to testify at a deposition.

A subpoena seeking documents is often called a "subpoena duces tecum." It will specify that certain documents are requested. A subpoena seeking only records may be written in a way that suggests you need to bring the patient record to the lawyer's office or the court on a particular date, but often the lawyer just wants the records sent to him or her. Sometimes a subpoena will appear to ask you to bring your documents to the deposition or hearing, but lawyers often prefer to receive the documents in advance so they can review the patient records and formulate questions for you.

You can clarify both of these issues — whether to send or bring documents and the timing — by contacting the lawyer who sent the subpoena, assuming that you have a court order or consent from the client to release documents and talk with that lawyer.

What happens when the parents disagree about consenting to disclosure of a child's records?

When a child's treatment records are subpoenaed, the parent or guardian or other legal representative of the child is generally the person with the power to consent to releasing documents or testimony in response to a subpoena. When the two parents disagree, this is a complex situation with heightened risks.

This problem is most likely to arise in the context of a separation, divorce or child custody dispute. When parents are divorced or separated, the rights of custodial and non-custodial parents to access treatment records may be specified by court order or may be covered by state law. When the parents are still legally married and have no separation order or agreement, there won't be a court order or agreement between the parties addressing this issue, so it will be necessary to look to any existing state law.

In these situations, you may want to contact the court for guidance, or contact your malpractice insurer or an attorney in your state.

Frequently Asked Questions About Depositions

Am I an "expert witness" or a "fact witness" in the case?

If you have been asked to provide deposition testimony in litigation brought by a patient whom you have treated, you are most likely being deposed as a fact witness. You will be asked to testify regarding the facts of your patient's condition and treatment.

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A psychologist expert witness, by contrast, is typically retained by the patient's lawyer or the court to provide an outside, expert view regarding treatment with which the expert was not involved. The expert witness is selected for his or her expertise and is usually subjected to specific court rules for expert witnesses. For example, the expert is formally designated by one party as its expert, prepares a report and can testify only if the court decides that the expert is qualified to provide the opinions listed in the report.

The expert witness is brought in to offer expert opinions on key issues in the case, such as the cause, extent or impact of the patient's psychological state. By contrast, a treating psychologist will typically be allowed to provide only those opinions that he or she formed in treating the patient.

For example, in a child custody case the psychologist who treated one parent for depression might testify as to opinions regarding that parent's condition and prognosis that were appropriately formed regarding the treatment for depression. But that psychologist would generally not be allowed to state opinions regarding the parent's fitness as a parent. Rather, that opinion would typically come from a child custody evaluator (an expert hired by one side or by the court) who followed APA's 2010 *Guidelines for Child Custody Evaluations in Family Law Proceedings.*

Psychologists generally do not serve both as the treating psychologist and as an expert witness in the patient's case, in part due to ethical consideration regarding multiple roles. (See *American Psychological Association's Ethical Principles of Psychology and Code of Conduct*, Section 3.05.)

If I am the treating psychologist testifying as a fact witness at the deposition, can I get paid for my time?

It is common for professionals to be compensated for the value of their time when being deposed as a fact witness, but this may vary from one jurisdiction to another. If you are uncertain whether and/or how much you will be compensated, you can ask the lawyer who has subpoenaed you, your client's lawyer or the clerk of the court.

You can also check whether your therapist-patient agreement provides that your patient pay you a certain amount per hour for your time being deposed in the client's case. This agreement basically is an expanded informed consent that also specifies certain payment obligations. For example, the therapist-patient agreement in the *HIPAA for Psychologists Privacy Rule* compliance product and the one given by the American Psychological Association Insurance Trust (The Trust) provide that your patient agrees to pay for your professional time if you are called to testify in his or her legal proceeding. Thus, if the attorney who has subpoenaed

continued on page 20

How to Handle Subpoenas and Depositions *continued from page 11*

you will not compensate you for your deposition time, you may be able to ask the patient to do so.

Should I retain a lawyer to represent me at the deposition?

In most cases, there is probably no need for you to have a lawyer represent you. Consider it, however, if you have reason to believe that your testimony is likely to result in your patient bringing a licensing board complaint or even a lawsuit against you. This may be a risk with very litigious patients, those with certain personality disorders or in cases where your testimony cannot legitimately support the client's strong view of an important issue in the case.

While your client's attorney will often have interests aligned with yours, remember that his or her primary loyalty is to your client and not to you.

You may also want to check whether your professional liability carrier is able to provide an attorney to represent your interests. For example, The Trust can provide an attorney to represent you if you are deposed in your client's case. However, The Trust finds that most psychologists decide, after consultation with The Trust, that they don't really need to bring in an attorney to represent them.

Are there any tips for how to approach my deposition testimony?

A helpful way to view a deposition is that it is in many ways the opposite of a normal conversation with a good friend. In a conversation, you help move the conversation along in various ways, such as assuming that you know what the other person is asking, talking as soon as the other person finishes and freely associating between topics. You can do these things because your friend understands what you are trying to say and will not later hold your statements against you. And your conversation is not being transcribed.

By contrast, your deposition testimony is being recorded, with lawyers intending to use it in support of or against your client. Playing by the rules of a normal conversation could result in your giving testimony that is confusing or that can be misconstrued. In deposition testimony it is the job of the lawyer questioning you to ask the right questions to elicit the information he or she seeks.

The following tips will make your deposition experience less stressful and lead to more accurate testimony:

- Take your time; this is not a test of speed.
- Make sure that you understand the question being asked. If you are not certain about what the lawyer is asking or the context or timeframe, ask the lawyer to clarify the question.
- Carefully think out what you want to say before you start speaking.
- Be precise and tell the truth.
- Answer only the question asked; do not volunteer additional information. For example if you are asked what diagnosis you provided, you should not go into an explanation of why or how you reached that diagnosis. It is the attorney's job to ask those follow up questions if he or she is interested.
- Qualify your answers with the appropriate degree of uncertainty. If you are not sure of your recollection, you can couch your answer with phrases like "to the best of my recollection." This will make things more comfortable for you if you realize you need to change your answer later in the deposition based on a document that you are shown or further questions about the client's treatment.
- Do not be intimidated by pushy lawyers or fail to exercise caution when lawyers seem to be friendly and relaxed.

You will often have the opportunity to read and sign your deposition, which gives you the opportunity to note corrections to your testimony.

Note: Legal issues are complex and highly fact specific and require legal expertise that cannot be provided by any single article. In addition, laws change over time and vary by jurisdiction. The information in this article does not constitute legal advice and should not be used as a substitute for obtaining personal legal advice and consultation prior to making decisions regarding individual circumstances.

This question-and-answer guide is adapted from a November 2011 article in the *PracticeUpdate* e-newsletter from the APA Practice Organization. Members may contact the Practice Directorate's Office of Legal & Regulatory Affairs at (202) 336-5886 or email their questions about this article to praclegal@apa.org.

Further information about responding to a subpoena is contained in the Fall 2008 *Good Practice* article, "How to Deal with a Subpoena: Pointers for Psychologists."