



Responding to a subpoena

Question: I was recently subpoenaed to testify in court in the matter of my client.

This makes me nervous. How do I respond to a subpoena?

Answer: Testifying in court tends to be one of the most dreaded and unpleasant parts of our jobs as counselors. The first thing you should do is contact your liability (malpractice) insurance company.

Licensed professional counselors are taught to follow HIPAA (Health Insurance Portability and Accountability Act) guidelines and maintain the *ACA Code of Ethics*. When they are called on to testify in a court of law, counselors often feel they are not protected. The truth is, some judges and attorneys may not understand the potential harm that having counselors testify in court could cause. Therefore, licensed professional counselors must rely on the *ACA Code of Ethics* while following the rules of the court.

The 2014 *ACA Code of Ethics* touches on this topic in many of its sections, including Section A, The Counseling Relationship (see Standards A.1.a., A.1.b. and A.2.a.); Section B, Confidentiality and Privacy (see Standards B.1.c., B.1.d., B.2.a., B.2.d., B.2.e., B.6.a. and B.6.g.); and Section C, Professional Responsibility (see Standards C.2.e. and C.6.b.). In addition, Standard I.1. discusses that the first step in making any ethical decision is to use an ethical decision-making model. (For an example, see sdcounseling.org/documents/Ethical_Decision_Making_Model.pdf, which was adapted from the fifth edition of *Ethics in Counseling and Psychotherapy* by Elizabeth Reynolds Welfel.)

As counselors know, our first ethical guideline is to respect the dignity and welfare of our clients and to avoid doing harm. When we are called to testify in court, it may feel like we are violating that responsibility to our clients. When

being subpoenaed, counselors may be asked to share information about a client. For that reason, it is important that counselors explain confidentiality and informed consent in the first session with the client and describe the limitations to that confidentiality. The client will need to understand that information may be shared in court if the counselor is called on to testify.

When ordered by a court to testify, counselors should get a written release of information from the client. Ensure that it is specific and narrow in focus so that only the essential privileged information can be shared. Always make sure that your forms reflect the latest HIPAA requirements.

When dealing with subpoenas, be certain to read the court order in its entirety. Some court orders may request your presence in court, while others may request your progress notes or your electronic data. In cases in which notes or data are being requested, counselors need to ensure that they are keeping their records up to date, and if amendments have been made, proper documentation should be noted.

It is important to remember to share only the information that is directly relevant to the case. Explain to the attorney or judge your hesitancy about sharing all progress notes, especially because all of the notes may not be related to the case. If you question whether your notes should be released, bring them to court and keep them secure until it is necessary to release them. Explain the reasons why the notes should be protected. Many times, the judge will not ask to see them, meaning they can be kept secure.

Some parties may request a summary of treatment in lieu of the progress notes. Make sure this summary is accurate, objective and honest. When testifying and sharing notes, be sure to disclose only

essential information pertaining to that specific case.

When responding to a subpoena, consult with other counselors on the correct procedures. It also may be a good idea to get legal counsel. A benefit of maintaining liability insurance is that most insurance companies provide free legal counsel in situations such as these. ACA's Ethics Department is always willing to help address these concerns as well.

Always seek help and counsel when courts get involved. Make sure to adhere to ACA ethical standards, and document the decision-making process and rationale for the decision that was reached in case it is called into question. It is also important to reflect back on all decisions involving ethical matters to ensure that the decision was made effectively.



The questions addressed in this column are for educational purposes only. As a reminder, a benefit of ACA membership is personal ethical consultation through the ACA Ethics Department at 800.347.6647 ext. 314 or ethics@counseling.org.

Erin Stolsmark is the ethics chair of the South Dakota Counseling Association, a branch of ACA. A licensed professional mental health counselor and national certified counselor, she works in private practice in Sioux Falls. She has served as co-editor of the Ethics Inquiries column.

Letters to the editor:
ct@counseling.org