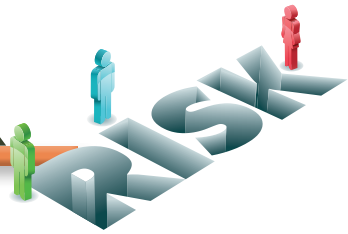

Handling a subpoena for client records

Question: A former supervisor of mine suggested that I just ignore a subpoena for a client's records that was issued by an attorney rather than a judge. Should I do this?

Answer: This isn't the first time that I've heard of such advice, but it could prove troublesome for you. It's possible that your former supervisor is confusing the concept of a subpoena with a court order that comes from a judge. However, you should never ignore a subpoena. You could ultimately be held in contempt of court or experience other adverse consequences for failing to attend to the subpoena properly. The following are some general steps you can take when you are served with a subpoena.

First, speak with your own local health care attorney or, if you're employed at a school or agency, ask your administrator for permission to speak with the attorney for the institution. Just remember that the institution's attorney is not *your* personal attorney. You may wish to call your professional liability insurance carrier promptly to ask whether it will assign an attorney to you to handle the subpoena issue. Be aware that this would likely be set up as an insurance claim.

From a procedural standpoint, your local attorney can advise you on whether the subpoena was properly served. State law and court rules may come into play, so if there is a question about the process, your attorney is the appropriate person to guide you.

From a substantive standpoint, both state law and federal Health Insurance Portability and Accountability Act (HIPAA) regulations may be relevant to the subpoena issue, depending on the facts. HIPAA applies if you're a "covered entity" under HIPAA. (For help determining whether you are a covered entity, go to *cms.gov/Regulations-and-Guidance/Administrative-Simplification/HIPAA-ACA/AreYouaCoveredEntity.html.*)

If you are a school counselor, you will need to ascertain whether there is a "privileged communication" law that applies to you. The Family Educational Rights and Privacy Act may also be relevant. See *www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html.*

Next, if your attorney agrees, speak with your client about what is in the records. See if the client will provide you with authorization to speak with his or her attorney. It may be best if the client first gives you permission to release information and records to his or her own attorney, who can then review everything and ascertain whether a counselor-client evidentiary "privilege" may apply. (Most states have privilege laws for licensed professional counselors, but such laws are rare for school counselors. Even where privilege laws exist, there are many exceptions to the rule.)

If the client and his or her attorney agree to release information to the other side in the litigation, make sure that your client signs an appropriate authorization form to permit you to release information and testify in court or at a deposition. In some situations, the client may have waived privilege by putting his or her mental condition into issue in the lawsuit. Your local attorney can advise you on the specifics of your state law. If you keep separate psychotherapy notes as defined by HIPAA, you must have a HIPAA-compliant authorization to release such notes.

If the client's attorney believes the information is privileged and refuses to allow the client to sign your appropriate authorization form, you or your attorney may ask if the client's attorney will file a motion to quash the subpoena or a motion for a protective order. The motion should eventually lead to a court order from the judge.

State laws vary regarding exact procedures. For example, in Virginia, a counselor must send the records to the court clerk in a sealed envelope pending disposition of a motion to quash. However, someone must file the motion to trigger a court order, which will typically issue after a hearing on the motion.

If you do not receive written client authorization or the client's attorney refuses to file an appropriate motion, talk to your own attorney again. Under HIPAA and some state laws, if the person seeking information by subpoena provides "satisfactory assurances" that appropriate notice was given to the client or the client's attorney, you may be required to turn over information and testify. In some circumstances, you may wish to have your own local attorney file a motion that will lead to a court order from the judge.

Be aware that the underlying facts, and the applicable law, may guide your actions. For example, if you are subpoenaed to produce a couple's records in the context of a divorce and custody case, you may need written authorization from *both* parties before releasing the joint records, or you will need to ensure that a motion is filed so that a judge will issue an order.

For more information on the issue of subpoenas, see Chapter 5 of *The Counselor and the Law: A Guide to Legal and Ethical Practice*, seventh edition, which I co-authored with Burt Bertram. The book is published by the American Counseling Association.

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The question addressed in this column was developed from a deidentified composite of calls made to the Risk Management Helpline sponsored by ACA. This information is presented solely for educational purposes. For specific legal advice, please consult your own local attorney. ❖

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