

How are Treating Psychologists to Respond to Requests for Court Testimony?¹

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Abstract

Responding to subpoenas is usually anxiety provoking and often frustrating. This article suggests that responding to subpoenas is a duty easily exercised when the psychologist understands the nature of a subpoena, is familiar with the rules about when and how to respond, and how to advise a court when the psychologist has neither consent nor a court order. The article also deals with the consequences of non-response and improper release of information, as well as tips for dealing with courts.

Key words: subpoena, court order, testimony, records release, privacy

The Question

Recently, a question was posted on a list serve that provides a forum for discussion of issues in psychology and law. The question posed was by the psychologist was as follows:

“I have been called by a judge to testify in a divorce case regarding the two minor children who are my patients. I try my best to not become involved in court cases Do the limits of confidentiality, particularly as they pertain to minors, also apply in the courtroom? How much of my conversations with these children can I legally and ethically divulge in the courtroom?”

¹ The comments in this article are not meant to be, nor should they be construed as, the provision of legal advice but simply as reflections for educational purposes about the issues obvious or implicit in the questioner's list posting. Gregory DeClue, Ph.D., editor of Open Access Journal of Forensic Psychology, invited this response.

The Issues

As may be often the case, this simple question contains many issues, including, how do the issues of privacy differ for minors, and in the courtroom, from other settings? The psychologist is reluctant to become involved in court cases, which may imply that the purposes, nature of consent agreement, and expectations for treatment did not include sharing information in a legal setting. The psychologist is aware that privacy issues might be handled differently both with regard to minors and in legal proceedings. The psychologist also wonders what information could—or should—be shared in a judicial proceeding. The underlying question should perhaps be stated, “How does a treating psychologist respond to a subpoena?”

Overview of Response

In this paper we identify the issues contained in this question, provide our rationale as to why the psychologist should be pleased (if less than happy) to provide testimony, indicate our belief as to how to cope with this request, define privacy of mental-health information as confidential or privileged, and provide simple rules to follow when a psychologist is faced with a subpoena

Dealing with subpoenas is often anxiety provoking for mental-health practitioners. On one hand, release of information that is confidential and might be privileged, without the consent of the person or a court order can subject the practitioner to a potential Board complaint for breach of confidentiality or a lawsuit by an aggrieved patient. Yet, on the other hand, failure to respond to a subpoena could subject the provider to a host of sanctions including confinement, or costs, or both.

Authors' Bias

First, because we are both attorneys, we are biased toward providing testimony, as we believe that courts are the ultimate arbiters of truth under the constitutional system of government in this country. As arbiters of the truth, courts deserve to have the broadest possible base of information in order to reach reasonable decisions. Second, and relevant to the question initially posed, in most jurisdictions, matters that involve parent-child relations operate on the principle of “best interests of the child” to decide admission of evidence, which means that privacy interests, although important, are given less weight than obtaining information about the children and their caregivers. This is, however, a complex issue on which there are wide jurisdictional differences.²

² This is not a treatise on evidence; however, it may be noted that the “best-interest standard” is not the only standard for admissibility of evidence in child-custody proceedings. Although the Federal Rules of Evidence (FRE) 402 state “All relevant evidence is admissible. . .,” there are exceptions: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence,” FRE 403. More specifically, in some jurisdictions a parent’s mental-health status would not abrogate privilege in a custody matter, cf. *Navarre v. Navarre*, 479 N.W.2d 357 (Mich. Ct. App. 1991). Similarly, in Virginia, there was a statutory prohibition against use of mental-health information of parents in child-custody proceedings, cf. now repealed, Va. Code 20-124.3:1 (repealed by Acts 2008, c. 809, cl. 1). This statute was repealed because of the unintended consequences resulting in decisions that did not serve children well (see Hagan, Leigh D.; Landry, Scott D.; and Blanks, T. Michael, “Custody and Admissibility of Mental Health Records: Data

Differences between clinical and forensic roles

The psychologist's question illustrates conflicts, which inevitably arise when a psychologist is drawn into a legal forum, either unintentionally or in an unanticipated fashion. We do not know if, at the time the psychologist initiated treatment with the minor children, the psychologist was aware that litigation concerning the parent-child relationship was anticipated, i.e., whether the services were strictly psychotherapeutic or were forensic.³

Different rules commonly apply to forensic services involving evaluation and opinions offered in a judicial proceeding than to purely therapeutic services where there is no expected involvement with a court. The licensing boards in some jurisdictions, e.g., Texas, have distinguished between therapeutic and forensic services—reserving the latter for services “which the licensee knows or should know will be utilized in a legal proceeding, such as a child custody determination or a divorce,” and require that the licensee “comply with all applicable Board rules concerning forensic services regardless of whether the licensee is acting as a factual witness or an expert.”⁴

Forensic evaluations, as opposed to therapeutic services, also involve far less an advocacy role for the psychologist, and—as in Texas—may not identify the beneficiary of services as a “patient,” thereby

Trumps Rhetoric,” *Virginia Lawyer*, February 2008.) In Texas, however, a permissive exception to psychologist-patient privilege in custody matters has long existed, cf. Tex. Health & Safety Code §611.006. In addition, there is, in law, a “least intrusive means doctrine”—akin to the “least restrictive alternative” for civil commitment—wherein the entity seeking redress has the duty to pursue its goals in the least intrusive manner possible. This is often applied to the Government having the duty to exhaust all other means before requiring disclosure of sensitive or otherwise privileged information, e.g., see, *Ralls v. United States*, 52 F.3d 223 (9th Cir. 1995); see also, Perlin, M.L. (2000) “Their Promises of Paradise: Will Olmstead v. L.C. Resuscitate the Constitutional ‘Least Restrictive Alternative’ Principle in Mental Disability Law?” *Houston Law Review* 37:4 pp 999-1054. Under this doctrine, evidence may be excluded if there is a less intrusive means of obtaining the same information.

³ Therapeutic and forensic matters are differentiated, sometimes by rule, as in the following: “Forensic psychology” is the provision of psychological services involving a court of law or the legal system. The provision of forensic psychological services includes any and all preliminary and exploratory services, testing, assessments, evaluations, interviews, examinations, depositions, oral or written reports, live or recorded testimony, or any psychological service provided by a licensee concerning a current or potential legal case at the request of a party or potential party, an attorney for a party, or a court, or any other individual or entity, regardless of whether the licensee ultimately provides a report or testimony that is utilized in a legal proceeding. A person who is the subject of forensic evaluation is not considered to be a patient under these rules. “Forensic evaluation” is an evaluation conducted, not for the purpose of providing mental-health treatment, but rather at the request of a court, an attorney, or an administrative body to assist in addressing a forensic referral question,” 21 TAC §465.1(3). See also, *Specialty Guidelines for Forensic Psychology*, 5th Draft 8/1/10., 6.02.01ff. In the *Guidelines*, 6.02.02 points out that merely providing testimony about a “participant in a legal matter does not necessarily involve the practice of forensic psychology even when that testimony is relevant to a psycholegal issue that is before the decision-maker.”

⁴ 21 TAC §465.18. See also, *Specialty Guidelines for Forensic Psychology*, 5th Draft 8/1/10., 6.02.02, 10.ff.

relieving the psychologist from a host of rules that would otherwise apply to patients for certain purposes.⁵

It is not uncommon for regulatory boards to adopt rules that prohibit a provider from being both a treater and an examiner in the same case.⁶ Forensic examinations are considered as appraisals that though clinical in nature are not designed to be therapeutic.⁷ As such, court-ordered examinations, or appraisals for third parties such as disability carriers, are quasi-legal in nature, requiring only the “informed” portion of “informed consent” but not the “consent” portion, so that the subject is aware of the limitations of confidentiality associated with such an examination.⁸ Additionally, the examination does not constitute a typical “doctor-patient relationship” between the psychologist and the examinee.⁹ In addition, frequently, the examinee does not receive a copy of the results, which are provided to the requesting agency such as a court or to a disability carrier, or even the employer; however, the examinee is entitled to know, in advance, that such limitations on confidentiality exist.¹⁰ In contrast to evaluations only, treatment services ordered by a court are designed to be therapeutic but are subject to different rules regarding disclosure of the limits of confidentiality in such circumstance.¹¹

In the question presented in this case, the psychologist appears to be providing therapeutic services, did not anticipate or understand that these services might be forensic in nature, and is anxious about the nature of testimony that may be requested in a judicial proceeding. We assume the psychologist has received a subpoena. How is the psychologist to respond?

Two Types of Subpoenas

A subpoena is simply a command to bring information before a court, which may be essential to the resolution of the dispute.¹² There are two types of subpoenas: the *subpoena ad testificandum*,¹³ which orders a person to attend and give testimony in a deposition, hearing or trial, and the more-common *subpoena duces tecum*,¹⁴ which orders a person to bring or submit physical evidence before the ordering authority or face punishment. These types are differentiated on their face: The one directs the witness to appear at a specific time and place; while the other merely directs the witness to make available specific documents or records as specified within the four corners of the subpoena itself.

Anxiety about Subpoenas

Subpoenas are frequently served by a peace officer. When this method of service occurs, very often the result is to raise the anxiety level of the professional and the office staff (though in many if not most

⁵ 21 TAC §465.1(3), see also §465.18J(d)(3), “The role of the psychologist in a child custody forensic engagement is one of a professional expert. The psychologist cannot function as an advocate and must retain impartiality and objectivity, regardless of whether retained by the court or a party to the divorce. The psychologist must not perform an evaluation where there has been a prior therapeutic relationship with the child or the child's immediate family members, unless required to do so by court order.” Also see, *Guidelines for Child Custody Examinations*, American Psychological Assn., Washington, 2009.

⁶ 21 TAC §465.18(b)(5).

⁷ 21 TAC §465.1(3).

⁸ *Specialty Guidelines for Forensic Psychology*, 5th Draft 8/1/10., 8.03.02.

⁹ 21 TAC §465.1(3).

¹⁰ Cf., for example, Tex. Code Crim. Proc. art.46B.026.

¹¹ See *Specialty Guidelines for Forensic Psychology*, 5th Draft 8/1/10., 8.03.02.

¹² See Fed. R. Civ. P. 45, Fed. R. Crim. P. 17

¹³ *Black's Law Dictionary*, 9th ed. 2009.

¹⁴ Id.

settings, subpoenas may be served by a civil process server or even by mail).¹⁵ When a constable arrives in the provider's waiting room wearing a uniform and duty weapon, and the secretary advises, "There is a policeman out here to see you," most psychologists are likely somewhat concerned at receiving such a message.

It may be helpful to note that most subpoenas are routine, merely designed to obtain records, and do not require testimony by the provider (a *subpoena duces tecum*).¹⁶ They are issued as a matter of routine in an attempt to discover information that might be useful in resolution of a dispute. Subpoenas can be issued by the clerk of a court, an attorney, or "an officer authorized to take depositions. . . ."¹⁷ Under Federal rules, either the clerk of the court or an attorney issues a subpoena.¹⁸ Whereas the civil courts make no provision for service of a subpoena other than by "delivering a copy to the witness and tendering . . . any fees required by law . . .," the criminal courts specifically allow service by other means, i.e., "reading the subpoena in the hearing of the witness . . ."; "delivering a copy of the subpoena to the witness"; "electronically transmitting a copy of the subpoena to the last known electronic address of the witness . . ."; mailing a copy of the subpoena by certified mail, return receipt request. . . ."¹⁹ Refusal to respond in a timely manner can result in penalties including contempt or fine.²⁰ The senior author has been involved in several contempt proceedings to ward off sanctions against mental-health providers for failure to respond in an appropriate and timely fashion.²¹

Factors to Consider in Responding to a Subpoena

How a mental-health provider responds to a subpoena requires knowledge of three areas: 1) knowing what a subpoena is and is not; 2) knowing when and how to respond to a subpoena (which means having an understanding of confidentiality and privilege); and 3) practical matters in how to advise a court when the psychologist has neither consent nor a court order to release information.

Response Principles

The first principle in dealing with subpoenas is simply to relax and recall the description of a subpoena: subpoenas are commands to place possible evidence before a court. Courts resolve disputes and subpoenas are a means of getting information into court. A subpoena is **not** a court order, though the language suggests such, e.g., "You are hereby ordered, required, demanded, to appear . . ." In fact, a subpoena is only a writing issued under authority of a court to compel the appearance of a witness at a judicial proceeding, or the disclosure of information in the witness's possession to the court.

The second principle is that one always responds to a subpoena: Disobeying a subpoena could subject the witness to a contempt citation, and sanctions ordered by a court which could include being jailed or

¹⁵ See Fed. R. Civ. P. 47, compare Tex. Code Crim. Proc. art.24.04.

¹⁶ Fed. R. Civ. P. 45(c)(2)(a).

¹⁷ Tex. R. Civ. P. 176.4.

¹⁸ Fed. R. Civ. P. 45(a)(3).

¹⁹ Tex. Code Crim. Proc. art. 24.04.

²⁰ See *United States v. Willis*, 486 F. Supp. 63 (N. Dist. II. 1080); *Cincinnati Bar Ass'n. v. Komarek*, 702 N.E.2d 62 (Ohio, 1998). On the other hand, in *Commonwealth v. Fladger*, 378 A.2d 440, (Pa. Super. 1977) the witness avoided sanctions because she was not served personally and did not have actual knowledge that she was personally liable for failure to comply. See also, Fed. R. Civ. P. 37 viz. procedures if a witness fails to comply.

²¹ Timely response is required, despite the fact that the vast number of subpoenas issued to mental-health practitioners are "non-party subpoenas." The practitioner is not a party to the suit. The courts are obligated to modify or quash a subpoena if it "requires disclosure of privileged or other protected matter, if no exception or waiver applies." Fed. R. Civ. P. 46(c)(3)(a)(iii). For a discussion of these issues see: "Greetings, You are Hereby Commanded": A survival guide to subpoenas issued in a Texas APA contested case to a non-party not under a party's control, 10 Tex. Tech. Admin. L. J. 451 (2009).

fined, but releasing information even in response to a subpoena without the consent of the person or in the absence of a court order may subject the psychologist to penalties or a lawsuit.²² Thus, “responding” to a subpoena does not necessarily mean releasing the requested information.²³

Always respond to a subpoena, even if the response is to seek legal counsel, i.e. an attorney, who may submit a motion for instructions or in some cases, a motion to quash the subpoena.²⁴ In fact the litany from the provider’s mouth should be, “I’m always happy to respond to a subpoena.” Note again that “responding” does not necessarily mean supplying the requested information. The process of discovering evidence through the subpoena process and admission of that evidence in a court proceeding are different matters. Much information is or may be discoverable. Far less is relevant or material, therefore admissible if not otherwise subject to protection.²⁵ The provider must remember when there is concern to protect the privacy of the client it is the court, which decides what is admissible, not the psychologist.²⁶ Although officers of the court will argue this issue, the provider’s role is merely to raise the issue if there is anything unclear about privacy matters. It is not the provider’s role to attempt to be the arbiter of what is either discoverable or admissible; that is the court’s function. It is, however, the duty of the provider to inform the court that information is confidential and may be privileged—which is the point in the case to be discussed below.

The court having been advised that information is confidential and might be privileged, it may then decide if the requested information is material and relevant so that it is discoverable or admissible. Thus, the psychologist releases information only in response to consent or a court order, and a subpoena is not a court order.

²² See, for example, *Rost v. State Board of Psychology*, 659 A.2d 626 (Pa. 1995), wherein, confidential information was released pursuant to a subpoena, but in error, as the named party had not given consent. Note, however, that although most states statutorily protect medical or mental-health information, this is not uniformly the case in all jurisdictions—and, even when present, some states such as Texas would afford protections in civil cases but far the less in criminal cases, unless the protected information related to substance-abuse treatment or evaluation.

²³ Though a few years old, a state-by-state analysis of differences as may exist between the states is summarized in: “*Synopsis of State Case and Statutory Law*,” 2002 Yale J. Health Pol’y & Ethics 365 (2002). For example, Del. Code Ann. tit 16 §9926 would require that a patient’s health-care information is not subject to a court subpoena and is to be released only with consent of the patient. Or, in *Shady Grove Psychiatric Hospital v. State*, 736 A.2d 1168 (Md. Co. Spec. App. 1999), the court of appeals held that the trial court had erred when it enforced a subpoena without the patient’s consent. On the other hand, a Texas court oddly held that a hospital was not liable when it released information solely on the basis of a subpoena as it was not required to investigate the validity of the subpoena, see *Tobias v. Green Oaks Hosp.* No. 05-95-01022-CV, (Tex. App. – Dallas LEXIS 3557); however, this was a criminal case where privilege does not apply and the records were requested of a facility, rather than an individual practitioner.

²⁴ See Fed R. Civ. P. 46(d)(2), wherein witnesses may request of the court that a subpoena be quashed or modified if it requires disclosure of privileged material, is overly burdensome, or there is insufficient time to respond.

²⁵ Evidence that is “discoverable” is information upon which a court could rely to adjudicate a matter before it. Evidence which is “admissible” is discoverable evidence which has met the test of relevancy and materiality, and is not excluded on the grounds of prejudice, or confusion, or because it is protected by a privilege, e.g. lawyer-client, psychotherapist-patient, husband-wife, communications to clergymen, see Fed. R. Evid. 501, Notes to Rule 501, Notes of Committee on the Judiciary, House Report No. 93-650, (1995).

²⁶ See, *In re Lifschutz*, 2 Cal.3d 415 (Cal. 1970), wherein a psychiatrist refused to release patient records in response to a subpoena and was court ordered so to do. Again refusing, he was jailed for contempt. The court pointed out that the privilege was held by the patient and not by Dr. Lifschutz, as he had maintained, and inasmuch as the patient had not invoked her privilege and the court had ordered release of the records, Dr. Lifschutz had no right to refuse to comply.

In the instant query, however, the psychologist is concerned because the patients are minor children and in such circumstances, absent court removal of parental authority or court order, the parents stand in the stead of the minor children and can grant or withhold consent for release of information.²⁷ The psychologist has a duty to advise the court that information requested is confidential and might be privileged and request instructions on how to proceed. The court can then decide whether information is discoverable or admissible. Note, however, that, if the person having authority to consent is contacted (in this case, the parents of the minor children), and consent is given (in writing), the psychologist has no basis for refusal to release information.

²⁷ Exceptions to this principle are uncommon; see the discussion in *Abrams v. Jones*, 35 SW3d 360 (Tex. 2000) wherein the psychologist refused to release information and after trial proceedings and appellate court review, the matter went to the Texas Supreme Court which affirmed the psychologist's decision. Among the issues was whether the person requesting the information (the patient's father) was truly standing in stead of the patient or had another agenda at variance with the patient's best interest. The court concluded he did not have the patient's best interest in mind and supported the provider.

Case Illustration

A client in New Jersey who had been treated over a five-year period was in the process of a divorce and sought and obtained a temporary restraining order (TRO) prohibiting her husband from returning to the marital home. The husband contested the restraining order and subpoenaed the therapist Maureen Smith, Ph.D., who had treated the couple. The therapist appeared at the time of the scheduled hearing, was sworn, and testified, expressing concern for the welfare and safety of the children. She testified that the wife did not have a history of a good relationship with the children; that she had been somewhat of an absentee mother in the past two years; that she had been physically and verbally abusive with her oldest son; and that she had an obsessive compulsive personality and was involved with a cult-like group. The therapist, who had also seen the father, testified that the father had an excellent relationship with his children and was the primary parent. The wife did not appear at the hearing. The family court judge found the therapist's testimony persuasive and modified the TRO by granting temporary custody of the children to the father. Subsequent to the hearing, the therapist submitted a written report, in which she was critical of the mother, concluding that it would be a mistake to expose the children to "the ideology of a woman with obvious thought disorders." This report was used by the court to restrict the mother's access to her children. Eventually, the father was awarded custody of the children. The therapist was subsequently and successfully sued by the mother. On appeal to the New Jersey Supreme Court the decision was upheld, noting that, if a psychologist fails to raise the patient's privilege and discloses confidential information without a court determination that disclosure is required, the psychologist has breached the duty owed to the patient and the patient has a cause of action against the psychologist for the unauthorized disclosure of information.²⁸

In Runyon (2000) the psychologist properly appeared in court as requested, but provided information about her client without the client's consent, and, in addition, provided information gratuitously after the proceeding—to the detriment of her client. Though not part of this case, she also proffered testimony on the parenting ability of the father. It is not at all clear that was her mandate and she failed to advise the court that information requested was confidential and might be privileged.

As a result, the psychologist was deemed negligent, liable for damages, as well as likely subject to Board sanctions. The opinion of the court emphasized that she had the duty to advise the court that the information requested was confidential and might be privileged and therefore, she should have afforded the court the opportunity to ascertain whether and how such information could be provided.

Difference between Confidential and Privileged Information

When issues of privacy are concerned, there is a difference between "confidential" and "privileged," which we next address. Confidentiality is a broad-based term that means information is "confidential" if it is not intended to be disclosed to third persons. As opposed to confidentiality, "privilege" on the other hand, is a right and a duty of a witness in a judicial proceeding not to disclose private information. Information that is confidential may not be privileged, but information that is privileged is confidential (Hays, 1981).²⁹ A South Carolina case nicely points out the difference between confidentiality and privilege stating, "The terms 'privilege' and 'confidences' are not synonymous, and a professional's duty to maintain his client's confidences is independent of the issue whether he can be legally compelled to reveal some or all of those confidences, that is, whether those communications are privileged" (State Board of Medical Examiners v. Hedgepath 1997).³⁰

²⁸ Runyon v. Maureen Smith, Ph.D., 163 N.J. 439 (N.J. 2000).

²⁹ Hays, J. R. (1981). Privacy and confidentiality: Comment on Everstine. *American Psychologist*, 36, 914.

³⁰ *State Board of Medical Examiners v. Hedgepath*, 325 S.C. 166, 480 S.E.2d 724 (1997). Dr. Hedgepath was a physician engaged in the general practice of medicine and addictionology. During 1989, he acted as a family therapist for a married couple, Mr. and Mrs. C. From January until May 1991, he was Mrs. C.'s individual therapist. In 1992, the C.'s filed for divorce. Dr. Hedgepath provided an affidavit for use at the family court's temporary hearing. This affidavit was created at the request of Mr. C.'s attorney, without

Privilege belongs to the patient and not the practitioner and is claimed by the practitioner on behalf of the patient. A common violation of patient or client rights occurs when practitioners misconstrue the privilege as belonging to themselves and not the client, believing they have a right to withhold information. In fact, the provider may not refuse to withhold confidential information with impunity when ordered by a court to provide such information. Nor are there grounds to refuse to release information if the person having authority to grant such release provides consent.³¹ Dr. Lifschutz was a psychiatrist in San Mateo, California who treated a patient (Housek) in the late 1950's. A decade later, Housek sued another person for damages resulting from an alleged assault. Dr. Lifschutz had treated Housek for six months and received a subpoena for the medical records of Housek. The doctor appeared for the deposition but refused to produce records or answer questions, or even disclose whether Housek had been a patient. Note that Housek had neither claimed nor waived a psychotherapist-patient privilege. Lifschutz claimed the privilege belonged to him and refused to testify even when ordered to do so. He was jailed for contempt and sought release on *habeas corpus*. The case went to the California Supreme Court wherein the court held that no right to privacy is violated when the interests of justice require access to information otherwise confidential and that a psychotherapist can be compelled to testify, i.e. the privilege is not absolute (In re Lifschutz, 1970).

Dr. Lifschutz attempted to assert the privilege, though the patient had not. Although it was proper for him to raise the issue to the court, it was not proper to withhold information, the court having ordered him to produce such. The point is that the provider cannot assert the patient's privilege if it has been waived or otherwise excepted. Civil contempt was an appropriate remedy for refusal to comply with a valid court order. Dr. Lifschutz was jailed because no privilege existed, for though the information was confidential it should have been disclosed.

Further discussion of the rules applicable to confidentiality and disclosure without the patient's consent are beyond the scope of this paper's focus upon responding to subpoenas, but suffice it to say that these rules emphasize the necessity for the patient's consent unless otherwise legally authorized. In the case of subpoenas, authorization means consent or a court order. Practitioners might take note, however, that disclosure upon having received a court order provides a limited immunity from civil suit for breach of confidentiality.³²

Dealing with Counsel and the Court

In addition to knowing what a subpoena is and is not, as well as understanding the necessity to respond to subpoenas, practical issues as to when and how to seek legal assistance as well as deal directly with a court are relevant. At the same time, providers are encouraged to develop a relationship with an attorney whom they can consult periodically regarding legal and ethical questions.

Some practical rules to keep in mind upon receipt of a subpoena are as follow: 1) attempt to advise the patient and all counsel that a subpoena has been received. In this case, for example, advise the parents. 2) Contact the person having issued the subpoena—whose name is on the subpoena itself. If the consent of the patient has not been provided, the psychologist may neither affirm nor deny that the person has been seen, but indicate that, should consent or a court order be received, the provider would be happy to comply. 3) If the provider then contacts opposing counsel and describes the circumstances, then it may be possible to shift the burden to counsel opposing release of information to file a motion to

consulting with Mrs. C. or obtaining her consent, and was voluntary, that is the affidavit was not compelled by subpoena or other legal process. The affidavit was not flattering to either party, and it is undisputed that respondent's affidavit revealed confidences entrusted to him by Mrs. C. during their doctor-patient relationship. The Board found him guilty of violating the patient's confidence. On appeal the South Carolina Supreme Court upheld the Board finding.

³¹ *In re Lifschutz*, 2 Cal.3d 415 (Cal. 1970).

³² See *Briscoe v. LaHue*, 103 S. Ct. 1108 (1983); *Lombardo v. Traugher*, 990 S.W.2d 958 (Tex. App. – Beaumont 1999 writ ref'd).

quash. Failing that effort, the provider could then seek legal counsel who will file such a motion, or alternatively a motion for instructions.³³ 4) As noted, obtaining the court's order to disclose information relieves the provider of any liability associated with the disclosure.

If no consent is received and there is any bullying of the psychologist to provide the information, it may be necessary to obtain legal counsel to file a motion for instructions. If so, this would enable the provider to seek some protection from the subpoena, and more importantly, protection from objection by the party opposing release, because information is released only after the court has ordered release.

In the instant query, some discussion appeared on one listserv as to whether a letter by the psychologist and addressed to the court would be sufficient to raise the issue. Although a letter would not ordinarily serve as a motion to the court *per se*, such a letter—with copies to counsel—would likely precipitate action on the part of counsel to quash, modify the subpoena, or provide protection or instruction for the psychologist. Were the psychologist to assume the most neutral position and seek a motion for instructions from the court either in advance or when appearing, such as in the scenario below, there would be some protection.

If the psychologist has not received the consent of the party holding the authority to consent to release of information, the psychologist should appear at the date and time specified. When asked to testify the psychologist could turn to the court and say, "I am now being asked about matters which I believe are confidential and might be privileged, and I would appreciate it if you would instruct me whether to respond." As stated, should the court order the witness to answer the question, then some degree of immunity applies to the testimony. This approach provides another opportunity for counsel to object, or assent, to the psychologist's testimony and more importantly clearly identify the psychologist as neutral and having no stake in whether or what information goes to the court but merely raising the question that the court may then direct.

Content of Psychologist's Testimony

When ordered to do so by the court, or upon having received a proper consent, the psychologist may, in response to specific questions: 1) discuss the treatment of the children, including signs, symptoms, and measures of change; 2) provide a diagnosis, if one was rendered, and; 3) discuss prognosis. On the other hand, since the psychologist is not a forensic examiner, he or she should not offer testimony on the ultimate issue before the court, e.g. child-custody arrangements, the quality of the parenting skills of either party, or other matters which are beyond the scope of the treatment provided. If asked about these issues, the psychologist may respond truthfully, "I have no opinion on that issue." The advantage of this posture is both to provide some protections to the psychologist by responding to questions only upon the court's order, and to provide protections to the therapeutic relationship by resisting boundary incursions into matters which are more properly the subject of forensic evaluation.

Summary

In summary, the psychologist must respond to a subpoena, should contact the client to obtain consent; contact the agency, attorney, or court issuing the request and assert that the information is confidential in order to step out of the middle; but, if all else fails, obtain counsel to assert the privilege on behalf of the patient, and finally, await a court's instructions.

³³ See *Greer v. Anglemeyer*, No. 3:93-CV-649RP, 1996 LEXIS 1429 (N.D. Ind. 1996).