
MYTHS & MISCONCEPTIONS:

Subpoenas Should Not be Ignored

Q: A patient told me that a process server is going to track me down and try to serve me with a subpoena related to the patient's divorce proceeding. Since people have to appear on camera and be "buzzed in" to my office, I plan not to let the process server in. I can avoid the process server by leaving from the back entrance of the office. If I do get served with the subpoena, I'll just ignore it. Is this a good plan? What is the purpose of a subpoena anyway?

A: A subpoena is a legal document used to obtain the testimony, either written or oral, of a witness in a legal proceeding. There are two general types of subpoenas:

- Subpoenas for **written information**, such as a copy of a treatment record, are often labeled subpoena *duces tecum*.
- Subpoenas for **oral information** can be for testimony either in a deposition or in court, and are sometimes labeled subpoena *ad testificandum*.

Some subpoenas are hybrids - they require an appearance to give testimony, but offer the option of not appearing if a copy of the treatment record is provided prior to the appearance date.

Subpoenas are usually issued by attorneys. They have the authority of the court behind them, but are not themselves court orders. Subpoenas are a routine part of legal proceedings. So routine, in fact, that most subpoenas nowadays are delivered by mail. Evading service of a subpoena rarely benefits anyone. It is generally best to accept service of the subpoena so it can be evaluated and a proper response formulated.

Subpoenas will indicate a specific date by which an action is to be done, such as appearing for testimony or providing copies of medical records. This date cannot be ignored. Ignoring subpoenas can expose the psychiatrist to charges of contempt of court. The psychiatrist may become responsible for the legal costs the subpoenaing party incurs to enforce the subpoena. Additionally, a simple record request may escalate into a subpoena for a court appearance or deposition. However, not ignoring the subpoena does not necessarily mean complying with the subpoena; rather, it often means responding to the subpoena without releasing the requested information. **Even subpoenas that are not sufficient to compel the release of the medical record may be sufficient to compel a response, and failure to respond could result in contempt of court charges being sought.**

RISK MANAGEMENT ADVICE: SUBPOENAS FOR WRITTEN INFORMATION

Generally, the first step upon receipt of a subpoena *duces tecum* is to contact the patient and notify him or her of the receipt of the subpoena. Subpoenas often are issued without the patient's knowledge that psychiatric information is being sought. If the subpoena is accompanied by a written release authorization, confirm that the patient indeed wants the information released. If so, and the psychiatrist is satisfied that the release authorization is adequate, it should be low risk to provide the written information sought.

If no release authorization accompanied the subpoena, ask the patient for one. The patient may want to talk to his or her attorney. In that case, remind the patient of the response deadline and that you will need some "lead" time to prepare your response. You should not delay in contacting risk management for too long because of the inaction of the patient or the patient's attorney.

If the patient will not provide a written release authorization, revokes the authorization, cannot be reached or tells you that his or her attorney is going file a motion to quash (stop) the subpoena, the psychiatrist should contact their risk managers right away. Do not

wait any longer. Be prepared to fax a copy of the subpoena. Do not contact the attorney who issued the subpoena, even if it is the patient's attorney or the patient authorizes the contact.

Generally, a subpoena alone, without a written release authorization, is not sufficient to compel the release of psychiatric information. Nevertheless, subpoenas require a timely response even if no information is released. There is a time deadline for responding. **Failure to respond timely to a subpoena may expose the psychiatrist to legal sanctions by the court.**

A few states have statutory procedures in place to compel the release of subpoenaed information even without a written release authorization. It is not always clear that the legal requirements have been met. Risk management can assist in reviewing the subpoena and with providing an appropriate response in these situations.

RISK MANAGEMENT ADVICE: SUBPOENAS FOR TESTIMONY

The risk management advice for subpoenas *ad testificandum* is straightforward – contact your professional liability insurance company right away upon receipt of the subpoena. Do not wait. Be prepared to fax a copy of the subpoena. Do not contact the attorney who issued the subpoena, even if it is the patient's attorney or the patient authorizes the contact.

Most importantly, do not give testimony before contacting your claims examiner, even if the testimony is requested and/or authorized by the patient. None of the attorneys in court or at a deposition is there to represent your interests. Rather, each attorney will attempt to use your testimony to the advantage of his or her client. Given the adversarial nature of litigation, one (or both) parties will be unhappy with the outcome of the deposition or trial. If your testimony does not go well for the patient, you may become the target of a lawsuit; if you provide self-incriminating testimony, that same testimony may be used in a lawsuit or a medical licensing board complaint against you.

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