

# TSBEP Newsletter

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## **Subpoenas for Mental Health Records**

A subpoena is a document by which a court clerk or a court reporter, pursuant to a commission from a court or an agency, can command an individual to appear and give testimony at a date and time certain and/or to produce records and documents. Subpoenas are not court orders. However, a person who does not obey a subpoena can be held in contempt of court which can involve a fine or even imprisonment.

Psychologists should always remember that if a Board rule conflicts with applicable federal or state law, the law overrides the rule. In the case of a subpoena, any Board rules that relate to the release of records or confidentiality of records should be disregarded to the extent that they conflict with applicable law.

Applicable Texas law on subpoenas for mental health records is contained in Chapter 611 of the Health & Safety Code [H&S Code] and Attorney General Opinion 96-102. In general, as interpreted by the Attorney General opinion, **3** 611.006 of the H&S Code **requires** that a psychologist comply with a subpoena for any information that is **not** subject to the "therapist-client privilege." The therapist client privilege is defined in Texas Civil Rule of Evidence [TCRE] 510.

TCRE 510(b)(2), states that: "Records of the identity, diagnosis, evaluation or treatment of a patient which are created or maintained by a professional are confidential and shall not be disclosed."

This privilege belongs to the patient or client, not the psychologist.\* The privilege applies equally to current and former clients. A psychologist may raise the privilege only on behalf of a patient. If the patient waives the privilege, the psychologist cannot raise the privilege as a defense to turning over the records. However, if the patient has not waived the privilege, the authority of the psychologist to claim the privilege on behalf of the patient "is presumed in the absence of evidence to the contrary." TCRE 51 0 (c) .

In the vast majority of cases, there is no real privilege to claim. The client's records are being subpoenaed because the client is a party to the suit. The therapist/patient privilege has a broad exemption that renders any information non-privileged if it is relevant to an issue of the physical, mental or emotional condition of a patient and either party relies upon that condition as a basis for the law suit or as a defense to the suit. There is no privilege in a child custody suit if the disclosure is relevant to a child custody issue. Therefore, even if a client does not personally want the records released, the client's attorney will often advise the client not to fight their release because the attorney knows that the court, if asked, would rule that the records are not covered by the privilege.

Obviously, a psychologist who receives a subpoena for psychological records will not know if any of the records requested are privileged. Only the judge in charge of the lawsuit can make that determination. Since the privilege belongs to the client, the psychologist who fears that a subpoena may request information that may be privileged should notify the client that a request has been made for the client's records. This gives the client, through the attorney representing the client in the suit, the option of raising the privilege in court. If the court finds the documents are privileged it will enter an order to quash the subpoena. However, in the absence of an order issued by a court quashing the subpoena, a psychologist **must** release records requested pursuant to a valid subpoena.

In some cases, a psychologist will receive a subpoena for records of a former client who is not a party to the suit for which the subpoena was issued, or the psychologist will not be able to contact the client or the client's attorney. In these cases, the psychologist should usually consult his or her own lawyer before taking any action.

### **Some Questions to Ask When a Subpoena Arrives**

Who requested the subpoena? If the lawyer demanding the records represents the patient, the patient has almost certainly waived the privilege. TCRE 510(d) states that the privilege does not exist: (1) in a suit brought by the patient against the therapist; (2) in any license revocation proceedings in which the patient is a complaining witness and in which disclosure is relevant to the claim or defense of a professional; or, (3) if the purpose of the proceeding is to collect on a claim for emotional or mental health services rendered to the patient.

Is it a civil or criminal case? The privilege available to defendants in a criminal proceeding is limited to communications involving voluntary treatment of alcohol or drug abuse. An individual whose records are subpoenaed in a criminal proceeding and who is not the defendant probably can raise some greater degree of privilege.

Is it a **valid subpoena**? Texas H&S Code 3 611.006 applies only to subpoenas issued by a court or an agency. A subpoena for a lawsuit may be issued by a clerk or other official of the court or a justice of the peace. A state or federal agency subpoena may be issued by the agency itself or the agency may commission a court reporter to issue it. If a court reporter issues the subpoena, a

copy of the official commission authorizing the subpoena from the agency should accompany the subpoena.

How did the subpoena arrive? Civil Rule 178 requires subpoenas to be delivered by a person who is not a party of the suit and signed for by the person being subpoenaed or another witness to the service. If you get a subpoena in the mail, it is not valid. (But, remember, a mailed subpoena accompanied by a release signed by the client should be treated as a request for records on behalf of the client. Under 3 611.0045, H&S Code, a psychologist must respond for a request for records from a client.)

What information is being subpoenaed? Test data and test protocols refer to testing materials, test booklets, completed answer sheets and protocols used in the testing process. Test data is used by the psychologist to generate a test result or report. Test data and protocols, see Board rule 465.22(d)(S), are **not** considered part of a patient's records for purposes of Chapter 611 Texas H&S Code. (See Attorney General Letter Opinion 97-073, TSBEP Newsletter, Fall 1997 at page 3-4) Therefore, a psychologist does not release test data or protocols pursuant to a subpoena. If a subpoena requests test data, the psychologist should explain to the requester, or the judge, if necessary, that the psychologist will release the test data and protocols only if the judge specifically orders the psychologist to release the data or protocols. Test results and reports created by the psychologist as the result of testing **are** part of the patients' records and are subject to subpoena.

### **When in Doubt Seek Competent Legal Advice**

Always consult an attorney for legal advice if you have doubts about your responsibilities following the service of a subpoena. Please remember that the General Counsel for the Texas State Board of Examiners is the attorney for the Agency. She can provide only general information about how the Board interprets its rules and laws affecting the practice of psychology. She cannot provide legal advice to licensees. However, many professional associations, including the Texas Psychological Association, offer referral services to lawyers with experience in psychological issues. In addition, the Texas State Bar and some local bar associations provide referrals.

\*For purposes of this article, the terms "patient" and "client" are used interchangeably.

### **Board Policy Statement: Use of Supervised Students in Private Practice of Psychology**

Individuals pursuing a course of study in a recognized training institution or facility may engage in activities and services involving psychology under qualified supervision if the activities and services constitute part of their supervised course of study. Texas Psychologists' Licensing Act, Section 22(b).

Board rule 465.3(a)(2) states that psychologists may employ or utilize an individual to provide psychological services in any setting not specifically exempt under Section 22(a) of the Act, only

if "the individual is specifically exempted from the license requirements by Section 22(b) of the Act, relating to provision of services as part of a supervised course of study by students, residents or interns pursuing a course of study in a recognized training institution or facility."

The Board issues this policy statement to indicate that it interprets "pursuing a course of study" for purposes of Section 22(b) of the Act to require that the services or activities being performed under supervision be documented in a course description or syllabus of course work in which the student, resident, or intern must be enrolled during the entire period in which the services or activities are being performed by the student. The description or syllabus must include the requirement that the student, resident, or intern be supervised as required by Board rule 465.3 at all times while the activities or services are being performed.

Any services or activities being provided by an unlicensed student, resident or intern that are not provided as part of a documented course description or syllabus in which the student, resident, or intern is enrolled shall constitute the unlicensed practice of psychology as well as a violation of Board rules. Any licensee so utilizing a student, intern, or resident is aiding or abetting the unlicensed practice of psychology in violation of the Board's Act and rules. This policy applies regardless of whether the student, intern or licensee is compensated for the services or activities provided.

This policy was adopted by the Board on December 12, 1997.