



Building Professional Excellence- Part 3 Session 1: Responding to Subpoenas and Requests for Court Appearances

Webinar Follow-up Question and Answer Session with Dr. Theodore P. Remley Jr.

1. **Question from Rosemary Thompson**

Can you squash a subpoena if you don't have enough information on the client?

Answer

It is possible to file a petition with a court to quash a subpoena. Usually an attorney has to do that because non-attorneys do not know how to file legal petitions. A counselor not having enough information about a client would not be sufficient grounds for asking a judge to quash a subpoena. Legitimate grounds might be that the information requested is privileged by state or federal statute, that the subpoena was sent solely to harass the counselor, or the attorney who issued the subpoena did not have the authority to do so.

2. **Question from Daniel Burrell**

Is there a sample document that would outline to a client before counseling begins what we are willing to do legally?

Answer

Many counselor-client agreement forms I have seen include a statement that the counselor will not appear in court on behalf of a client, and some even set a fee amount if the counselor is forced to appear in court via a subpoena. But as I said in the webinar, such fees are not enforceable. Clients do not have to pay them if they do not want to.

3. **Question from Paula Franklin**

If you tell client, "I am not your court advocate, that is not my role," how does that change when you are paid to attend court?

Answer

You can still send an invoice for services rendered if you have to appear in court, but as I said in #2 above, the clients do not have to pay such fees.

4. **Question from Shirley Lee**

I've been subpoenaed to be a character witness for a teacher at my school who has been accused of sexual improprieties with a student whom he coaches. I don't want to be a character witness for this person. What recourse do I have?

Answer

You, or the school board attorney, should contact the attorney for the teacher and explain you do not want to serve as a character witness for the teacher. That should lead to the teacher's attorney withdrawing the subpoena.

5. **Question from C. Tanaka**



What if you have been asked to complete an evaluation and there is no therapeutic relationship and you're asked "your opinion"?

Answer

If you have evaluated an individual for some reason and have not provided counseling services to that person, you could be subpoenaed to explain the evaluation document you wrote. In most circumstances, you could send an invoice to the attorney who subpoenaed you, but as I said in #2, you could not force payment.

6. Question from Marie Holland

How does one become an expert witness? Is there are certification or training for this title? Thank you!

Answer

I do not know of any type of expert witness certification. However, if you want to be a child custody evaluator, you should go through a training program for doing that. If you want to do rehabilitation evaluations, you should be a Certified Rehabilitation Counselor. In order to serve as an expert witness, the attorney hiring you has to make a motion for the judge presiding in the case to approve you as an expert. When that motion is filed, the other side's attorney will have an opportunity to object and to cross examine you arguing that you are not qualified to be an expert. The judge in the case will then rule either that you are qualified as an expert or you are not.

7. Question from April Milam

Can you talk a bit about the difference between a subpoena from an attorney and a court order as well as options for responding to each? What are our obligations to respond to attorney subpoenas for records?

Answer

A subpoena is issued by an attorney, who is authorize to do so when a law suit has been filed. A subpoena may or may not be valid, so counselors must consult with an attorney to determine whether to respond. On the other hand, a court order is a direct order issued by a judge and always must be followed. When counselors receive a subpoena for records, an attorney should be consulted to determine whether the subpoena is valid. If it is valid, copies of the records must be provided to the attorney who issued the subpoena. If the subpoena is not valid, the attorney who advised you it is not valid should contact the attorney who issued the subpoena and inform that attorney that the records will not be provided.

8. Question from Jacquelyne Joens

Do you recommend getting an individual malpractice policy in addition to the clinic's policy?

Answer

Definitely. An agency's policy protects the agency; not the individual counselor.

9. Question from Erin Collins

The line between counselor and advocate does not seem so cut and dry to me when I am working with a victim of domestic violence. Clients may need help filing protective orders and come to me for that because I know how to help and because they trust me already. Can you comment a little on this?



Answer

If you are working as a counselor in an advocacy agency, perhaps you would help clients seek protective orders. However, if you are in private practice, I think the counselor's role would be to inform clients how to request protective orders; but not be involved in the process.

10. Question from Sister Theresa Elitz

Is it advisable to fill out disability reports? Is it advisable to write reports to lawyers?

Answer

I'm not sure what the term *disability reports* means. If your role is evaluator and you are being paid by the client or someone else to do an evaluation, then you would deliver the evaluation to the individual who paid you to produce it.

11. Question from Roxanne Davidson

How can I obtain a list of child custody evaluator supervisors in Louisiana?

Answer

I'm not sure there is a list of child custody evaluators available in any state. If you are seeking a child custody evaluator to supervise your work and help you learn how to be a child custody evaluator yourself, then I suggest you contact the local clerk of the court and ask for the names of local child custody evaluators. If that is not productive, then I suggest you ask local well-known divorce lawyers for the names of local child custody evaluators they know.

12. Question from Sheri Severson

What things can a counselor do to prepare themselves for court if they are subpoenaed?

Answer

If you are in private practice, hire an attorney to advise you. If you work for someone else or an agency, ask your direct supervisor to provide you with legal advice to prepare you for appearing in relation to the subpoena.

13. Question from Ryan Hepler

It is my understanding that as a counselor we do not have to respond to a subpoena. We would only have to respond to a court order to attend court. What is your insight into this? Additionally, what about release of information or lack of release of information and participating in court proceedings?

Answer

If a subpoena is valid, you do have to respond or appear. In my opinion, you need to seek legal advice to determine whether the subpoena is valid and whether you need to respond or appear.

14. Question from Kathryn Henderson

I often have students interested in learning about what resources are available for specialized training in being an expert witness. Are there any associations or other groups that provide reputable training?



Answer

The primary areas for expert testimony for counselors is child custody evaluator or rehabilitation expert. There are associations for both specialties that could be contacted if training in those areas is something you would like to have.

15. Question from Anonymous

What is a counselor's obligation to provide records of sessions for a suit about a car accident when the client is not consulting about said accident? (In the case that the records are subpoenaed).

Answer

An attorney would have to review the circumstances and state and federal laws and advise you.

16. Question from Ashley Cho

I am somewhat confused on what an expert witness is. Do counselors get to decide whether or not they will serve as an expert witness, or this is a role that we have to fulfill, even if it is something that we are not comfortable fulfilling?

Answer

If you have not agreed to be an expert witness (and are not being paid to be one), then you would be a fact witness. If you are a fact witness and are asked your opinion, say you don't have enough information to form a professional judgement about the matter.

17. Question from Megan O'Neill

What if you answer with "I do not have enough information..." several times? Is there a limit to how many times you can use that answer?

Answer

Once you have made that statement, the judge will tell you what to do from there. Always do what a judge says. If he/she tells you that you have to render an opinion, do so...with as much restraint as you can muster. You can never get into trouble when you have followed a judge's order.

18. Question from Marjorie Hendrickson

Very excellent presentation. Does a counselor have to have a court order to give any information in a deposition or even to your own organization's lawyer?

Answer

You can always trust and rely on your organization's lawyer. The only time you should be cautious is if your organization's lawyer seems to be trying to take a position that you did something without the organization's approval.

19. Question from Larry Fritz

How does one choose an attorney to consult with for licensing board complaint, lawsuit, etc.?



Answer

Your best bet is to find an attorney who specializes in representing professionals who have been accused of wrong-doing. Those attorneys are often found in the state capital city. If an attorney representing physicians, lawyers, accountants, or other professionals who have been accused of wrong-doing, they can represent counselors as well.

20. Question from Maxine Notice

Any pointers in regard to managing documentation security in case of death. Can your records be used post mortem in court?

Answer

State laws determine how records of deceased clients must be handled. You must consult with a lawyer in your state.

21. Question from Madelyn Esposito

Can personal notes also be subpoenaed? How can we ensure protection of personal notes?

Answer

Yes, personal notes can be subpoenaed. All notes are vulnerable to subpoenas. You cannot protect personal notes if they are validly subpoenaed.

22. Question from Christine Hall

If you work in private practice, does having insurance ensure an attorney is going to accept your case? I.E. How do I go about getting an appropriate attorney if my company or licensure or insurance does not supply one?

Answer

If you have professional liability insurance, your insurance company will select a lawyer for you. In most cases, they will hire the best qualified lawyer to represent you. However, if you are not satisfied with their choice, you can request a different lawyer.

23. Question from Tayler Shannon

Is there a good resource that you know of that guides counselors in what minimum info should be documented when it comes to suicidal ideation-type situations?

Answer

I don't know of such a publication. However, you should write down everything you and the client (and anyone else involved) did or said leading up to your determination that a client might be at risk for suicide and any actions you took after making that determination.

24. Question from Crystal Jacquot

Would you please address privileged communication as it relates to counselors?



Answer

In most states, clients have privileged communication with licensed counselors. However, in some states, there is no privilege.

25. Question from Patricia Kryger

Given that our notes can be subpoenaed, how detailed should our progress notes be?

Answer

Your progress notes should do what the term implies, note progress toward meeting counseling goals that have been established and written down. These notes must be provided to insurance companies for reimbursement. I recommend not writing any other notes that are not necessary in order to render quality professional services to a client.

26. Question from Aynur Fox

How do you know if you have a privilege with your client?

Answer

See #24 above.

27. Question from Lori Malec

How often are court orders utilized when clinicians do not respond to a subpoena?

Answer

I think any lawyer who issued a valid subpoena would seek a court order in the event a counselor refused to appear or provide requested records. However, I don't know how often court orders are sought when counselors do not provide records or fail to appear in response to a court order.

28. Question from Shubha Chatterjee

In order to follow ethics do you think that there should ever be a compromise?

Answer

I'm not sure how to respond to this question. I am in favor of mediation and compromise, but when people have filed lawsuits, usually compromise efforts have failed.

29. Question from Dr. Reginald Holt

In other conferences, I was informed that a subpoena is not the same as a court order signed by a judge; therefore, the expectations of responding to a subpoena are not the same (especially if the request is for copies of the clinical record).

Answer

See #7 above.



30. Question from Thomas Nowak

Should we ask for a release of information to be signed by the client prior to any sort of testimony?

Answer

Yes. However, in some situations, even if the client does not give you a release, you must provide information.

31. Question from Denise Matherne

Can you talk about how to become privileged?

Answer

See #24 above.

32. Question from Perry Francis

Ted, thanks for the information. Can you say more about not providing legal or forensic evaluations for current clients?

Answer

Ethical standards require that counselors not evaluate individuals who are current or former clients. When you are a client's counselor, you are biased in favor of that person. An evaluator must be unbiased.

33. Question from Willie Greene

What about if you work on a 24/7 mobile crisis team which is very prevalent here in the State of GA? They have to rely on cellphones for gathering information and calling clients while they are enrooted to the clients' home.

Answer

There is no problem with cellphone use in such situations.

34. Question from Daniel Burrell

What about the NY requirement to report clients who own firearms if they appear unstable?

Answer

Counselors must always ethically and legally take action to prevent harm if they determine a client may be dangerous to self or others. This statute defines for you in NY that a person who owns a firearm and appears unstable could be a danger to self or others. I see nothing wrong with such a statute. Counselors must comply.

35. Question from Jessenith Colon

What are some justified reasons to tell a client for not going to court?

Answer



Reasons could include that a counselor's job is to counsel, not be an advocate, that counselors cannot be away from work for extended periods or time, but most importantly that the testimony of a client's counselor is not very helpful to clients because counselors are seen to be biased in favor of their clients.

36. Question from Shannon Slater

What if I as a counselor get a subpoena not from my plaintiff client but from the defendants' attorney?

Answer

Quite often a subpoena comes from the other attorney...not your client's. Sometimes such subpoenas are valid and must be complied with; other times they are not and should not be complied with. You always should legal advice in such situations.

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