'You've been served': What to do if you receive a subpoena

Douglas Mossman, MD

Dear Dr. Mossman,
Psychiatrists should not reveal what their patients say except to avert a threat to health or safety or to report abuse. So, how can psychiatrists be subpoenaed to provide information for a trial? If I receive a subpoena, how can I comply without violating patient privacy? If I have to go to court, can I "plead the Fifth"?

Submitted by "Dr. S"

Physicians who are served with a subpoena feel upset for the reason Dr. S described: Complying with a subpoena seems to violate the obligation to protect patients' privacy. But physicians can't "plead the Fifth" under these circumstances, because the Fifth Amendment to the U.S. Constitution only bars forcing someone to give self-incriminating testimony.[1]

If you receive a subpoena for information gleaned during patient care, you should not ignore it. Failing to respond might place you in contempt of court and subject you to a fine or even jail time. Yet simply complying could have legal and professional implications, too.

Often, a psychiatrist who receives a subpoena should seek an attorney's advice on how to best respond. But understanding what subpoenas are and how they work might let you feel less anxious as you go through the process of responding. With this goal in mind, this article covers:

- what a subpoena is and isn't
- 2 types of privacy obligations
- legal options
- avoiding potential embarrassment (***Box, page 34***).[2]

What is a subpoena?

All citizens have a legal obligation to furnish courts with the information needed to decide legal issues.[3] Statutes and legal rules dictate how such material comes to court.

Issuing a subpoena (from the Latin *sub poena*, "under penalty") is one way of obtaining information needed for a legal proceeding. A subpoena *ad testificandum* directs the recipient to appear at a legal proceeding and provide testimony. A subpoena *duces tecum* ("you shall bring with you") directs the recipient to produce specific records or to appear at a legal proceeding with the records.

Usually, subpoenas are issued by attorneys or court clerks, not by judges. As such, they are not court orders. If you receive a subpoena, you should make a timely response of some sort. But, ultimately, you might not have to release the information. Although physicians have to follow the same rules as other citizens, courts recognize that doctors also have professional obligations to their patients.

Confidentiality: Your reason to hesitate

Receiving a subpoena doesn't change your obligation to protect your patient's con-

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▶ Include your name, address, and practice location. If your question is chosen for publication, your name can be withheld by request.

Box

A caution about trying to avoid embarrassment

Sometimes, such as when treating someone who is a party to a lawsuit, you should expect that lawyers or the court eventually will seek your records or ask for testimony about your patient. Indeed, information from any clinical encounter might get subpoenaed later, if events make it relevant during the legal process. Depending on what your records say, they could embarrass you, your patient, or both of you.

Some potentially embarrassing things—suicidal thoughts, drug use, or childhood abuse—are clinically important to include in records. Omitting discussion of these matters to prevent possible disclosure might violate professional standards for record-keeping—and you still might have to testify about the things you knew about but did not record. Keeping double records (eg, separate "psychotherapy notes") won't help here, because if your failure to disclose all records demanded by a subpoena or court order is discovered, you could face legal sanctions for contempt of court or obstruction of justice. If you use symbols or code words to refer to embarrassing topics, you could later be asked to explain your cryptic language; meanwhile, your notes might be difficult for another treating clinician to understand.

For these reasons, it's best not to finesse or conceal potentially sensitive but crucial clinical material. No approach to documentation can satisfy professional standards while avoiding all potential for embarrassment. Treatment records should evidence a respectful attitude toward patients yet meet your needs as a responsible clinician.[2]

Clinical Point

Don't ignore a subpoena. Failing to respond might place you in contempt of court, subject to a fine or jail time

fidentiality. From the law's standpoint, patient confidentiality is a function of the rules that govern use of information in legal proceedings.

The Privacy Rule[4] that arose from the Health Insurance Portability and Accountability Act (HIPAA) of 1996[5] provides guidance on acceptable responses to subpoenas by "covered entities," which includes most physicians' practices. HIPAA permits disclosure of the minimum amount of personal information needed to fulfill the demands of a subpoena. The ***Table***[6,7] explains HIPAA's rules about specific responses to subpoenas, depending on their source.

Many states have patient privacy laws that are stricter than HIPAA rules. If you practice in one of those states, *you have to follow the more stringent rule*.[8] For example, Ohio law does not let subpoenaed providers tender medical records for use in a grand jury proceeding without a release signed by the patient, although HIPAA would allow this (***Table***).[6,7] Out of concern that "giving law enforcement unbridled access to medical records could discourage patients from seeking medical treatment," Ohio protects patient records more than HIPAA does.[9] New York State's privilege rules also are stricter than HIPAA[10] and contain specific provisions about releasing certain types of information (eg, HIV status[11]). State courts expect physicians to follow their laws about patient privacy and to consult attorneys to make sure that releasing information is done properly.[12]

Releasing information improperly could become grounds for legal action against you, even if you released the information in response to a subpoena. Legal action could take the form of a lawsuit for breach of confidentiality, a HIPAA-based complaint, a complaint to the state medical board, or all 3 of these.

Must you turn over information?

Before you testify or turn over documents, you need to verify that the legal and ethical requirements for the disclosure are met—as you would for any release of patient information. You can do this by obtaining your patient's formal, written consent for the disclosure. Before you accept the patient's agreement, however, you might—and in most cases should—

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Table

How HIPAA privacy rules affect your response to a subpoena

If the subpoena …	then you should …
Names you as a defendant	Contact your lawyer about how to respond
Comes from a grand jury proceeding	Comply
Is signed by a judge (ie, is a court order)	Comply
Is signed by a clerk or attorney (ie, is not a court order)	Notify your patient that you will comply unless the patient objects to the disclosure before the deadline, or … Obtain your patient's written authorization to release the requested information, or … Find out whether the parties involved in the legal case have agreed to a protective order
Comes from an administrative or investigative body	Comply if the requested information is relevant to the body's law enforcement activity and is limited and appropriate to that activity
Seeks information pursuant to workers' compensation	Confirm the appropriateness of the request under your state's workers compensation law before complying
Comes from a public health entity or a government oversight agency (eg, a medical licensing board)	Confirm that the disclosure satisfies the privacy rule's requirements

Note: The rules in this ***Table*** assume that the subpoena is issued by a state agency or court that has jurisdiction over the provider, which usually would be the case if the provider practiced in the state where the issuer was located. If you aren't sure whether the source of the subpoena has jurisdiction over you, contact your lawyer to find out

HIPAA: Health Insurance Portability and Accountability Act of 1996

Source: References 6 and 7

Clinical Point

Obtaining the patient's written authorization should allow you to release information without violating confidentiality

consider discussing how the disclosure could affect the patient's well-being or your treatment relationship.

If the patient will not agree to the disclosure, the patient or the patient's attorney can seek to have the subpoena modified or *quashed* (declared void). One tactic for doing this is by asserting *doctor–patient privilege*, a legal doctrine codified in most state's laws. The privilege recognizes that, because privacy is important in medical care, stopping clinical information from automatically coming in court serves an important social purpose.[13]

The doctor–patient privilege belongs to the litigant—here, your patient—not to you, so your patient has to raise the objection to releasing information.[14] Also, the privilege is not absolute. If having the clinical information is necessary, the judge may issue a court order denying the patient's motion to quash. Unless the judge later modifies or vacates the order, you risk being found in contempt of court if you still refuse to turn over documents demanded by the subpoena.

Fact witness or expert witness?

If the subpoena demands your testimony, the issuing party might want you to serve as a fact witness or expert witness. Persons with relevant personal knowledge to a legal proceeding can serve as fact witnesses, and testify about things they did or perceived.[15] For example, a psychiatrist serving as a fact witness could recount having heard or seen a patient talking aloud as if arguing with someone when no real interlocutor was present.

A witness whom the court deems an "expert" by virtue of special knowledge, skill, experience, training, or education may offer opinions based on specific sets of

facts. Courts hear such testimony when the expert's specialized knowledge will help the jury understand the evidence or reach a verdict in a case.[16] To return to the example above: a psychiatric expert witness might tell jurors that the patient's "arguing" was evidence that she was hallucinating and suffered from schizophrenia.

If you receive a subpoena to testify about someone you have treated, you should notify the issuing party that you will provide fact testimony if required to do so. You cannot be compelled to serve as an expert witness, however. In many situations, attempting to provide objective expert testimony about one's own patient could create unresolvable conflicts between the obligation to tell the truth and your obligation to serve your patient's interests.[17]

If the subpoena requests deposition testimony about a patient, you probably will be able to schedule the deposition at a time that is convenient for you and the attorneys involved. Yet you should not agree to be deposed unless (a) you have received the patient's authorization, (b) a court has ordered you to testify despite the patient's objection, or (c) your attorney (whom you have consulted about the situation) has advised you that providing testimony is appropriate.

If you are called as a fact witness for a trial, the attorney or court that has subpoenaed you often will try to schedule things to minimize the time taken away from your other duties. Once in court, you can ask the judge (on the record) whether you must answer if you are asked questions about a patient who has not previously authorized you to release treatment information. A judge's explicit command to respond absolves you of any further ethical obligation to withhold confidential information about the patient's care.

Clinical Point

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Bottom Line

If you receive a subpoena for records or testimony, obtaining the patient's written authorization should allow you to release the information without violating confidentiality obligations. If your patient won't agree to the release, if turning over information might adversely affect the patient, or if you're not sure what to do, seek advice from an attorney who knows about medical privacy rules. That way, you can be sure you are meeting all legal and professional standards that apply.