

Strategies for Private Practitioners Coping With Subpoenas or Compelled Testimony for Client/Patient Records or Test Data or Test Materials

Committee on Legal Issues
American Psychological Association

Psychologists have numerous ethical, professional, and legal obligations regarding the release of Client/Patient records, test data, and other information in the legal context. The demands of the legal system sometimes conflict with psychologists' ethical obligations to maintain confidentiality of Client/Patient records, to protect the integrity and security of test materials, and to avoid misuse of assessment techniques and data. This article identifies legal issues that may arise when private practitioners are faced with subpoenas or compelled court testimony for Client/Patient records or test data and suggests strategies that might be considered in the event such a subpoena or demand is received.

Keywords: subpoenas, legal and ethical issues, responding to court order, release of Client/Patient records, test disclosure

In response to a large number of inquiries by psychologists faced with subpoenas or compelled court testimony concerning Client/Patient records or test data, manuals, protocols, and other test information, the American Psychological Association's (APA) Committee on Legal Issues prepared this article. It identifies legal issues that may arise from such subpoenas and similar legal demands, and it suggests strategies that might be considered in the event such a subpoena or demand is received. This document is not intended to establish any standards of care or conduct for practitioners; rather, it addresses this general question: What strategies

may be available to psychologists in private practice for responding to subpoenas or compelled court testimony concerning Client/Patient records, test data, test manuals, test protocols, or other test information?

All citizens are required, as a general principle of law, to provide information necessary for deciding issues before a court. From the perspective of the legal system, the more relevant the available information is to the trier of fact (i.e., judge or jury), the fairer the decision. Statutes, rules of civil and criminal procedure, and rules of evidence have established the procedures for the transmittal of such information. In order to obtain this material, the court may issue *subpoenas* (legal commands to appear to provide testimony) or *subpoenas duces tecum* (legal commands to appear and bring along specific documents). Alternatively, the court may issue a *court order* to provide testimony or produce documents. A subpoena issued by an attorney under court rules, requesting testimony or documents, even if not signed by a judge, requires a timely response, but it may be modified or quashed (i.e., made void or invalid).

It is important to differentiate responding to a subpoena from disclosing confidential information. Unless the issuing attorney or court excuses the psychologist, it will be necessary to respond to a subpoena, that is, to be at a particular place at a particular time (with records if the subpoena is a subpoena duces tecum). Responding to the subpoena, however, does not necessarily entail disclosing confidential information. In order to disclose confidential information, a psychologist will need to ensure that the conditions for disclosing confidential information, such as the Client/Patient's consent or a judge's order or other legal mandate, are met, in addition to having a valid subpoena. Thus, while a subpoena requires a response, a subpoena alone will generally not be sufficient to warrant a disclosure of confidential information. However, once a court order for testimony or documents is issued and any attempt (made in a timely manner) to have the court vacate or modify its order has been unsuccessful, a psychologist may be held in contempt of court if he or she fails to comply.

Editor's Note. This document does not provide legal advice, nor is it intended to be or to substitute for the advice of an attorney. Relevant law varies substantially from state to state and context to context. Psychologists receiving a subpoena or other legal process that requires or is likely to require revelation of Client/Patient records or test data, manuals, protocols, or other test information are encouraged to consult legal counsel, who can review the pertinent law and facts and provide appropriate legal assistance.

THIS DOCUMENT WAS INITIALLY PUBLISHED IN 1996 and revised in 2006 to provide updated references to the most recent version of the Ethics Code as well as to laws that have come into effect since the first document was published. The current revision was deemed necessary to develop a new section addressing communications with judges and attorneys. The Committee on Legal Issues (COLI) and the Office of General Counsel wish to thank the members of COLI who participated in this revision as well as central office staff for their time and effort in drafting and producing this version of the document. In addition, COLI and the Office of General Counsel wish to extend special appreciation to the representatives from APA's Committee on Professional Practice Standards, the Board of Professional Affairs, the Committee for the Advancement of Professional Practice, the Committee on Psychological Tests and Assessments, and the Ethics Committee for their valuable input and review.

CORRESPONDENCE CONCERNING THIS ARTICLE should be addressed to the Committee on Legal Issues Staff Liaison, Office of General Counsel, Sixth Floor, American Psychological Association, 750 First Street, NE, Washington, DC 20002-4242.

The demands of the legal system sometimes conflict with the responsibility of psychologists to maintain the confidentiality of Client/Patient records. This responsibility arises from tenets of good clinical practice, ethical standards, professional licensing laws, and other applicable statutes and legal precedent. In many contexts, the Client/Patient material generated in the course of a professional relationship may also fall under an evidentiary privilege, which protects such information from judicial scrutiny. Most state and federal jurisdictions recognize a patient privilege that allows the Client/Patient to prevent confidential material conveyed to a psychologist from being communicated to others in legal settings although there are variations from state to state and between state and federal definitions. In most jurisdictions, the privilege belongs to the Client/Patient, not to the therapist. The psychologist has a responsibility to maintain confidentiality and to assert the psychotherapist–patient privilege unless the Client/Patient has explicitly waived privilege or signed a valid release, unless a legally recognized exception to privilege exists, or unless the court orders the psychologist to turn over the Client/Patient’s information.

The clinical record, any separately kept psychotherapy notes, Client/Patient information forms, billing records, and other such information usually may be turned over to the court with appropriate authorization by the Client/Patient or with a court order. (Psychologists who need to comply with HIPAA would need a HIPAA-compliant authorization form to release such information, and a separate authorization for release of psychotherapy notes. The risk of disclosure through subpoena or court order should be disclosed to Client/Patients in the informed consent document and discussion.) Psychological test material and test data can present a more complicated situation. Although a Client/Patient’s test data may have to be released in response to a subpoena, the disclosure of test materials (i.e., manuals, instruments, protocols, and test questions) may require the additional safeguard of a court order because the inappropriate disclosure of test materials may seriously impair the security and threaten the validity of the test and its value as a measurement tool.

Psychologists have numerous ethical, professional, and legal obligations that touch on the release of Client/Patient records, test data, and other information in the legal context. Many such obligations may favor disclosure, including, in particular, the general obligation of all citizens to give truthful and complete testimony in courts of law when subpoenaed to do so. But there are often conflicting duties and principles that favor withholding such information. These may include obligations to (a) Client/Patients or other individuals who receive treatment and/or are assessed or administered psychological tests (e.g., privileged or confidential communications that may include Client/Patient responses to test items); (b) the public (e.g., to avoid public dissemination of test items, questions, protocols, or other test information that could adversely affect the integrity and continued validity of tests); (c) test publishers (e.g., contractual obligations between the psychologist and test publishers not to disclose test information; obligations under the copyright laws); and (d) other third parties (e.g., employers). It merits mention that a special type of third-party obligation may arise in forensic contexts: If, for example, a psychologist performed work for an attorney, it is important to investigate whether that work is protected from disclosure under the attorney work product privilege. The aforementioned obligations

may, at times, conflict with one another. Psychologists must identify and seek to reconcile their obligations. For more on these obligations, see APA’s “Ethical Principles of Psychologists and Code of Conduct” (APA, 2010), hereinafter referred to as the APA Ethics Code (see [Appendix A](#)).

There are specific settings (e.g., educational, institutional, employment) in which the legal or ethical obligations of psychologists as they relate to disclosure of Client/Patient records or test information present special problems. This article does not purport to address disclosure issues in these special contexts, nor does it attempt to resolve dilemmas faced by psychologists in reconciling legal and ethical obligations.

Strategies for Dealing With Subpoenas

Determine Whether the Request for Information Carries the Force of Law

It must first be determined whether a psychologist has, in fact, received a legally valid demand for disclosure of sensitive test data and Client/Patient records. If a demand is not legally enforceable for any reason, then the psychologist has no legal obligation to comply with it and may have no legal obligation even to respond. A subpoena to produce documents generally must allow sufficient time to respond to the demand and provide for some time within which the opposing side may move to quash such a demand. Without this allowed time period, the subpoena may not be valid. Even a demand that claims to be legally enforceable may not be. For example, the court issuing the subpoena may not have jurisdiction over the psychologist or his or her records (e.g., a subpoena issued in one state may not be legally binding on a psychologist residing and working in a different state). Or, the subpoena may not have been properly served on the psychologist (e.g., some states may require service in person or by certified mail or that a subpoena for such records be accompanied by a special court order). It is advisable that a psychologist consult with an attorney in making such a determination.¹

If the psychologist concludes that the demand is legally valid, then some formal response to the attorney or court will be re-

¹ It is important to recognize that the client’s attorney, or the attorney who issues the subpoena, is not the psychologist’s attorney and may represent interests different from those of the psychologist. Thus, the psychologist may not be able to rely upon the information provided by that attorney. Psychologists can find attorneys with experience representing psychologists via their states’ bar associations, their states’ psychological association, colleagues, and local attorneys.

Fees for consultation with or representation by an attorney may be substantial. If consultation with an attorney becomes necessary to protect the interests and privileges of the client, then the practitioner may wish to clarify with his or her client who will be responsible for such legal fees. In some cases, malpractice carriers will authorize legal consultation free of charge. During an initial consultation, psychologists should ask an attorney the following questions before hiring him or her: (a) How many psychologists or other medical professionals has the attorney represented? (b) Is the attorney familiar with the state’s psychology licensing statute and ethical code? (c) How many psychologists or other medical professionals has the attorney represented in licensing actions/ethical complaints? (d) Is the attorney familiar with the federal HIPAA law and the state’s confidentiality statutes? In addition, the psychologist should not hesitate to ask other relevant questions about fees, retainers, and the like.

quired—either compliance with or opposition to the demand, in whole or in part. A psychologist's obligations in responding to a valid subpoena are not necessarily the same as those under a court order (see section titled *File a Motion to Quash the Subpoena or File a Protective Order*). The next step, in most cases, may involve contacting the psychologist's Client/Patient. However, the psychologist may wish to consider grounds for opposing or limiting production of the demanded information before contacting the Client/Patient so that the Client/Patient can more fully understand his or her options (see section titled *Possible Grounds for Opposing or Limiting Production of Client/Patient Records or Test Data*).

Contact the Client/Patient

The Client/Patient to whom requested records pertain often has a legally protected interest in preserving the confidentiality of the records. If, therefore, a psychologist receives a subpoena or advance notice that he or she may be required to divulge Client/Patient records or test data, the psychologist may, when appropriate, discuss the implications of the demand with the Client/Patient (or his or her legal guardian). Also when appropriate and with the Client/Patient's valid consent, the psychologist may consult with the Client/Patient's attorney. The discussion with the Client/Patient will inform the Client/Patient which information has been demanded, the purpose of the demand, the entities or individuals to whom the information is to be provided, and the possible scope of further disclosure by those entities or individuals. Following such a discussion, a legally competent Client/Patient or the Client/Patient's legal guardian may choose to consent to production of the data. Generally, it is legally required to have such consent in writing, for clarity and if there is a need for documentation in the future. Written consent may avoid future conflicts or legal entanglements with the Client/Patient over the release of confidential tests or other records pertaining to the Client/Patient. The Client/Patient's consent may not, however, resolve the potential confidentiality claims of third parties (such as test publishers). For more information, see APA Ethics Code, Ethical Standards, Section 4 (APA, 2010), and *Standards for Educational and Psychological Testing* (American Educational Research Association, APA, & National Council on Measurement in Education, 2014).

It also merits emphasis to a Client/Patient that when agreeing to release information requested in a subpoena, he or she cannot specify or limit which information is released, rather, the entire record (e.g., psychotherapy notes, billing records administrative notes) will be available. The scope of the release may be the subject of negotiation among attorneys, however, and if the psychologist believes that a release would harm the Client/Patient, the psychologist should voice his or her concerns and object to the release on that basis.

Negotiate With the Requester

If a Client/Patient does not consent to release of the requested information, the psychologist (often through counsel) may seek to prevent disclosure through discussions with legal counsel for the requesting party. The psychologist's position in such discussions may be bolstered by legal arguments against disclosure, including the psychologist's duties under rules regarding psychotherapist–patient privilege. These rules often allow the psychologist to assert

privilege on behalf of the Client/Patient in the absence of a specific release or court order. (Some possible arguments are outlined in the section titled *Possible Grounds for Opposing or Limiting Production of Client/Patient Records or Test Data*.) Such negotiations may explore whether there are ways to achieve the requesting party's objectives without divulging confidential information, for example, through disclosure of nonconfidential materials or submission of an affidavit by the psychologist disclosing nonconfidential information. Negotiation may also be used as a strategy to avoid compelled testimony in court or by deposition. In short, negotiation can be explored as a possible means of avoiding the wholesale release of confidential test or Client/Patient information—release that may not be in the best interests of the Client/Patient, the public, or the profession and that may not even be relevant to the issues before the court. Such an option could be explored in consultation with the psychologist's attorney or the Client/Patient's attorney.

File a Motion to Quash the Subpoena or File a Protective Order

If negotiation is not successful, it may be necessary to file a motion for relief from the obligations imposed by the demand for production of the confidential records. In many jurisdictions, the possible motions include a motion to quash the subpoena, in whole or in part, or a motion for a protective order. Filing such a motion may require the assistance of counsel, representing either the psychologist or the psychologist's Client/Patient.

Courts are generally more receptive to a motion to quash or a motion for a protective order if it is filed by the Client/Patient about whom information is sought (who would be defending his or her own interests) rather than by a psychologist who, in essence, would be seeking to protect the rights of the Client/Patient or other third parties. The psychologist may wish to determine initially whether the Client/Patient's lawyer is inclined to seek to quash a subpoena or to seek a protective order and, if so, may wish to provide assistance to the Client/Patient's attorney in this regard. If the Client/Patient has refused to consent to disclosure of the information, his or her attorney may be willing to take the lead in opposing the subpoena.

A *motion to quash* is a formal application made to a court or judge for purposes of having a subpoena vacated or declared invalid. Grounds may exist for asserting that the subpoena or request for testimony should be quashed, in whole or in part. For example, the information sought may be protected by the therapist–Client/Patient privilege and therefore may not be subject to discovery, or it may not be relevant to the issues before the court (see section titled *Possible Grounds for Opposing or Limiting Production of Client/Patient Records or Test Data*). This strategy may be used alone or in combination with a motion for a protective order.

A *motion for a protective order* anticipates production of material responsive to the subpoena but seeks an order or decree from the court that protects against the untoward consequences of disclosing information. A protective order can be tailored to meet the legitimate interests of the Client/Patient and of third parties such as test publishers and the public. The focus of this strategy first and foremost is to prevent or limit those to whom produced information may be disclosed and the use of sensitive Client/Patient and

test information. The protective order—and the motion—may include any of the elements listed below.

Generally, the motion may state that the psychologist is ethically obligated not to produce the confidential records or test data or to testify about them unless compelled to do so by the court or with the consent of the Client/Patient. It may include a request that the court consider the psychologist's obligations to adhere to federal requirements (e.g., the [Health Insurance Portability and Accountability Act of 1996 \[HIPAA\]](#)) and to protect the interests of the Client/Patient, the interests of third parties (e.g., test publishers or others), and the public's interest in preserving the integrity and continued validity of the tests themselves. This may help sensitize the court to the potential adverse effects of dissemination. The motion might also attempt to provide suggestions, such as the following, to the court about ways to minimize the adverse consequences of disclosure if the court is inclined to require production at all:

1. Suggest that the court direct the psychologist to provide test data only to another appropriately qualified professional designated by the court or by the party seeking such information. The manual for the test should specify the credentials of the professional who is qualified to use it.
2. Suggest that the court limit the use of Client/Patient records or test data to prevent wide dissemination. For example, the court might order that the information be delivered to the court, be kept under seal, be used solely for the purposes of the litigation, and that all copies of the data be returned to the psychologist under seal after the litigation is terminated. The order might also provide that the requester must prevent or limit the disclosure of the information to third parties.
3. Suggest that the court limit the categories of information that must be produced. For example, Client/Patient records may contain confidential information about a third party, such as a spouse, who may have independent interests in maintaining confidentiality, and such data may be of minimal or no relevance to the issues before the court. The court should limit its production order to exclude such information.
4. Suggest that the court determine for itself, through in camera proceedings (i.e., a nonpublic hearing or a review by the judge in chambers), whether the use of the Client/Patient records or test data is relevant to the issues before the court or whether it might be insulated from disclosure, in whole or in part, by the therapist–Client/Patient privilege or another privilege (e.g., attorney–Client/Patient privilege).
5. Suggest that the court deny or limit the demand because it is unduly burdensome on the psychologist (see, e.g., Federal Rule of Civil Procedure 45(c)).
6. Suggest that the court shield from production “psychotherapy notes” if the psychologist keeps separate psycho-

therapy notes as defined by the Privacy Rule (see [Security and Privacy, 2015](#)). See rule excerpts in [Appendix B](#).

Psychologists' Testimony

If a psychologist is asked to disclose confidential information during questioning at a deposition, he or she may refuse to answer the question only if the information is privileged. If there is a reasonable basis for asserting a privilege, the psychologist may refuse to provide test data or Client/Patient records until so ordered by the court. A psychologist who refuses to answer questions without a reasonable basis may be penalized by the court, including the obligation to pay the requesting parties' costs and fees in obtaining court enforcement of the subpoena. For these reasons, it is advisable that a psychologist be represented by his or her own counsel at the deposition. A lawyer may advise the psychologist, on the record, when a question seeks confidential information; such on-the-record advice will help protect the psychologist from the adverse legal consequences of erroneous disclosures or erroneous refusals to disclose.

Similarly, if the request for confidential information arises for the first time during courtroom testimony, the psychologist may assert a privilege and refuse to answer unless directed to do so by the court. The law in this area is somewhat unsettled. Thus, it may be advisable for him or her to consult an attorney before testifying.

Possible Grounds for Opposing or Limiting Production of Client/Patient Records or Test Data

The following options may or may not be available under the facts of a particular case and/or a particular jurisdiction for resisting a demand to produce confidential information, records, or test data (see [Appendix C](#)):

1. The court does not have jurisdiction over the psychologist, the Client/Patient records, or the test data, or the psychologist did not receive a legally sufficient demand (e.g., improper service) for production of records or test data testimony.
2. The psychologist does not have custody or control of the records or test data that are sought, because, for example, they belong not to the psychologist but to his or her employer.
3. The therapist–Client/Patient privilege insulates the records or test data from disclosure. The rationale for the privilege, recognized in many states, is that the openness necessary for effective therapy requires that Client/Patients have an expectation that all records of therapy, contents of therapeutic disclosures, and test data will remain confidential. Disclosure would be a serious invasion of the Client/Patient's privacy. The psychologist is under an ethical obligation to protect the client's reasonable expectations of confidentiality. See APA Ethics Code, Ethical Standards, Section 4 ([APA, 2010](#)). There are important exceptions to this protection that negate the privilege. For example, if the Client/former client is a party to the litigation and has raised his/her mental state as an issue in the proceeding, the client may have waived the psychotherapist–patient privilege. This varies by jurisdiction with most jurisdictions holding a broad patient–litigant exception to privilege,

with a few construing the patient-litigant exception much more narrowly.

It is important that the psychologist be aware of the law in the relevant jurisdiction, because this may ultimately control the issue about release of (otherwise) confidential client information.

In this circumstance, the fact that a client who is a party to a legal case does not want to consent to release of information may not ultimately be dispositive on the issue. In such a case, the psychologist should discuss the issue of potential patient-litigant exception with the client's attorney, to determine if the records will need to be turned over due to the exception and to obtain any needed authorizations from the client.²

4. The information sought is not relevant to the issues before the court, or the scope of the demand for information is overbroad in reaching information not relevant to the issues before the court, including irrelevant information pertaining to third parties such as a spouse.
5. Public dissemination of test information such as manuals, protocols, and so forth may harm the public interest because it may affect responses of future test populations. This effect could result in the loss of valuable assessment tools to the detriment of both the public and the profession of psychology.
6. Test publishers have an interest in the protection of test information, and the psychologist may have a contractual or other legal obligation (e.g., copyright laws) not to disclose such information. Such contractual claims, coupled with concerns about test data devolving into the public domain and thereby, diminishing its usefulness to the courts, may justify issuance of a protective order against dissemination of a test instrument or protocols.³
7. Psychologists have an ethical obligation to protect the integrity and security of test information and data including protecting the intellectual property (copyright) and unauthorized test disclosure, and to avoid misuse of assessment techniques and data. Psychologists are also ethically obligated to take reasonable steps to prevent others from misusing such information. See APA Ethics Code, Ethical Standards, Section 2 (APA, 2010).
8. Refer to ethical and legal obligations of psychologists as provided for under ethics codes; professional standards; state, federal, or local laws; or regulatory agencies.

9. Some court rules allow the party receiving the subpoena to object to the subpoena's demand or ask that the demand be limited on the basis that it imposes an undue burden on the recipient (see, e.g., Rule 45(c) of the *Federal Rules of Civil Procedure*, 2014).
10. Ultimately, the judge's ruling controls in a court. Psychologists who are not violating human rights and who take reasonable steps to follow Standard 1.02 of the Ethics Code and inform the Court of their requirements under the Ethics Code will not be subject to disciplinary procedures for complying with a court order directing to produce information.

² A psychologist's obligation to maintain confidentiality may not apply under certain legally recognized exceptions to the therapist-patient privilege, including, but not limited to, situations such as the following: when child or elder abuse is involved; cases involving involuntary commitment evaluations; court-ordered evaluations; when clients raise their emotional condition as a basis for a legal claim or defense; or when the client presents an imminent danger to himself or herself or the community. Exceptions may depend on jurisdiction and the facts of a particular situation. Thus, the most prudent course of action may be for the psychologist to consult with an attorney.

³ Most test publishers have policies that address the disclosure of test data and materials. Very often, such policies can be found on a test publisher's website, along with other information such as terms of purchasing psychological tests, the publisher's position on legal aspects of disclosing test data and test materials, and contact information for the test publisher's privacy officer or general counsel. Reviewing a particular test publisher's website can be very helpful when psychologists are considering disclosing test data or test materials, especially when the disclosure potentially involves nonpsychologists. Psychologists should be aware that the information on test publisher websites may or may not be consistent with APA policy, may not reflect exceptions that apply in certain states, and APA takes no position on the accuracy of legal statements or claims found on such websites.

References

- American Educational Research Association, American Psychological Association, & National Council on Measurement in Education. (2014). *Standards for educational and psychological testing*. Washington, DC: Authors.
- American Psychological Association. (2010). *Ethical principles of psychologists and code of conduct (2002, Amended June 1, 2010)*. Retrieved from <http://www.apa.org/ethics/code/index.aspx>
- Federal Rules of Civil Procedure, Title VI, Rule 45(c), 28 U.S.C. (2014).
- Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936.
- Security and Privacy, 45 C.F.R. § 164.501 (2015).

(Appendices follow)

Appendix A

Excerpts From Sections of the APA Ethics Code (2010)

Section 1. Resolving Ethical Issues

1.02 Conflicts Between Ethics and Law, Regulations, or Other Governing Legal Authority

If psychologists' ethical responsibilities conflict with law, regulations, or other governing legal authority, psychologists clarify the nature of the conflict, make known their commitment to the Ethics Code, and take reasonable steps to resolve the conflict consistent with the General Principles and Ethical Standards of the Ethics Code. Under no circumstances may this standard be used to justify or defend violating human rights.

Section 2. Competence

2.01 Boundaries of Competence

(a) Psychologists provide services, teach, and conduct research with populations and in areas only within the boundaries of their competence, based on their education, training, supervised experience, consultation, study, or professional experience.

(b) Where scientific or professional knowledge in the discipline of psychology establishes that an understanding of factors associated with age, gender, gender identity, race, ethnicity, culture, national origin, religion, sexual orientation, disability, language, or socioeconomic status is essential for effective implementation of their services or research, psychologists have or obtain the training, experience, consultation, or supervision necessary to ensure the competence of their services, or they make appropriate referrals, except as provided in Standard 2.02, Providing Services in Emergencies.

(c) Psychologists planning to provide services, teach, or conduct research involving populations, areas, techniques, or technologies new to them undertake relevant education, training, supervised experience, consultation, or study.

(d) When psychologists are asked to provide services to individuals for whom appropriate mental health services are not available and for which psychologists have not obtained the competence necessary, psychologists with closely related prior training or experience may provide such services in order to ensure that services are not denied if they make a reasonable effort to obtain the competence required by using relevant research, training, consultation, or study.

(e) In those emerging areas in which generally recognized standards for preparatory training do not yet exist, psychologists nevertheless take reasonable steps to ensure the competence of

their work and to protect clients/patients, students, supervisees, research participants, organizational clients, and others from harm.

(f) When assuming forensic roles, psychologists are or become reasonably familiar with the judicial or administrative rules governing their roles.

Section 4. Privacy and Confidentiality

4.01 Maintaining Confidentiality

Psychologists have a primary obligation and take reasonable precautions to protect confidential information obtained through or stored in any medium, recognizing that the extent and limits of confidentiality may be regulated by law or established by institutional rules or professional or scientific relationship. (See also Standard 2.05, Delegation of Work to Others.)

4.02 Discussing the Limits of Confidentiality

(a) Psychologists discuss with persons (including, to the extent feasible, persons who are legally incapable of giving informed consent and their legal representatives) and organizations with whom they establish a scientific or professional relationship (1) the relevant limits of confidentiality and (2) the foreseeable uses of the information generated through their psychological activities. (See also Standard 3.10, Informed Consent.)

(b) Unless it is not feasible or is contraindicated, the discussion of confidentiality occurs at the outset of the relationship and thereafter as new circumstances may warrant.

(c) Psychologists who offer services, products, or information via electronic transmission inform clients/patients of the risks to privacy and limits of confidentiality.

4.04 Minimizing Intrusions on Privacy

(a) Psychologists include in written and oral reports and consultations, only information germane to the purpose for which the communication is made.

(b) Psychologists discuss confidential information obtained in their work only for appropriate scientific or professional purposes and only with persons clearly concerned with such matters.

4.05 Disclosures

(a) Psychologists may disclose confidential information with the appropriate consent of the organizational client, the individual client/patient, or another legally authorized person on behalf of the client/patient unless prohibited by law.

(Appendices continue)

(b) Psychologists disclose confidential information without the consent of the individual only as mandated by law, or where permitted by law for a valid purpose such as to (1) provide needed professional services; (2) obtain appropriate professional consultations; (3) protect the client/patient, psychologist, or others from harm; or (4) obtain payment for services from a client/patient, in which instance disclosure is limited to the minimum that is necessary to achieve the purpose. (See also Standard 6.04e, Fees and Financial Arrangements.)

Section 6. Record Keeping and Fees

6.01 Documentation of Professional and Scientific Work and Maintenance of Records

Psychologists create, and to the extent the records are under their control, maintain, disseminate, store, retain, and dispose of records and data relating to their professional and scientific work in order to (1) facilitate provision of services later by them or by other professionals, (2) allow for replication of research design and analyses, (3) meet institutional requirements, (4) ensure accuracy of billing and payments, and (5) ensure compliance with law. (See also Standard 4.01, Maintaining Confidentiality.)

6.02 Maintenance, Dissemination, and Disposal of Confidential Records of Professional and Scientific Work

(a) Psychologists maintain confidentiality in creating, storing, accessing, transferring, and disposing of records under their control, whether these are written, automated, or in any other medium. (See also Standards 4.01, Maintaining Confidentiality, and 6.01, Documentation of Professional and Scientific Work and Maintenance of Records.)

(b) If confidential information concerning recipients of psychological services is entered into databases or systems of records available to persons whose access has not been consented to by the recipient, psychologists use coding or other techniques to avoid the inclusion of personal identifiers.

(c) Psychologists make plans in advance to facilitate the appropriate transfer and to protect the confidentiality of records and data in the event of psychologists' withdrawal from positions or practice. (See also Standards 3.12, Interruption of Psychological Services, and 10.09, Interruption of Therapy.)

Section 9. Assessment

9.01 Bases for Assessments

(a) Psychologists base the opinions contained in their recommendations, reports, and diagnostic or evaluative statements, including forensic testimony, on information and techniques suffi-

cient to substantiate their findings. (See also Standard 2.04, Bases for Scientific and Professional Judgments.)

(b) Except as noted in 9.01c, psychologists provide opinions of the psychological characteristics of individuals only after they have conducted an examination of the individuals adequate to support their statements or conclusions. When, despite reasonable efforts, such an examination is not practical, psychologists document the efforts they made and the result of those efforts, clarify the probable impact of their limited information on the reliability and validity of their opinions, and appropriately limit the nature and extent of their conclusions or recommendations. (See also Standards 2.01, Boundaries of Competence, and 9.06, Interpreting Assessment Results.)

(c) When psychologists conduct a record review or provide consultation or supervision and an individual examination is not warranted or necessary for the opinion, psychologists explain this and the sources of information on which they based their conclusions and recommendations.

9.02 Use of Assessments

(a) Psychologists administer, adapt, score, interpret, or use assessment techniques, interviews, tests, or instruments in a manner and for purposes that are appropriate in light of the research on or evidence of the usefulness and proper application of the techniques.

(b) Psychologists use assessment instruments whose validity and reliability have been established for use with members of the population tested. When such validity or reliability has not been established, psychologists describe the strengths and limitations of test results and interpretation.

(c) Psychologists use assessment methods that are appropriate to an individual's language preference and competence, unless the use of an alternative language is relevant to the assessment issues.

9.04 Release of Test Data

(a) The term *test data* refers to raw and scaled scores, client/patient responses to test questions or stimuli, and psychologists' notes and recordings concerning client/patient statements and behavior during an examination. Those portions of test materials that include client/patient responses are included in the definition of *test data*. Pursuant to a client/patient release, psychologists provide test data to the client/patient or other persons identified in the release. Psychologists may refrain from releasing test data to protect a client/patient or others from substantial harm or misuse or misrepresentation of the data or the test, recognizing that in many instances release of confidential information under these circumstances is regulated by law. (See also Standard 9.11, Maintaining Test Security.)

(b) In the absence of a client/patient release, psychologists provide test data only as required by law or court order.

(Appendices continue)

9.06 Interpreting Assessment Results

When interpreting assessment results, including automated interpretations, psychologists take into account the purpose of the assessment as well as the various test factors, test-taking abilities, and other characteristics of the person being assessed, such as situational, personal, linguistic, and cultural differences, that might affect psychologists' judgments or reduce the accuracy of their interpretations. They indicate any significant limitations of their interpretations. (See also Standards 2.01b and c, Boundaries of Competence, and 3.01, Unfair Discrimination.)

9.07 Assessment by Unqualified Persons

Psychologists do not promote the use of psychological assessment techniques by unqualified persons, except when such use is conducted for training purposes with appropriate supervision. (See also Standard 2.05, Delegation of Work to Others.)

9.09 Test Scoring and Interpretation Services

(a) Psychologists who offer assessment or scoring services to other professionals accurately describe the purpose, norms, validity, reliability, and applications of the procedures and any special qualifications applicable to their use.

(b) Psychologists select scoring and interpretation services (including automated services) on the basis of evidence of the validity of the program and procedures as well as on other appropriate considerations. (See also Standard 2.01b and c, Boundaries of Competence.)

(c) Psychologists retain responsibility for the appropriate application, interpretation, and use of assessment instruments, whether they score and interpret such tests themselves or use automated or other services.

9.11 Maintaining Test Security

The term *test materials* refers to manuals, instruments, protocols, and test questions or stimuli and does not include *test data* as defined in Standard 9.04, Release of Test Data. Psychologists make reasonable efforts to maintain the integrity and security of test materials and other assessment techniques consistent with law and contractual obligations, and in a manner that permits adherence to this Ethics Code.

Note. From "Ethical Principles of Psychologists and Code of Conduct" by the American Psychological Association, 2002, Amended June 1, 2010. Copyright 2010 by the American Psychological Association.

Appendix B

Federal Rules and Regulations

Excerpt From Code of Federal Regulations

Title 45—Public Welfare

Subtitle A—Department of Health and Human Services

Part 164—Security and Privacy—Contents

Subpart E—Privacy of Individually Identifiable Health Information §164.501 Definitions

As used in this subpart, the following terms have the following meanings: . . .

Psychotherapy notes means notes recorded (in any medium) by a health care provider who is a mental health professional documenting or analyzing the contents of conversation during a private counseling session or a group, joint, or family counseling session and that are separated from the rest of the individual's medical record. Psychotherapy notes excludes medication prescription and monitoring, counseling session start and stop times, the modalities and frequencies of treatment furnished, results of clinical tests, and any summary of the following items: Diagnosis, functional status, the treatment plan, symptoms, prognosis, and progress to date . . .

Excerpt From Federal Rules of Civil Procedure

VI. Trials

Rule 45. Subpoena

. . . (d) Protecting a Person Subject to a Subpoena; Enforcement.

- (1) *Avoiding Undue Burden or Expense; Sanctions.* A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(Appendices continue)

- (2) *Command to Produce Materials or Permit Inspection.*
- (A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.
- (B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:
- (i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
- (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.
- (3) *Quashing or Modifying a Subpoena.*
- (A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:
- (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.
- (B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:
- (i) disclosing a trade secret or other confidential research, development, or commercial information; or
- (ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.
- (C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:
- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.
- (e) *Duties in Responding to a Subpoena.*
- (1) *Producing Documents or Electronically Stored Information.* These procedures apply to producing documents or electronically stored information:
- (A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.
- (B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(Appendices continue)

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) *Claiming Privilege or Protection.*

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

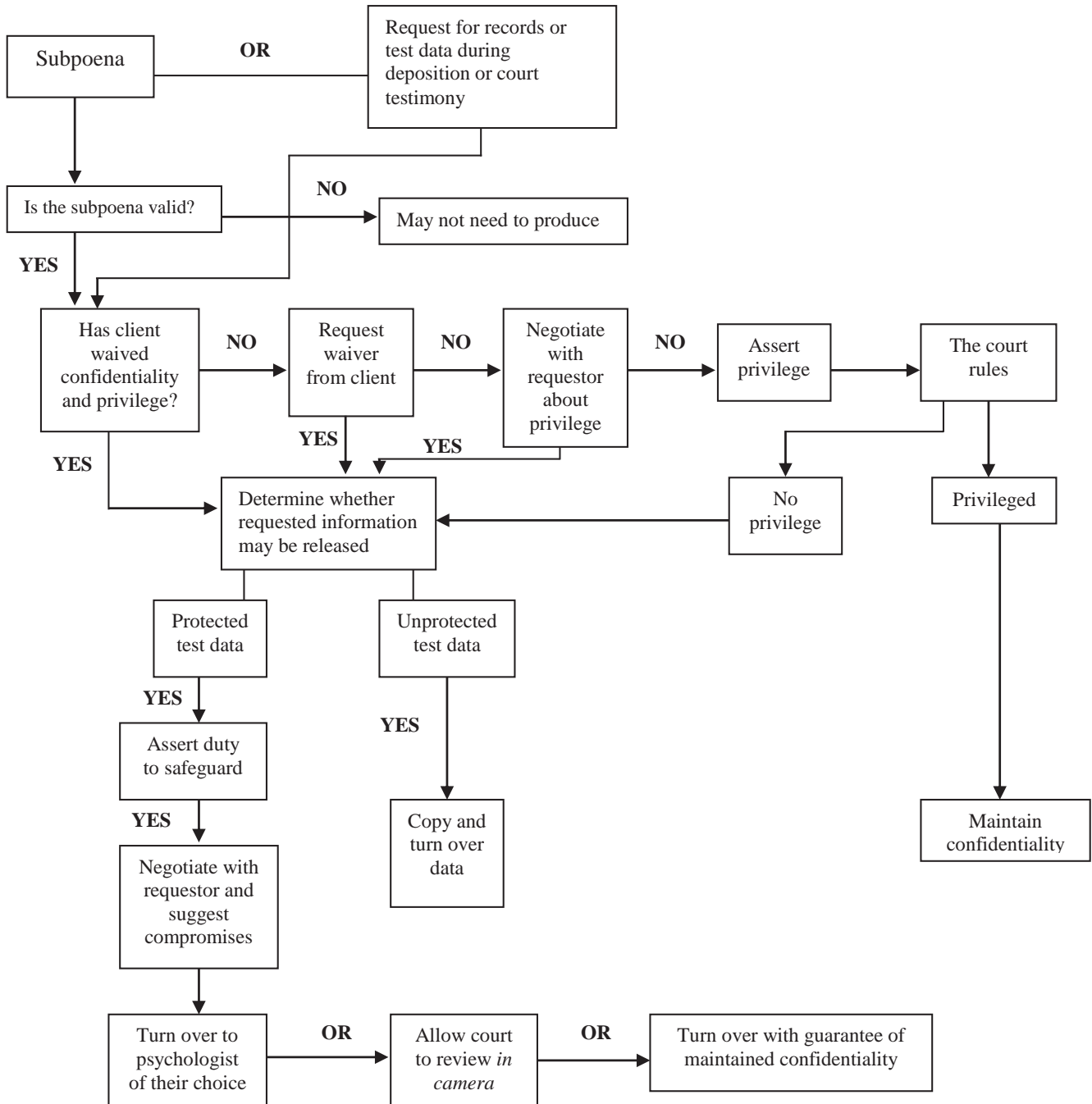
(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(Appendices continue)

Appendix C
Disclosure Issues

The following steps may be taken, as appropriate:



This document is copyrighted by the American Psychological Association or one of its allied publishers. This article is intended solely for the personal use of the individual user and is not to be disseminated broadly.

Received August 11, 2015
Revision received November 24, 2015
Accepted December 2, 2015 ■