THE PSYCHIATRIST AND THE SUBPOENA

by

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The psychiatrist opens his mail and stares at a very legal document. It does not start out with "Greetings!", but the effect may be the same. A paragraph half way down reads "You are commanded to appear and testify before the Superior Court (or similar judicial authority)" and specifies an exact date and hour for that appearance. Near the bottom, to account for his reaction, might be the statement "and for a failure to attend you will be deemed guilty of a *contempt of court.*"[1] His reaction might be more marked if the document sounds sterner to include "that all and singular business and excuses being laid aside [and] you appear and attend, etc."; and in addition to punishment for contempt "you will forfeit to the party aggrieved one hundred dollars and all damages which may be sustained by your failure to attend."[1] It might be signed by a district attorney, the judge of a court, but most likely by a clerk of the court of jurisdiction.[2]** The dilemma for the psychiatrist in his professional role is that he is being ordered to testify about and supply all his records on a specific patient while under the professional obligation to maintain absolute confidentiality. The Code of Ethics of the American Medical Association, in Section 9, dealing with confidentiality makes an unqualified exception for a legal demand for information. The American Psychiatric Association included this on its position paper on guidelines for psychiatrists, but emphasized "*but the psychiatrist should understand his duty to protect the welfare of the patient.*"[3]

The frightening language of the document intimidates most recipients of subpoenas. The danger in failure to comply is real. Dr. Joseph E. Lifschutz of Orinda, California spent three days in jail in trying to support the principle that he had an obligation not to give information about his patients. Only the intervention of the California Supreme Court got him out of jail at the end of three days. Dr. James B. Robertson of San Leandro, California and Dr. George R. Caesar of Kentfield, California have each spent between ten thousand and twenty-five thousand dollars trying to protect the confidentiality of their patients from the threat of subpoenas.

If the recipient knew how easy it was to have a subpoena issued; if he knew how readily the subpoena could demand information when there actually was no legal right to command the disclosure of information; if he knew how often an individual releases information that legally he had no right to release because of intimidation, – he would view the threat of the subpoena with less fear and greater skepticism. A lawyer may merely attest that he believes a certain individual has certain information that is relevant to the issue at court to get a subpoena issued. These forms are transmitted to the office of the clerk of the court routinely and the clerk of the court has a staff that routinely makes out the subpoena to be served by organized processors. No one reviews the request for the subpoena. No one examines the basis for the request. No one discusses with anyone else whether there is a legal right for disclosure. No one raises the question whether information is protected by law against disclosure before the subpoena is issued. The subpoena is requested and routinely issued on the principle of law that there is a right for discovery of any and all facts relative to the issue at court.

It isn't that the laws are necessarily written to support this procedure. In California, where the above process operates, the law demands an affidavit "setting forth in *full detail* [italics added] the materiality thereof to the issue involved."[1] The California law even presumes a judicial review before a subpoena is issued.[4] This protection against violation of the Fourth Amendment was covered in the Federal Laws until July 1, 1970 by requiring "showing good cause" for the issuance of a subpoena.[5] This term "good cause" "means more than mere

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**A 1971 amendment added "defendant's attorney of record."

relevancy, but is separate from and in addition to requirement of relevance"[6]. Another decision of defining "good cause" stated "*burden is on party seeking production* of records to show good cause, that is, that requested documents *are necessary to establish* his claim, or that denial of production will unduly prejudice preparation of his case, or cause him hardship or injustice." [italics added][7] In 1970, the phrase "good cause" was removed. The notes on this change, by the Advisory Committee on Rules, indicated it was necessary because of the widely differing interpretations of the phrase. However, they conclude "the revision of Rule 34 to operate *extra-judicially* rather than by court order reflects existing *law office protocol*" [italics added].[8] Nowhere is there any mention of protection of the Fourth Amendment previously served by the deleted "good cause."

This legal doctrine is based on the philosophy that in order to decide an issue at court the truth must be discovered from whatever sources are available.[9] It is based on old English Common Law that stated as much. When this rule was promulgated and the issue of a writ of subpoena was developed, in the Fifteenth Century, it was based on a Royal prerogative to demand and command of any and all witnesses that they give testimony.[10, 11, 12, 13] It began with the institution of the Court of Chancery which was the representative of the king of England. To help maintain one's skeptical, if not cynical attitude toward the subpoena, it might be mentioned that this Court of Chancery came to be known as the Court of the Star Chamber because of the hall in which the court met. The tactics and procedures of this Court of Chancery, with its subpoenas,[14] led to the expression "star chamber proceedings" and all that that term implies.

The courts start out with the premise that they have this right, not based on the United States Constitution, but on rules of procedures that have their origins in the Royal prerogatives of the English Court as noted above. In California this is reflected in Section 911 of the evidence code which states that "except as otherwise provided by statute [specific privilege] no person has a privilege to refuse to be a witness or to refuse to disclose any matter or produce any writing, object or other thing."[15]

Certain exceptions to this provision of rules of procedure stemming from the English Common Law are certain statutory exceptions often based on the United States Constitution Bill of Rights. Wigmore, in addition to comments about physician-patient privilege,[16] postulated four conditions that must be met for privilege in general, and applicable to confidentiality. Wigmore's postulates have been adopted by the legal profession in considering the validity of extending a privilege not to testify. Primarily these are that the communication was indeed confidential, that it was necessary for the interaction between the confidants, which was of such an order that the process was a necessity for the social well being of the community, that this interaction could not be successfully carried out for the benefit of the community unless confidentiality was maintained, and the injury that would follow the disclosure must be greater than the benefit for correct disposal of litigation.[17] It is because these postulates are met by psychotherapist-patient privilege that a number of the states have legislated such protection; and the proposed Federal Code of Evidence that was approved by the United States Supreme Court contained a similar provision. The difficulty has to do with exceptions to the privilege. The one that usually concerns psychiatrists is that in most of these laws the patient waives the privilege whenever the patient injects his mental or emotional state as a claim or defense at issue in court.

There are a number of judicial, and quasi-judicial agencies, that have the power to issue a subpoena. With this power goes the right to punish for ignoring this writ. Commonly we have been aware that all courts of law and Congress have this power. It is well to add that district attorneys may issue such writs on their own;[2] and the legislative bodies may grant this power to other state or federal agencies.

The common supposition is that a subpoena must be handed in person to the individual summoned. This is true in California,[18, 19] and in current Federal law. From English Common Law,[20] in some jurisdictions it might be left at the usual dwelling with any responsible person, Federal Code of 1938,[21] or delivered by mail.[20] It need not even be certified or registered mail

requiring a signature or receipt. The need to guarantee that the involved person has personal knowledge that he has been summoned is often assumed by the legislative process that allows these alternatives of service.

Tales are manifold of people avoiding court appearance by not being accessible to personal service. For the psychiatrist to resort to this romanticized approach is quite unrealistic. The ethical professional problem is not to avoid the service, but to know what his patient's and his own rights are both in the manner of service and in compliance with the demand. We should be concerned with the effects of this on therapy and on our patients' welfare in responding to the demand. This has been discussed previously, by Barchas,[22] Louisell,[23] Slawson,[24] Slovenko,[25] and GAP.[26]

The legality of service is important, however, should the psychiatrist respond to an illegal request or service. He would be liable for releasing information when not legally required to do so. It would be well for him to consult with his or his patient's attorney whether the jurisdiction making demand has the right to do so; and whether the manner of service is legal in the jurisdiction involved. Barchas made a similar point in a broader context.[22] In one instance a subpoena was left in an outside mail box, but the server filed the return that it had been served in person. These returns must be made under oath. It happened that at the time, the psychiatrist was away for a number of weeks and could document the fact that on the date the service allegedly was made he was registered at a hotel on the other side of the continent.

Another problem is a form of harassment, usually when the attorney seeking the evidence is representing the patient's opponent. As noted, the writ demands the physician's presence at a specific place at a specific time. For many reasons, scheduled depositions and court hearings are postponed for the convenience of either attorney or the court. The patient's attorney, if he made the demand, usually notifies the physician. Too often an opposing attorney might "forget" to do so. The psychiatrist learns this only after he has cancelled his appointments for the day and shown up in court at the appointed time. The prudent physician will check with the court or the attorney just before making his plans to attend as ordered.

Usually attorneys will schedule depositions, or give enough time in subpoena service for court appearance, so that the physician can make his necessary arrangements. This is usually done as a matter of courtesy. It may be supported in addition by judicial rule that a subpoena can be "quashed or modified . . . if . . . unreasonable and oppressive."[27]

Attorneys will often depend on the reluctance of the physician to give up his time to appear personally by issuing the *subpoena duces tecum* to include a statement indicating he can avoid a personal appearance by submitting all his records for photocopying. This is usually during the preliminary discovery phase by deposition. In the first place, it is no guarantee that a subsequent subpoena for personal appearance will not follow for a deposition; nor that the physician will not be subpoenaed for the actual trial itself.

The greatest hazard in following this suggestion is that any rights of the patient to prevent disclosure are violated because no one may be available to make objection to the release of the material. The patient's attorney cannot always be relied on to do so. Even in a personal appearance at a discovery deposition, there is no court authority to rule on protecting legal rights against disclosures even though there is an official appointed to preside at the deposition. In this situation, however, the patient's attorney is present to raise the objection. If the other attorney refuses to accept the objection, he must go to court for a judicial ruling on whether or not the patient's rights to confidentiality are superseded by the legal aspects of the points in question. Connecticut, Massachusetts, Illinois, and California[28] are some of the states that recognize a need for special protection against disclosing psychotherapeutic communication. As noted above, the proposed Federal Code of Evidence submitted to Congress by the Supreme Court does the same in Rule 5.04.* Even in states that have ordinary physician-patient privilege

*This led to a campaign to inform medical record librarians of the legal aspects of privilege and to help them develop procedures for responding to legal demands for information about patients. One hospital when subpoenaed sends the sealed records to the court[31] with the notation that these are psychiatric records, are protected by privilege, and they are not to be released until the court has ruled that the privilege cannot be enforced. Another recommendation is that the medical librarian not act independently but secure clearance from the hospital's attorney as well as the doctor on the case.

laws, or no such written laws, the legal principles involved probably can be pleaded successfully. In Illinois, the psychiatrist shares the right with the patient. In California, the psychotherapist is obligated to claim the privilege (refuse to give the information) in the absence of a specific disclaimer from the patient to the contrary.

One of the exceptions to this protection is based on the patient placing his mental and emotional state at issue either as plaintiff in an action for damages, or as a defense against the issue brought by others. Illinois has added one area of relief from this in divorce and child custody suits. Attempts to challenge this in California have repeatedly failed, even though the California Supreme Court ordered there be limits set on disclosure.[29] Subsequent cases ignored the limitation effect of the *Lifschutz* decision.

Another harassment for the psychiatrist stems from legal process, even though the law demands he not give information about his patient. In one case, on receipt of the subpoena, the physician notified the attorney who had it issued that the laws protected against disclosure, the patient was against disclosure, and since the patient was the defendant, no evidence could be given, and certainly no records would be released. The attorney replied that the psychiatrist would have to appear anyhow and the judge would have to rule on this. Attempts to reach the judge by phone were not allowed, and his clerk was as non-committal as the attorney. Actually the legal process will hold a physician in contempt if he refuses to attend because the subpoena is invalid since the affidavit supporting it was invalid in that the material was privileged. The judge himself may not excuse the physician orally.[30] The subpoena can be "quashed," but it requires a formal legal request for such a motion and all that it entails[30] The harassment was complete when the psychiatrist appeared in court, to be informed that the suit had been settled that morning, and no one bothered to notify the physician. In this particular case, the hospital in which the patient had been treated was also served with a demand for the records; and forwarded the file without awareness that they were legally protected against disclosure.*

A special problem is created for the psychiatrist when the patient has signed a blanket authorization for release of information. This stems from the legal doctrine followed in all jurisdictions that the privilege belongs to the patient, and the patient can waive it. This waiver may be in the form of a blanket consent, a specific detailed consent, through various processes that void the aspect of confidentiality on which privilege is based, or technical courtroom rules of procedure. A recent decision of the California Supreme Court ruled that the blanket consent was not a waiver in a specific case because it was intended for another purpose.[32] In essence this begins to apply the doctrine of "informed consent" to such written waivers. The psychiatrist should explore if the patient really knows the consequences of releasing available information and testimony when a patient signs a waiver. He would do well to counsel the patient's attorney whether in his opinion the information can be traumatic and possibly even destructive to the patient either by direct effect on the patient, or because of its public disclosure and that effect on the patient.

This problem is more pressing when the patient's attorney has subpoenaed the psychiatrist. As the patient's attorney he acts for the patient, exercising the patient's right for disclosure. In California the Legislature has seen fit to pass a law that the attorney has the right to inspect the records on request without any subpoena.[33] If the psychiatrist refuses, the physician then becomes liable for all costs of legal action made necessary to demand the records through court order. In these cases particularly, the psychiatrist would do well to demand a written authorization from the patient, and explore whether the patient is truly informed of the nature of the consent. The psychiatrist might consider putting the attorney on record as having been advised of any possible destructive effect it might have on the patient and therefore be liable for such effect in persisting to demand the disclosure. Whether a copy of such notification should be sent to the patient lies in the psychiatrist's judgment and discretion.

*At this time Congress has held up approval of the proposed code. The AMA has objected to the elimination of the general rule for physician-patient privilege, while approving Rule 5.04.

Some psychiatrists have handled the legal demand for records from whatever source as have the hospital officials as noted above. They send the sealed records to the court, call attention to the legal protection necessary, specifying the damaging effects it would have on the patient if revealed to the patient in the first place, even by disclosure to the attorneys in chambers proceedings, and certainly by disclosure publicly in open court.

A number have discussed the problem with the patient's attorney recommending that the latter object to their release on the basis of privilege, – especially in discovery proceedings, – and demand court determination to protect the confidentiality of the communication. As indicated above, Dr. Lifschutz's refusal to reveal information in the face of the court order, and spending three days in jail, led to the higher court ruling that disclosure, even when indicated must be minimal to protect the patient's psychiatric rights.[29] Subsequently, Drs. Robertson and Caesar carried their protests to the California Supreme Court at an expense of $10,000 to $25,000 plus the drain on personal time and emotions by the legal procedures

Each individual psychiatrist alone can determine for himself or herself to what extent they will resist legal demands on the basis of principle, knowing what the costs are. All are ethically bound to protect their patients' rights to confidentiality within the framework of the existing law and legal interpretations. A recommendation has been made that the American Psychiatric Association interpret the A.M.A. Ethics Code, Section 9 by the addition of "The right to dissent within the framework of the law should not be impaired," in protecting patients from legal demands to reveal information. To do this they would be well advised to know what these laws are in their jurisdiction. They would be even better advised to implement this with consulting their own attorney when in any doubt, or in proceeding beyond simple preliminary stages of the process set in motion once they read, "You are commanded to appear and testify!" with the explicit or implied addition, "bring your records, or an overnight bag for a stay in jail."

To help their members the Northern California Psychiatric Society through its Task Force on Confidentiality, consulting with their legal counsel Kurt Melchior, of San Francisco, prepared a brief paper "What to Do When Served With a Subpoena." It touches on the above, but with specific advice on how the psychiatrist may proceed. (Appendix)

APPENDIX

WHAT TO DO WHEN SERVED WITH A SUBPOENA

Many inquiries have been received by the Northern California Psychiatric Society concerning subpoenas served upon members in incidents arising out of their practice. The following memorandum has been prepared in consultation with counsel for the Society and represents only a general overview of the present state of the law concerning compulsory psychiatric testimony. It is not a substitute for individual consultation and does not necessarily fit any particular situation. *When in doubt, always consult your own attorney.*

A subpoena, as such, is an order from the governmental authority requiring one's attendance as a witness. Not all governmental agencies have subpoena power, which fact does not necessarily prevent their attempts to compel testimony. Various administrative agencies have the right to issue subpoenas, but others may use a subpoena-like form of process in the hope that testimony will be produced in response. Thus not every paper which appears to be a subpoena is necessarily a valid subpoena, although it may be assumed that any paper issuing out of a court of law and headed "subpoena" is a valid subpoena. This memorandum will deal only with judicial (court) subpoenas.

Such subpoenas may require attendance at a court session or outside court for the purpose of discovery of material facts before trial (so-called depositions). There are two basic kinds of such subpoenas. The subpoena duces tecum (which bears that name plainly on its face) requires production of records as stated therein, whereas a plain subpoena, i.e., one not "duces tecum" (technically called a subpoena ad testificandum), requires attendance but no records.

Subpoenas are a valid expression of court power and cannot be ignored. It should be understood, however, that attorneys have an absolute right to obtain "plain" subpoenas (those not requiring records) from the Clerk of the Court without any previous review by any judge; and even subpoenas duces tecum, while theoretically subject to a screening procedure, are in practice issued routinely without any meaningful scrutiny, and certainly without review by any judge. Therefore it is important to bear in mind that, speaking of subpoenas generally and not limiting the matter to psychotherapy, there are many situations where the witness has a well-defined right or perhaps even a duty to contest the subpoena by appropriate legal process. In the light of recent legal developments, this last statement is probably true as to virtually all subpoenas which are aimed at discovering psychotherapeutic material.

As a matter of accommodation, the time for appearance under a deposition subpoena is customarily rearranged so as reasonably to suit the particular convenience of a witness. Short deadlines indicated on such subpoenas will usually be extended as a matter of courtesy, particularly where a test of the validity or range of the subpoena can be fairly expected. Such arrangements are made with the attorneys who have obtained the subpoena. No court or judge can be expected to respond to any informal inquiries. Also, the manner of approaching a court can be very technical, and if the physician considers this step necessary he would be best advised to almost always consult an attorney about it.

Most lawyers for a patient will not serve a subpoena for an appearance in court without first discussing the proposed testimony with the physician; and almost always, they will give all possible consideration to the doctor's commitments in arranging the time for court appearances. Similar courtesy and consideration is unfortunately not always given by attorneys opposing the patient in litigation. If contacted by an attorney about a court appearance to give testimony, the psychiatrist could be well advised to raise the question of confidentiality.

As to what is required of a psychiatrist: certainly no psychiatrist is required by law to keep any records of the contents of psychotherapeutic communications in the ordinary course of his practice. However, it is a serious crime to destroy such records, if they have been kept in order to prevent their production under subpoena. It is not within the scope of this memorandum to suggest what records a psychiatrist should keep in the ordinary course of his practice, or what records he might be required to keep (for example) for tax purposes.

The California law is presently among the most liberal in the nation in recognizing the existence and scope of a privilege (a legal term for confidentiality) adhering to psycho-

therapeutic records and communications. A necessarily brief synopsis of the present law is as follows:

The psychotherapeutic privilege exists as to all such communications and records pertaining thereto. It is the privilege of the patient and not of the physician. It arises from the United States Constitution; in the well-known case of Dr. Joseph Lifschutz the California Supreme Court stated:

> "We believe that a patient's interest in keeping such confidential revelations from public purview, in retaining this substantial privacy, has deeper roots than the California statute and draws sustenance from our constitutional heritage. In *Griswold v. Connecticut,**** the United States Supreme Court declared that 'Various guaranties [of the Bill of Rights] create zones of privacy,' and we believe that the confidentiality of the psychotherapeutic session falls within one such zone."

Therefore the privilege is very seriously regarded. However, there are exceptions to the privilege; and it is in the exceptions that the difficulties lie.

Initially, a psychiatrist has not only the right but the legal obligation to claim the privilege and not to reveal either by verbal testimony or by disclosure of records any material pertaining to a patient or his psychotherapy. Violation of this rule – unauthorized disclosure not specifically compelled by law – could subject the physician to legal liability toward his patient. Incidentally, the same rule – as to all matters covered herein – applies to ex-patients, living or dead, as well as to present patients.

The California Evidence Code states that a psychotherapist in possession of confidential communications "shall claim the privilege," i.e. shall merely state that he is under legal duty not to speak, "whenever he is present when the communication is sought to be disclosed."

Initially, then, a psychiatrist who is asked under subpoena to produce verbal or documentary evidence about a psychotherapeutic communication *must* claim the privilege unless and until one of two things has happened: either the patient has specifically waived the privilege, personally or through the patient's lawyer, or it has become clear – usually through the medium of the court – that despite the failure of the patient and his lawyer specifically to waive the privilege, legal steps taken by the patient have waived the privilege as a matter of law.

The usual waiver by the patient is by the undertaking of litigation by the patient, in which *the patient himself* has put his psychiatric condition in issue. In other words, a lawsuit in which *the other party* seeks to put the patient's psychiatric condition in issue does not involve, without more, a waiver of privilege. Example: a father seeks to obtain custody of minor children from the mother, claiming her emotional condition makes her unfit to keep the children, and seeks to compel her treating psychiatrist to testify as to that condition. The mother has *not* put her emotional condition in issue in the lawsuit, and her psychiatrist may *not* disclose confidential psychiatric communications without her consent.

It may be extraordinarily difficult even for lawyers or judges to determine precisely whether, in any given situation, the patient has voluntarily or involuntarily waived his privilege. Therefore, *as an initial matter,* the psychiatrist is probably best advised in every case to regard all psychotherapeutic material as privileged until he has had an opportunity to have the matter reviewed by proper legal authority. Certainly it is most unwise to comply with routine subpoenas requesting that records be copied by a copying service, without particular investigation.

As a matter of technique, the psychiatrist should probably almost always seek to determine who is the patient's or ex-patient's attorney, and advise him of the service of a subpoena upon the physician. If that attorney responds understandingly, a large part of the burden can thereafter usually be safely assumed by that attorney.

It is an important general rule always to make sure of the identity and authority of any person contacting the psychiatrist about a patient.

In some situations it might be helpful to contact also the attorney issuing the subpoena (if he represents a party other than the patient). It is possible that such an attorney may understand the situation and be responsive. More probably, however, such an attorney will be

more concerned about obtaining information he believes material to his client's interest; such an attorney might be unsympathetic, even hostile or rude, and he might make efforts to entangle the physican in disclosures about the patient and his treatment which ought to be avoided. On balance it is probably best to tread warily in dealing with attorneys representing a party other than the patient; perhaps the physician's own lawyer should be asked to handle such contacts.

Various extremely complex situations can arise concerning the production of testimony, and recent court decisions have greatly expanded the protection afforded to psychotherapeutic privilege. Physicians need not be knowledgeable in this area which is a legal rather than a medical subject. However, the medical implications of giving or not giving particular testimony, or of revealing or not revealing particular records, are obviously of great significance, and many circumstances having serious impact upon the patient's situation both in the lawsuit and in the patient's own life and well-being can arise. This memorandum cannot deal with these myriad possibilities, but it would not be complete without stating several things:

1. The physician probably has a responsibility of explaining to the patient or to someone acting on his behalf, at least to a degree, his view of the impact of his testimony or record-disclosure upon the patient – upon the on-going treatment, if any – and possibly upon the lawsuit.
2. It can be a very difficult choice to whom and how that explanation should be made – the patient or ex-patient, or his attorney? Many attorneys and of course many patients have little familiarity with psychiatric formulations or findings, or for that matter with the psychiatrist's approach to a patient's treatment and indeed to a patient's life context Misunderstandings are all too possible in this area, due to different interpretations placed upon the meaning of words.
3. We can conceive of circumstances where, in order to accomplish all the foregoing and to put the psychiatrist's concerns into proper context, he may have to speak to the patient's attorney through a lawyer of his own choice.

Many psychiatrists are fearful that failure to comply with a subpoena will constitute contempt of court and subject them to fines or imprisonment. It should be emphasized that a contempt of court could only be committed by disobeying a specific order from a judge, presumably upon a test of the subpoena in the particular circumstance. Please remember that the psychiatrist *must* claim the privilege as an initial matter, unless a waiver is plain.

The leading decision of the California Supreme Court in this area is *In re Lifschutz*, 2 Cal. 3d 415, which was supported by our Society. Many lawyers may not be familiar with it. Under the *Lifschutz* case, judges are particularly required to protect a patient against unwarranted intrusions into his privacy, and we have learned that at least one psychiatric hospital routinely sends all of its subpoenaed patient records to the court under seal with particular reference to the court's obligation to protect the patient under that case. Our counsel is concerned that such practice may not adequately protect the patient, and therefore not adequately discharge the physician's responsibilities.

We are not attempting herein to render legal opinions to cover any situation but merely to offer some helpful general guides; most particularly, we wish to point out that additional problems are created with respect to group practices, clinics and their records as to which those concerned should consult their own attorneys.

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