

Springfield

COLLABORATIVE DIVORCE

Divorce Without Drama



*Divorce Court Subpoenas
for Therapy Records*

This paper is intended to help clarify a therapist's obligations when confronted with a subpoena and to provide practical steps for responding appropriately.

Psychotherapists and marriage counselors are frequently the target of subpoenas to produce client records in divorce court. Some make the mistake of turning over records. Some make the mistake of ignoring the subpoena assuming that the records are confidential. This paper is intended to help clarify a therapist's obligations when confronted with a subpoena and to provide practical steps for responding appropriately.

We hope that in the not distant future these subpoenas will be rare. North Carolina law provides a statutory alternative to divorce court called collaborative divorce proceedings. Couples who opt for these alternative legal proceedings can be given the support and resources to fully consider mental health issues that may impact child custody and other divorce issues without resorting to subpoenas for therapy records. In the collaborative law process, good settlements are achieved without using sensitive and confidential communications between therapist and client to attack the other spouse in the courtroom.

But until our community better understands the collaborative divorce option as a healthier way to support people through the emotional and financial crisis of divorce, couples will continue to find themselves in the court process, and mental health professionals will continue to be served with subpoenas to turn over sensitive client information. Because of HIPAA regulations and the NC statutory privilege for communications between psychotherapist and patient, every mental health provider needs to know about these subpoenas and how to respond appropriately.





HIPAA Regulations and Psychotherapy Notes

Many therapists are subject to and must comply with the HIPAA privacy rules. HIPAA grants federal privacy rights that prohibit unauthorized disclosures of medical and therapy records. A therapist's "psychotherapy notes", kept for the therapist's use separately from the client's file, were granted a second level of privacy, requiring an even higher level of authorization from the client before they can be disclosed. In the absence of authorization that complies with HIPAA, it would generally be against the law for a therapist subject to HIPAA to disclose therapy records or psychotherapy notes. Assuming a client in divorce is not going to authorize disclosure of his records for use against him in court, it would seem a therapist should refuse in all cases to turn over mental health records under HIPAA.

There are, however, exceptions under the HIPAA regulations that provide for the disclosure of mental health records without the client's authorization. One of the exceptions is when disclosure is "required by law." Thus, a therapist can disclose records without authorization when required by "court orders and court-ordered warrants." So it is not against the law for a therapist to disclose mental health records and psychotherapy notes if the disclosure is pursuant to a court order. Indeed, a therapist may be held in contempt of court if disclosure is not made.

The Psychotherapist-Patient Privilege

In addition to the federal privacy laws under HIPAA, North Carolina recognizes by statute a "privilege" for communications between therapist and patient. The privilege extends to psychologists, licensed marriage and family therapists, licensed social workers, licensed counselors, and school counselors. It means that mental health professionals cannot be required to disclose these communications. Moreover, it means that mental health professionals have a duty to keep confidential what is said to them during therapy unless the client waives the privilege. The privilege recognizes society's interest in protecting people who want to have mental health care. As a society, we want to encourage people to get their mental health needs met without fear of disclosure.

But like the exceptions to non-disclosure under HIPAA, the psychotherapist-patient privilege in North Carolina has an exception. The statute that creates the privilege for communications between therapist and client also provides that a judge may override the privilege and order disclosure if it "is necessary to the proper administration of justice."

Judges Can Order the Disclosure of Confidential Patient Records

In divorce matters, the effort to get therapy records is often related to child custody disputes. One parent's lawyer is attempting to show that the other parent is not fit, or is less fit, to have custody of the children because of that parent's emotional or mental health. It's not hard to make the legal argument that in many situations, therapy records of a parent would be relevant in court to bear on what custody arrangement is in the best interest of the children.

A judge is then presented with the clash between the best interests of the children and the parent's interest in privacy with respect to his or her therapy records. In some states, courts have favored one interest over the other, either showing a bias toward admitting therapist records in the best interest of the children or protecting therapist records as confidential in the interest of the therapy client. North Carolina hasn't really shown a consistent bias, so it's hard to guess, in any particular case, whether a judge will admit therapy records or not. When they are admitted, there may be various protections such as sealing them from public disclosure, reviewing them "in camera", meaning back in the judge's chambers away from public scrutiny, and destroying or returning the records at the termination of the court proceedings. But, if admitted, therapy records will generally be used by one spouse's lawyer to attack the spouse whose records are being scrutinized.

Subpoenas for Therapy Records

When a therapist receives a subpoena for therapy records, it means she is being required to show up some place with the documents. Showing up as required by the subpoena is not the same thing as turning over the documents. A judge does not sign a subpoena. Typically, subpoenas are signed by the attorney who is trying to get the therapy records. A properly issued subpoena means you have to show up at the time and place indicated. But, without an authorization under HIPAA and a waiver of the psychotherapist-patient privilege by the client, a subpoena does not mean you turn over documents once you show up. In fact, you are required to not turn over the documents. You should only turn over therapy records and notes when ordered by a judge in court or through a court order *signed by a judge*.



What To Do When a Subpoena is Served

As a practical matter, the first thing to do when you get a subpoena for therapy records is to contact the lawyer who is issuing the subpoena and tell her that the records being requested are confidential (without confirming that you have worked with the client or disclosing anything about the nature of the records). Tell the lawyer that without the authorization and consent of the client you cannot disclose the records. See if you can kindly get the lawyer to go away. (Lawyers are notorious for last-minute subpoenas and if they know you're going to resist they might give up because there's not time to get a court order.)

If the lawyer insists that you comply with the subpoena, then the next thing to do is to contact your client and confirm that he does not wish to authorize disclosure under HIPAA and he does not wish to waive the privilege. Then see if you can get in touch with your client's attorney to see if that attorney will file an objection to the subpoena so that you don't have to show up as required by the subpoena.

If your client doesn't have a lawyer, or if the lawyer, for whatever reason is not helpful, then look at the subpoena to determine whether you're being commanded to *appear in court* to bring the records and testify. If so then you have to decide whether: (1) to show up as required by the subpoena, assert the privilege, and refuse disclosure (until the privilege is either waived by your client or the judge orders you to turn over the documents) or (2) get a lawyer yourself to file a "motion to quash" the subpoena so that you don't have to show up.

If you're not being commanded to appear in court, but are being commanded to produce documents at a place and time, then you have to decide whether to prepare and serve a written objection to the subpoena yourself, or get a lawyer to prepare the objection. Once the objection is properly served, you won't need to show up and produce documents unless and until you receive a court order signed by a judge.

The Future of Psychotherapy Records in Divorce Court

People headed for divorce are often in tremendous emotional distress. They desperately need the help and support of a mental health professional. But many are afraid to see a psychologist or therapist because it might be – and can be – used against them if a nasty divorce is inevitable.

The federal courts have already recognized an absolute privilege for therapy records. A therapist cannot be compelled to testify or produce therapy records or notes in federal court. It's a travesty to make those records available in divorce court. Yet, in North Carolina it happens all the time.

Until the law in North Carolina is changed to reflect the federal standard, the best way to protect therapy clients and their families is to use collaborative law proceedings when they are headed toward divorce. In the collaborative process, neither spouse is going to be torn apart on the witness stand by being confronted with notes taken by their therapist. Collaborative divorce proceedings happen outside of a courtroom.

In a much healthier and meaningful way, the collaborative process takes into account legitimate mental health concerns and the emotional turmoil common during divorces. Often with the help and support of mental health professionals who are part of the collaborative professional team, decisions are made in the best interests of the welfare of both spouses, and, most importantly, of the children.

*At Springfield Collaborative Divorce, we focus on the use of Collaborative Law Proceedings instead of court proceedings as a legal option for couples going through a divorce. It is a method of divorcing that encourages cooperation instead of confrontation. In this way, couples can divorce with dignity and ensure respect, integrity, and kindness in the process. **Please contact us if we can answer your questions about subpoenas or collaborative divorce proceedings.***

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