

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

Committee on Legal Issues
American Psychological Association

Psychologists have numerous ethical, professional, and legal obligations regarding the release of client 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 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 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 records, test disclosure

In response to a large number of inquiries by psychologists faced with subpoenas or compelled court testimony concerning client records or test data, manuals, protocols, and other test information, the American Psychological Association's 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 nor does it establish American Psychological Association (APA) policy or guidelines. Rather, it provides some general information regarding strategies that may be available to psychologists in independent practice for responding to subpoenas or compelled court testimony concerning client records, test data, test manuals, test protocols, or other test information.

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 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. The current revision was deemed necessary in order 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 Committee on Legal Issues and the Office of General Counsel wish to thank the following individuals who participated in this revision for their time and effort in drafting and producing this version of the document: Norman Abeles, Glenn A. Ally, Stephen Behnke, Marianne Ernesto, William E. Foote, Julia Ramos-Grenier, Lisa R. Grossman, Billie Hinnefeld, Daniel A. Krauss, Alan Nessman, Antonio E. Puente, and Mark Zelig.

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As a general principle of law, all citizens are required to provide information necessary for deciding issues before a court. From the perspective of the legal system, the more relevant information available to the trier of fact (i.e., judge or jury), the greater the likelihood of a fair decision being reached. 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, *subpoenas* (legal commands to appear to provide testimony) or *subpoenas duces tecum* (legal commands to appear and bring along specific documents) may be issued. Alternatively, the court may issue a *court order* to provide testimony or produce documents. A subpoena 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's consent or a judge's order or other legal mandate, are met, in addition to having a valid subpoena. Thus, although 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.

The demands of the legal system sometimes conflict with the responsibility of psychologists to maintain the confidentiality of client records. This responsibility arises from tenets of good clinical practice, ethical standards, professional licensing laws, statutes, and other applicable laws. In many contexts, the client 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 psychotherapist–patient privilege that allows the client to prevent confidential material conveyed to a psychotherapist from being communicated to others in legal settings. In most jurisdictions, the privilege belongs to the client, not to the therapist. The psychologist has a responsibility to maintain confidentiality and to assert the psychotherapist–patient privilege unless the client has explicitly waived privilege, unless a legally recognized exception to privilege exists or unless the court orders the psychologist to turn over the client’s information. Therapy notes, process notes, client information forms, billing records, and other such information usually may be turned over to the court with an appropriate release by the client or with a court order. Psychological test material presents a more complicated situation because inappropriate disclosure 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 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) clients or other individuals who receive treatment and/or are administered psychological tests (e.g., privileged or confidential communications that may include client 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). Such obligations may, at times, conflict with one another. Under APA’s “Ethical Principles of Psychologists and Code of Conduct” (APA, 2002), hereinafter referred to as the APA Ethics Code, psychologists facing a conflict between their ethical and legal responsibilities make known their commitment to the ethics code, take steps to resolve the conflict, and may fulfill their legal obligations if the conflict is unresolvable. For more on these obligations, 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 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 records, and consultation with a lawyer may be necessary to make this determination. If a demand is not legally enforceable for any reason, then the psychologist has no legal obli-

gation to comply with it and may have no legal obligation to respond. A subpoena to produce documents generally must allow a sufficient period of 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 to 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 required—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* below). The next step, in most cases, may involve contacting the psychologist’s client. However, the psychologist may wish to consider grounds for opposing or limiting production of the demanded information before contacting the client so that the client can more fully understand his or her options (see section titled *Possible Grounds for Opposing or Limiting Production of Client Records or Test Data* below).

Contact the Client

The client 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 records or test data, the psychologist, when appropriate, discusses the implications of the demand with the client (or his or her legal guardian). Also when appropriate and with the client’s valid consent, the psychologist may consult with the client’s attorney. It is important to recognize, however, that the client’s attorney’s interests and a psychologist’s interests may diverge through the course of legal proceeding, and the psychologist may need to seek independent legal consultation and representation to make sure his or her interests are protected.

The discussion with the client will inform the client 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 or the client’s legal guardian may choose to consent to production of the data. It is safest to have such consent in writing, for clarity and if there is a need for documentation in the future. In some states, consent in writing may be required by law. The client’s consent may not, however,

¹ 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.

resolve the potential confidentiality claims of third parties (such as test publishers). For more information, see APA Ethics Code, Ethical Standards, Section 4 (APA, 2002), and *Standards for Educational and Psychological Testing* (1999).

Negotiate With the Requester

If a client 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 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 Records or Test Data below.) 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 information—release that may not be in the best interests of the client, 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's attorney.

Seek Guidance From the Court

If, despite such discussions, the requesting party insists that confidential information or test data be produced, the safest course for the psychologist may be to seek a ruling from the court on whether disclosure is required. The simplest way of proceeding, and perhaps the least costly, may be for the psychologist (or his or her attorney) to write a letter to the court, with a copy to the attorneys for both parties, stating that the psychologist wishes to comply with the law but that he or she 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. In writing such a letter, the psychologist (or his or her lawyer) may 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]), to protect the interests of the client, to protect the interests of third parties (e.g., test publishers or others), and to protect the interests of the public in preserving the integrity and continued validity of the tests themselves. This letter may help sensitize the court about the potential adverse effects of dissemination. The letter might also attempt to provide suggestions, such as the following, to the court on 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 psychologist designated by the court or by the party seeking such information.

2. Suggest that the court limit the use of client 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 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 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 privilege or another privilege (e.g., attorney–client 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][1–3]).
6. Suggest that the court shields from production “psychotherapy notes,” if the psychologist keeps separate psychotherapy notes as defined by HIPAA privacy regulations. See rule excerpts in Appendix B.

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

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 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 Records or Test Data below). This strategy may be used alone or in combination with a motion for a protective order.

A *motion for a protective order* 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 and of third parties such as test publishers and the public. The focus of this strategy first and foremost is to prevent or limit disclosure and the use of sensitive client and test information. The protective order—and the motion—may include any of the elements listed in the preceding section.

If, because of local procedure or other considerations, guidance cannot be sought through the informal means of a letter to the court, it may be necessary to file a motion seeking to be relieved

of 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.

Courts are generally more receptive to a motion to quash or a motion for a protective order if it is filed by the client 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 or other third parties. The psychologist may wish to determine initially whether the client'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's attorney in this regard. If the client has refused to consent to disclosure of the information, his or her attorney may be willing to take the lead in opposing the subpoena.

Psychologist's 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 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 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 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 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 clients 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'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, 2002).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, 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 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, 2002).

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 Web site, 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 Web site 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's Web sites may or may not be consistent with APA policy, and APA takes no position on the accuracy of legal statements or claims found on such Web sites.

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., Federal Rule of Civil Procedure 45[c][1–3]).

References

- American Psychological Association. (2002). Ethical principles of psychologists and code of conduct. *American Psychologist*, 57, 1060–1073.
- Definitions, 45 C.F.R. § 164.501 (2005).
- Fed. R. Civ. P. 45(c)
- Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104–191, 110 Stat. 1936.
- Standards for educational and psychological testing*. (1999). Washington, DC: American Psychological Association.

Appendix A

Excerpts From Sections of the APA Ethics Code (2002)

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 make known their commitment to the Ethics Code and take steps to resolve the conflict. If the conflict is unresolvable via such means, psychologists may adhere to the requirements of the law, regulations, or other governing legal authority.

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.

(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 sufficient 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.

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 American Psychological Association, 2002, *American Psychologist*, 57, pp. 1063–1064, 1066–1068, 1071–1072. Copyright 2002 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–TABLE OF
CONTENTS

Subpart E–Privacy of Individually Identifiable Health
Information

Section 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

... (c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney’s fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after

service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert’s opinion or information not describing specific events or occurrences in dispute and resulting from the expert’s study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions. . . .

(Appendix follows)

Appendix C

Disclosure Issues Diagram
The following steps may be taken, as appropriate:

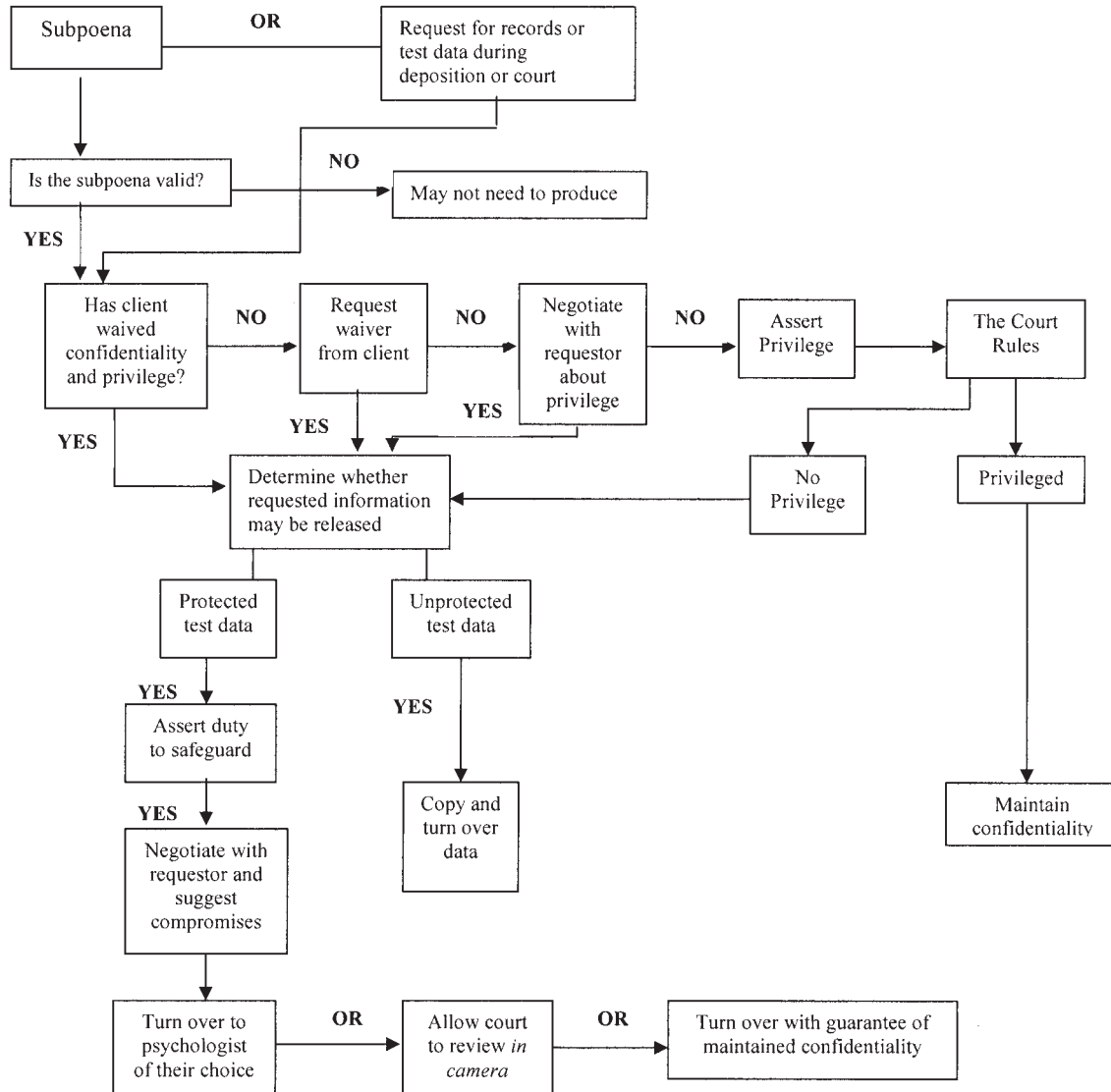


Figure C1.

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