



HOW TO STAY OUT OF COURT

BY: WILLIAM B. BERMAN, Ph.D.

DIVORCE TRANSITION SERVICES
918-745-0238

WWW.CHRISTIANFAMILYINSTITUTE.COM

How to Stay Out of Court

1. Know what the law really says about the release of mental health treatment information
 - a. Licensure rules and regulations
 - b. Oklahoma Statute
 - c. HIPAA
 - d. U.S. Supreme Court
2. Have a well defined plan for response to all subpoenas
3. Know why your clients are really in your office

LMFT Rules & Regulations

Subchapter 5. Rules of Professional Conduct

310:400-5-3. Professional competence and integrity

(n) LMFT candidates and licensees may not perform forensic services, which include, but are not limited to, assessments, interviews, consultations, custody evaluations, reports, or expert testimony, or other such activity that is undertaken or conducted by the candidate or licensee in contemplation that the results may, or are intended to be, later furnished to a trier of fact or other decision maker, except under the following conditions:

Caveat: LPC Rules and regulations are identical, but numbered and titled different

1. LMFT candidates and licensees must demonstrate competence by certification, education or experience in the subject matter relevant to the issues in question and must certify in writing that they have complied with all applicable provisions of the Rules and Regulations described in Sections 310:400-5-1(i), 310:400-5-2(d) and 310:400-5-3(e),(g),(h),(i), and (n) of this Chapter.

4. LMFT candidates and licensees must conduct a thorough examination of the person who is the subject of their forensic analysis, and such other person or persons who has/have a legally recognizable right in the subject matter of the proceeding, which may be directly adversely affected by the findings and conclusions made by the candidate or licensee, and must utilize a "face-to-face" interview of the person who is the subject of the forensic analysis, or any other such person who may be directly adversely affected by the findings and conclusions made by the candidate or licensee.

6. LMFT candidates and licensees who provide therapy services for a client may only provide fact witness testimony in forensic matters involving that client, unless otherwise required by law or court order. LMFT candidates and licensees who provide mediation, parent coordinating assistance or any other neutral participation, may not undertake to provide therapy to any person(s) involved or directly affected by the LMFT candidate's or licensee's role as a neutral participant. Fact witness testimony means evidentiary statements that are limited to direct observations of the LMFT candidate or licensee and shall not include conclusions, opinions or recommendations.

7. Assessments, interviews, consultations, custody evaluations, reports or other activity not performed in contemplation that the results would be furnished to a trier of fact or decision maker, must be kept confidential and cannot be utilized in the formation or publication of an opinion by the candidate or licensee

How Important is Confidentiality?

Confidentiality

- Relates to matters of professional ethics (although mental health licensure incorporates codes of ethics into their rules of professional conduct)
- Standards are established and maintained by professional organizations
- Intended to protect a client from unauthorized disclosure of information without the informed consent of the client.

Privileged Communication

- Relates to a legal right established by statute
- Intended to protect a client confidences from being revealed in the context of a legal proceeding without the consent of the client.

Oklahoma Statutes Citationized
_Title 43A. Mental Health
_Chapter 1 - Mental Health Law of 1986
Section 1-109 - Privileged, Confidential Nature of Medical
Records and Physician/Client Communications

A. 1. All mental health and drug or alcohol abuse treatment information, **whether or not recorded**, and all communications between a physician or psychotherapist and a consumer are **both privileged and confidential**. In addition, the identity of all persons who have received or are receiving mental health or drug or alcohol abuse treatment services shall be considered confidential and privileged.

2. Such information shall only be available to persons actively engaged in the treatment of the consumer or in related administrative work. The information available to persons actively engaged in the treatment of the consumer or in related administrative work shall be **limited** to the minimum amount of information necessary for the person or agency to carry out its function.

Oklahoma Statutes Citationized
_Title 43A. Mental Health
_Chapter 1 - Mental Health Law of 1986
Section 1-109 - Privileged, Confidential Nature of Medical
Records and Physician/Client Communications

D. Except as otherwise permitted, mental health and alcohol or substance abuse treatment information may not be disclosed without valid patient authorization or a valid court order issued by a court of competent jurisdiction. For purposes of this section, a **subpoena** by itself is not sufficient to authorize disclosure of mental health and alcohol or substance abuse treatment information.

What is "HIPAA" and Why Was it Passed?

Health **I**nsurance **P**ortability and **A**ccountability **A**ct was passed by Congress passed in 1996, to be administered by the Department of Health and Human Services (DHHS).

Purpose

In part, it was intended to facilitate continued insurance coverage of individuals who move between employers that provide health insurance without a waiting period for a prior or preexisting medical condition.

Administrative standards were also established that simplify electronic billing for health care providers, including how an individuals' health information is to be stored and transmitted electronically.

In doing so, however, the risks to the security and privacy of that information dramatically increased.

In December of 2000, DHHS issued the "Privacy Rule" to offer a higher level of protection for private and confidential health information, with a final compliance date of April 14, 2003.



HIPAA Vocabulary

BEFORE

- **Medical Record**
- **Consent to Release**
- **Release of Information**

AFTER

- **Protected Health care information (PHI)**
- **Authorization to Disclose**
- **HIPPA Compliant Authorization Form**





Enforcement of HIPAA

- HIPAA is enforced by the Department of Health and Human Services Office of Civil Rights (OCR).
- Broad range of penalties (including fines and prison) for improper use or disclosure of "protected health information" (PHI)
- Penalties for the unlawful distribution or sale of PHI may be as high as \$250,000 and 10 years in prison.



Enforcement of HIPAA

-

- **OCR received 700 complaints in its HIPAA privacy enforcement program in January 2009 for a total of 41,807 complaints since the program started in April of 2003**
- **After five years, HHS still has not imposed a civil penalty**

Jaffee v. Redmond

- *Supreme Court of the United States 518 U.S. 1 (1996)*
- *Mary Lu Redmond was a police officer in the Village of Hoffman, IL*
- *On June 27, 1991, she shot and killed a suspect who allegedly was attempting to stab another man with a knife.*
- *Redmond sought individual counseling from an social worker (LCSW) following the incident.*
- *The family of the deceased filed suit claiming that unnecessary force was used and sought damages.*
- *During the discovery phase, the plaintiff sought the treatment records from the LCSW*
- *The LCSW refused to release the records, claiming that the notes were protected by the psychotherapist-patient privilege.*
- *The trial judge rejected this argument, and the jury later awarded Allen's estate \$545,000 in damages.*
- *The Seventh Circuit reversed, finding that the Federal Rules of Evidence did, **indirectly**, recognize a psychotherapist-patient privilege.*
- *The US Supreme Court affirmed the Seventh Circuit decision*

Why is Jaffee v. Redmond Important?

- Prior to this decision in 1996, the "public good" was considered to transcend the rights of the individual.
- Thus, a judge (a "trier of facts") could compel a mental health professional to testify to the "whole truth."
- The US Supreme Court added significant strength to understanding the importance of the psychotherapist-client privilege by stating:

"Effective psychotherapy... depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communication made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede disclosure of the confidential relationship necessary for successful treatment."

Court Order

- **A directive issued by the court - May be initiated by the court or upon motion by an attorney**
- **Signed by a Judge**
- **"File stamped"**
- **"Properly served"**
- **"Local Rule"**
- **YOU MUST COMPLY**
- **At the time of appearance, the court may be willing to entertain a motion to reconsider or motion to vacate the order.**

Subpoena

- **"Subpoena" is Latin for *"under penalty or punishment"***
- **It is a command to appear**
 - at a certain place
 - at a certain time
- **Subpoena Duces Tecum**
 - summons to *"bring with you under penalty or punishment"*
 - some jurisdictions call it "Subpoena for Production of Evidence"
- **Subpoena Ad Testificandum**
 - summons *"to testify orally"*
 - may also include a command to bring certain documents

What Do I Do If I Get Served A Subpoena?

- **DON'T DO NOTHING!**
- **If you work for an agency, clinic, etc., immediately notify supervisor.**
- **That doesn't let you off the hook if your name specifically appears!**
 - **Don't accept "We will take care of it."**
 - **The court doesn't care about clinic policy.**
- **NEVER HAND OVER REQUESTED RECORDS TO THE PROCESS SERVER!**
 - **A subpoena is not a search warrant**

Subpoena v. HIPAA

Subpoena may be used to obtain PHI

IF

- HIPAA compliant authorization is attached, or
- Signed and file stamped court order is attached.

OR

- HIPAA compliant "Notice of Intent" is received prior to subpoena being served
- Notice must include a description of
 - what specific information is being sought
 - how it is to be used in the litigation process (what issue is being disputed)
 - how and when to file an objection

AND

- "Written statement and accompanying documentation" is received certifying
 - Notice of Intent was issued
 - deadline for filing objection has passed
 - any objection filed has been dismissed

What Do I Do If I Get Served A Subpoena?

Step 1

Contact your client(s)

Step 2

Determine whether the release may do harm to your client(s)

(Remember, a client can't give "informed consent" without knowing what is in their file.)

Step 3

Speak with your client's attorney to decide if a "motion to quash" is needed (after obtaining Hipaa complaint authorization)

Step 4 (optional)

Speak with the attorney that issued the subpoena

Step 5

If the subpoena is valid and not formally notified that you have been released, GO!

Step 6 (mandatory)

Get paid for your time in advance

Why Is This Family Really In Your Office?

- Must first rule out null hypothesis that there is a forensic motive
- Do not automatically accept explanation regarding why both parents are not present at intake
- Insist upon contact information for the absent parent and obtain HIPAA compliant release
- Ask about history of custody/visitation litigation **and** if anything is pending
- Use discretion regarding appropriateness of child being present during this discussion
- Obtain signed agreement stating that therapist will **not** participate in any aspect of any litigation process pertaining to any member of this family system.

