

Subpoenas vs. Court Orders and the duty to safeguard confidential client information

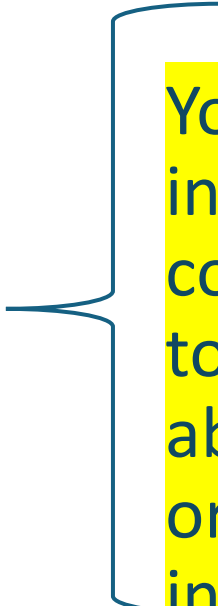
10th Annual Mental Health & Addiction Treatment
Symposium

Presented by: Florence Huffman, Attorney & Counselor at Law -- Mental Health Legal CE
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Caution: No one understands your ethical obligations better than you.

You or your attorney will likely have to educate the attorney and the judge about your ethical and legal duty of CONFIDENTIALITY and PRIVILEGE. . .

- Family & Custody Disputes
- Criminal Trials
- Civil Cases



Your professional liability insurance may provide coverage when you need to consult with an attorney about a subpoena or court order for client information.

Confidentiality means:

- The legal and ethical principle that client data or information *shall not* be made available or disclosed to unauthorized persons and/or processes.

You need to respond appropriately:

Subpoena:

1. Does NOT override the privilege and the confidentiality guaranteed to your client and their records.
2. May require objection or motion to quash if disclosure violates privilege.

Court Order:

1. The judge can COMPEL disclosure, but only after a judicial finding that the privilege does not apply or that you must yield and comply.
2. Must comply unless successfully appealed or stayed.

✓ Document all steps taken.

When can protected confidential information be shared legally?

- **Court Order:** Only a judge can compel a therapist to release records or testify.
- **Threats of Harm:** If someone poses a threat to themselves or others, counselors are often required by law to report it.
- **Suspected Abuse:** Therapists are mandated reporters and must report suspected child, elder, or dependent adult abuse (KRS 620.030 and KRS 209A.030).

KRS 335.170(3) (social workers) and comparable sections for counselors, psychologists, marriage & family therapists, and psychiatrists create statutory confidentiality and privilege.

Disclosure may occur only:

- With written client consent;
- Under mandatory-reporting laws (e.g., abuse, threat of harm); or
- Pursuant to court order after the judge has reviewed the necessity and limited scope of the disclosure.

HIPAA overlay: Under 45 C.F.R. § 164.512(e), a provider may release records in response to:

A court order, limited to what the order authorizes; or

A subpoena or discovery request with satisfactory

- assurances that:

- The patient was notified and had an opportunity to object;

or

- A qualified protective order (restricting use and re-disclosure) is in place.

Rule of Evidence 506: Counselor-Client Privilege

- Amended effective July 1, 2024
- Defines "counselor" to include various licensed professionals such as school counselors, sexual assault counselors, and marriage therapists.
- Establishes that a "client" is someone seeking professional or crisis response services.
- Confidential communications are protected unless disclosed to third parties for the client's interest.
- Clients can refuse to disclose communications, with exceptions for claims involving the client's mental or emotional condition and when the court finds the need for information outweighs the privilege.

What else protects your client's records?

Rule 507: Psychotherapist-patient privilege

A "psychotherapist" is:

- (A) A person licensed by the state of Kentucky, or by the laws of another state, to **practice medicine**, or reasonably believed by the patient to be licensed to practice medicine, while engaged in the diagnosis or treatment of a mental condition;
- (B) A person licensed or certified by the state of Kentucky, or by the laws of another state, as a **psychologist**, or a person reasonably believed by the patient to be a licensed or certified psychologist;
- (C) A **licensed clinical social worker**, licensed by the Kentucky Board of Social Work; or
- (D) A person licensed as a **registered nurse or advanced registered nurse practitioner** by the board of nursing and who practices psychiatric or mental health nursing.

Rule 507 General rule of privilege vs. Exceptions

A patient, or the patient's authorized representative, has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purpose of diagnosis or treatment of the patient's mental condition, between the patient, the patient's psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.

Rule 507 EXCEPTIONS: there is no privilege . .

- (1) In proceedings to hospitalize the patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization;
- (2) If a judge finds that a patient, after having been informed that the communications would not be privileged, has made communications to a psychotherapist in the course of an examination ordered by the court, provided that such communications shall be admissible only on issues involving the patient's mental condition; or
- (3) If the patient is asserting that patient's mental condition as an element of a claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of a claim or defense.

Is there really a big difference?

Subpoena

- A legal document that directs a person to attend a legal proceeding or produce documents
- It's a form issued by an attorney or a court clerk

Court Order

- An order issued by a judge that requires a person to do or refrain from doing something.

Legal Delivery (Service) of a Subpoena in Kentucky

Authority

- Kentucky Rules of Civil Procedure (CR) 45 governs subpoenas in state courts; Federal Rule 45 applies in federal proceedings.

Types

- **Subpoena ad testificandum** – compels personal appearance to testify at a hearing, deposition, or trial.
- **Subpoena duces tecum** – compels a person or custodian to *produce* documents, records, or tangible evidence (and sometimes also to appear).

Subpoena – AOC Form

Issuance

- May be issued by the clerk of court, or by an attorney of record as an officer of the court.
- Must state the name of the court, case caption, and docket number, and describe precisely what is commanded (appearance, documents, or both).

Subpoenas continued . . .

Service (Delivery)

- **Who may serve:** Any non-party adult (18+). In practice, most are served by the sheriff, constable, or professional process server.
- **How served:**
 - Personal delivery of the subpoena (and any witness fee if required) to the person named; or
 - Certified mail, return receipt requested, if authorized by local practice.
 - You DO NOT have to accept an email.
- **Timing:** Must allow reasonable time for compliance; CR 45(d) says typically at least 14 days before production or appearance, unless the court orders otherwise.
- **Proof of service:** The server completes a certificate of service or return filed with the court.

Subpoena *Duces Tecum* (Documents)

- Used to compel records, such as medical or therapy notes, employment files, bank documents, etc.
- May specify that the recipient mail or deliver records to the requesting attorney or court by a certain date.
- If the subpoena requests ***protected or privileged material***, the custodian (or the client/patient) may:
 - File a motion to quash or motion for protective order under CR 26.03 and 45(c); or
 - Object in writing to the production, identifying the specific privilege claimed.

KEY POINTS TO REMEMBER:

- A subpoena is NOT self-executing authority to disclose confidential information protected by law.

If privilege or confidentiality applies, the custodian must withhold the material pending either:

1. Client consent/release, or
2. Court order expressly authorizing disclosure.

Practical Steps When Served

- **Read carefully** – what is requested and by what date?
- **Verify service** – was it properly served under CR 45?
- **Determine privilege/confidentiality** – legal, medical, or psychotherapeutic.
- **Consult counsel** – to file a motion to quash, motion for protective order, or objection letter within the allowed time.
- **Preserve records** – do not release, alter or destroy anything.
- **Await direction** – release only with client authorization or signed judicial order.