

NOTEBOOK ON ETHICS, LEGAL ISSUES AND STANDARDS IN COUNSELLING

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Guidelines for Dealing with Subpoenas and Court Orders

In the Ethics Notebook, for October, 1999, I suggested that counsellors should treat requests from lawyers for client information like any other informal request. Proceed with caution! Such requests must always meet the conditions for 'informed consent'. All forms for the release of client information should be checked carefully and, whenever possible, counsellors should contact the client directly regarding the request. Should written informal consent be obtained then any disclosures should be limited to boundaries set within the informed consent process.

Formal requests from a court for information, on the other hand, should be handled differently. Such requests are either subpoenas or court orders. A subpoena is a legal command to provide information or to give testimony. Sometimes it can require both testimony and disclosure of specific documents. This is called subpoenas duos tecum. Since in Canada, unlike the United States, there is no counsellor-client privilege, there is virtually no information generated within these counselling relationships which is outside the reach of the courts. However, judges are typically sensitive to the counsellors' ethical responsibility to protect their clients' confidentiality, and do not require us to breach confidentiality unless there are compelling reasons to do so. Judges often apply the Wigmore criteria to enable them to adjudicate whether the breaching of confidentiality is warranted in a particular instance, see Cognica for further details.

The following guidelines, although not legal advice, may prove helpful should you receive a subpoena or court order,

- Always make a timely response to such requests. (But don't panic!) Counsellors are encouraged to consult with a lawyer before making any release of 'subpoenaed' information. Counsellors are also reminded that a decision to comply with such requests will not leave them legally vulnerable to a charge of breach of confidentiality. Nevertheless, disclosure should be restricted to only the information requested and disclosing additional information may be seen as a confidentiality violation.
- Never destroy information in response to a subpoena or to an expectation of receiving one. Such conduct, if proven, may be judged as obstruction of justice or contempt of court.
- Counsellors should consult their clients when in receipt of a subpoena or court order. After all 'confidentiality' belongs to the client not to the counsellor. Therefore, arguments advanced to court, on behalf of the client to cancel or further restrict the information requested may receive a more sympathetic hearing.
- Sometimes there are requests for informational disclosure which may have significant negative consequences. For example, court disclosure of test items, psychometric protocol, and other testing data may seriously affect the validity of a test and its integrity as a psychometric instrument. This is the type of request to which a counsellor may decide to resist compliance but, nevertheless, will need to make a formal response indicating the rationale for any concerns. It would be appropriate to seek legal counsel in advancing any such objections to the court. There are a number of court

decisions in Canada which support the withholding of such psychometric information. However, lawyers are best equipped to assist in presenting such legally based arguments. (I will share one such case in a future issue of Cognica).

Sometimes through negotiations with the requestor of the subpoena, a counsellor's concerns about the disclosure of certain information will be respected, and more restricted boundaries set for the request.

- There may be compelling reasons for a counsellor, in response to a particular subpoena, to file a motion to have it cancelled or modified. This will require the assistance of a lawyer. Also, a counsellor may seek the guidance of the court on a particular subpoena. For example, with respect to a demand for certain psychometric information a counsellor could argue that a disclosure would adversely affect third party interests such as those of test publishers and the public who wish to preserve the validity and integrity of certain psychometric instruments. This, too, could result in a more restricted disclosure than initially decided. Sometimes subpoenas are very broad to maximize access to information without much sensitivity to the nature of the information being requested.

In the final analysis, if a subpoena or court order is not withdrawn or modified, then counsellors must comply with the original request for disclosure with or without their client's consent.