

# Death Of The Patient

## Avoiding Liability Bulletin - December 2009

... What happens when your patient dies and your treatment records are thereafter subpoenaed or you are subpoenaed to appear and testify in a legal proceeding? Does the psychotherapist-patient privilege survive the death of the patient? If so, who is the holder of the privilege in such a case? How is the therapist or counselor to react to the service of the subpoena? Depending upon state law, the answers will vary. And, in some cases, there may be complications.

With respect to the question of who is the holder of the privilege, and by way of example, California law says that if the patient is dead, the holder of the privilege is the personal representative of the deceased. This would typically mean that the executor or administrator of the estate of the deceased is the holder of the privilege (the person who may waive or assert the privilege on behalf of the deceased). What does the law in your state provide? Who holds the privilege after the patient dies? Does the privilege survive the death of the patient (in other words, is it still applicable)?

With respect to the question of how the therapist or counselor should react, each practitioner should be familiar with the laws and policies or procedures that govern how a practitioner is to respond when served with a subpoena for treatment records or for the practitioner's testimony. I have previously written, in the Avoiding Liability Bulletin, several pieces on the subject of privilege within the CPH and Associates' website. Again using California as an example (and there is good reason to do so), a psychotherapist would typically assert the privilege and resist disclosure of records until the holder of the privilege can express his or her desires and give direction to the psychotherapist, or until the court orders the therapist to disclose the records or to testify.

Depending upon the wording of the statute involved in the case of a deceased patient, ambiguous situations may arise that can complicate matters for the therapist or counselor. For example, how is the therapist or counselor supposed to determine whether there is a "holder" in existence? What if the practitioner has no idea whether the patient left a will or a trust at the time the subpoena arrives? If there was a will that named a personal representative of the deceased patient, may that person assert the privilege even though a probate court has not issued the necessary paperwork to officially confirm the appointment as executor (personal representative)?

It is not my intent to answer these questions – only to raise them. I raise them for the purpose of encouraging the reader to inquire into these issues now – so that if faced with a situation – as many practitioners have faced – where the patient suddenly dies (e.g., victim of a crime, in an accident, suicide, heart attack), the issue of privilege is not ignored. Often, when a patient suddenly dies, one or more family members will contact the therapist or counselor for any number of reasons. The issue, and duty, of confidentiality is then in the forefront. This piece deals with privilege – that is, your right and/or duty, consistent with state law, to initially assert the privilege and resist the

production of records (or the giving of testimony) in a legal proceeding, should your records (or you) be subpoenaed.

Once the privilege is asserted, the search for the “holder” of the privilege will typically begin. During the period of time that the privilege is first asserted by the practitioner and the time when a holder of the privilege is found to exist, will the practitioner be forced to produce records or perhaps testify? Would the judge rule that if there is no holder of the privilege in existence then the privilege has been lost and the records must be produced and testimony given? How does the law treat these issues in your state?

## **RED FLAGS RULE**

... Once again, the Federal Trade Commission has postponed the date when enforcement of the Red Flags Rule will begin. The new date has been set for June 1, 2010. I have previously written about the Red Flags Rule and its potential impact upon individual practitioners and others. See the June 2009 Avoiding Liability Bulletin.

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