

Texas State Board of Examiners of Psychologists

Newsletter Vol. 26, No. 1

The Duty to Report: It's not just about child and elder abuse

When a person becomes licensed by the Texas State Board of Examiners of Psychologists, that individual is required by Board rule 461.15 to comply with the Psychologists' Licensing Act and the Board's rules. The failure to comply with the Psychologists' Licensing Act or the Board's rules may subject the individual to a Board initiated complaint and disciplinary action.

Board rule 469.11 is integral to the Board's ability to carry out its mission to protect the public by ensuring that psychological services are provided to the people of Texas by qualified and competent practitioners who adhere to established professional standards. Board rule 469.11 requires a licensee to report in a prescribed fashion, those legal actions bearing a reasonable relationship to the ability to deliver appropriate psychological services.

First, pursuant to Board rule 469.11(a)(1), a licensee must report any criminal action taken against them, including, but not limited to, arrest, indictment, or conviction. The list of reportable criminal actions set forth in this rule is not an exclusive list, and would include any information or complaint (i.e. misdemeanor charges) brought or filed against a licensee, as well as pre-trial diversion and deferred adjudication dispositions. However, the Board does not require a licensee to report speeding tickets or other minor traffic violations.

Criminal actions must be reported by the licensee within 30 days of the activity. By way of example, if a licensee is stopped while driving and arrested for DWI, but receives pre-trial diversion 6 months later, the licensee must have notified the Board of his or her arrest within 30 days in order to have complied with Board rule 469.11. If the licensee waits until they receive

pre-trial diversion before reporting to the Board, they will have violated Board rule 469.11.

Second, pursuant to Board rule 469.11(a)(2), a licensee must report any civil lawsuit in which he or she is involved pertaining to the practice of psychology or involving a patient or former patient. If the licensee initiated the lawsuit, he or she must send a copy of the initial pleadings to the Board within 30 days of filing the lawsuit. If the licensee is a defendant in the lawsuit, he or she must send a copy of the initial pleadings, which would include a copy of the plaintiff's pleadings, to the Board within 30 days of service upon the licensee. A licensee, who initiates a lawsuit, should in addition to submitting a copy of his or her own pleadings, send a copy of any counterclaim filed against them within 30 days of service.

Third, pursuant to Board rule 469.11(a)(4)-(5), a licensee must report any administrative action initiated or disciplinary action taken against them by another health licensing board in this state or any other jurisdiction. A report of an administrative action or disciplinary action must be accompanied by a copy of any correspondence, complaint, sanction, order, letter of discipline, or other similar document reflecting the administrative or disciplinary action, within 30 days of its receipt by the licensee. It is important to note that a voluntary surrender of a license issued by another health licensing board in this state or any other jurisdiction during an investigation or in lieu of disciplinary action, constitutes disciplinary action under the Board's rules and must be reported.

Lastly, the failure to fully and fairly respond to questions and instructions on the Board's annual renewal application concerning unreported legal actions, may also constitute a violation of Board rules 461.15 pertaining to compliance with Board directives and 461.16(b) pertaining to

inaccurate or false information in an annual renewal application.

New Executive Director for the Texas State Board of Examiners of Psychologists

The Board, at its August 16, 2012 meeting, amidst an outpouring of appreciation and recognition from the Board Members and members of the public in attendance, gave special acknowledgment to the retirement of Sherry L. Lee. Ms. Lee served as the Board's Executive Director from August 12, 1996 to August 31, 2012. When speaking of her retirement, Ms. Lee states that she plans on becoming "truly bilingual, a notable cook, an avid gardener, and a jack-of-all-trades, the latter for which I have had plenty of experience due to my service on the Board. Most importantly, I am confident that the future of the Board is in good hands."

Although Ms. Lee's contributions to the Board will be missed, the Board would like to express its best wishes to her on this new chapter in her life. The Board has hired Darrel D. Spinks, the Board's former General Counsel, as Ms. Lee's successor.



Seated, left to right: Monica Fiero, Rebecca Pounds, Sherry L. Lee, Carol Erickson, and Maricela Ramirez. Standing, left to right: Tracy De Bont, Christina Limon, Cynthia Barber, Darrel Spinks, Brenda Skiff, Jennifer Noack, Brian Creath, and Jeanette Waldrop.

Board Rule 465.18(e), Forensic Opinions Regarding Child Visitation: You've got to know when to hold'em.

In fiscal year 2012, the Board disposed of 228 complaints, 32 of which were forensic in nature. That same fiscal year, the Board heard 39 cases at its informal settlement conferences, 13 of which were forensic in nature. Although the Board's forensic complaints made up only 14% of the complaints disposed of that year, they made up 33% of the cases heard at informal settlement conferences. Stated another way, forensic complaints take up a disproportionate amount of the Board's time and resources.

In an effort to curtail the number of forensic complaints the Board is receiving, the Board would point out the recent amendment to Board rule 465.18(e) pertaining to forensic opinions regarding visitation and parenting access. Previously, this rule read as follows:

(e)Child Visitation. Forensic opinions as to child visitation and parenting arrangements must be supported by forensic evaluations.

(1)Licensees may provide treatment or evaluation, but not both in the same case.

(2)A treating psychologist may express an opinion as to the progress of treatment, but shall refrain from rendering an opinion about child visitation or parenting arrangements, unless required to do so by court order.

However, the Board proposed the following amendment at its August board meeting, and the amendment was adopted at the October board meeting.

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(2)A treating psychologist may express an opinion as to the progress of treatment, but shall refrain from

rendering an opinion about child visitation or parenting arrangements, unless required to do so by court order.

(3)Basis of forensic opinions as to child visitation and parenting access.

(A)The evaluation must be specific to the issue of visitation or parenting access. A general evaluation of an affected party's psychological condition is insufficient.

(B)The evaluation must be court ordered, or the psychologist-expert retained specifically to offer such opinion.

(C)Any evaluation to address the issue of visitation or parenting access must include an evaluation of all affected parties to the proceeding, or identify why a child or affected party was not evaluated, and include a statement as to the limitations on validity imposed thereby.

The amended rule reiterates in greater detail the requirement that any forensic opinion or report pertaining to child visitation or parenting access be based on information and techniques sufficient to provide appropriate substantiation. A licensee who has not met the requirements of this amended rule, yet is questioned about his opinion would do well to follow the advice of the proverbial gambler and “know when to hold'em.”

Board Welcomes New General Counsel



The Board is pleased to welcome Kristin Evelyn Starr as its new General Counsel. Ms. Starr, who started in October 2012, is a native to Central Texas, having grown up in Georgetown. She completed her undergraduate studies at

St. Edward's University in Austin and her Juris Doctor degree at Baylor Law School in Waco. Since receiving her law license in 2009, she has worked both as a legal analyst and an attorney in private practice.

What Do You Do When Served With A Subpoena?

Scope of this Article

There are 4 basic areas of the law in which you might receive a subpoena:

1. A civil case in state court (e.g. a divorce/custody or car accident case);
2. A criminal case in state court (e.g. a grand jury subpoena);
3. A state administrative proceeding; and
4. A case or proceeding in the federal system.

This article addresses the first two scenarios **only**, because those scenarios seem to be the most frequently encountered by the Board's licensees.

Responding to a Civil Subpoena

Governing Law. Although not an exhaustive list, the most often cited laws governing the discoverability of confidential mental health information are:

- ❖ Chapter 611 of the Texas Health and Safety Code

This chapter does several things: it grants patients access to their records (Section 611.0045), imposes a duty of confidentiality for communications and records (Section 611.002), and authorizes the disclosure of confidential information in specified circumstances, both within the context of a judicial or administrative proceeding (Section 611.006), and outside that context as well (Section 611.004). You are strongly encouraged to study the authorized disclosures for confidential information found in Sections 611.004 and 611.006 of the Health and Safety Code.

- ❖ Texas Rule of Evidence 510

This evidentiary rule governs the disclosure of communications between a patient and a provider, mental health records, and information gleaned from confidential communications or records, in a civil proceeding. In summary, this

rule imposes a duty of confidentiality with limited exceptions, most of which may also be found in Ch. 611 of the Health and Safety Code. However, unlike Ch. 611, this rule does allow for the disclosure of confidential information pertaining to a communication or record relevant to an issue of the physical, mental or emotional condition of a patient in any proceeding in which any party relies upon the condition as a part of the party's claim or defense.

❖ Texas Rule of Civil Procedure 176

This provision authorizes an attorney, a court clerk (for a district, county, or justice court), or a court reporter in a civil proceeding to issue a subpoena, either instructing a person to appear, commanding a person to produce documents or other things, or both. The rule requires that the subpoena be personally served on the person (not faxed or mailed), and it also prescribes certain geographical limitations for compelling the person's appearance. Suffice it to say, there are technical requirements that may allow escape from compliance, but would still require action to do so, e.g. hiring an attorney to file a motion to quash the subpoena or seek a protective order.

❖ Texas Rule of Civil Procedure 205

This provision governs the manner in which a party to a civil proceeding may compel discovery from a nonparty, and requires that the nonparty respond in accordance with TRCP 176.6. A party may seek to compel discovery from a nonparty through a deposition and/or a request for production of documents or tangible things by obtaining a court order or serving a subpoena. The rule sets out a detailed procedure for the type of notice that must be filed with the court and provided to a nonparty concerning the discovery sought. In the event medical or mental health records of a nonparty are being sought from another nonparty (e.g. Defendant serves a subpoena on the psychologist providing therapy to Plaintiff's spouse who is not a party to the litigation), the requesting party must serve the nonparty whose records are being sought with a copy of the notice required by this rule as well. Lastly, the rule requires that a party requesting production of documents by a

nonparty must reimburse the nonparty's reasonable costs of production.

❖ Texas Rule of Civil Procedure 193.3

This provision governs the manner in which assertions of privilege from discovery, such as a claim of confidentiality under Ch. 611 or TRE 510, must be made. This rule, together with TRCP 176.6, also speaks to when and in what manner confidential materials may be withheld from production. In summary, privileged material may be withheld from production, but a responding party must inform the party issuing the subpoena that responsive information or material has been withheld, identify the request to which the withheld information or material relates, and identify the privilege(s) asserted.

❖ Texas Rule of Civil Procedure 192.6

This provision governs the manner in which a protective order may be sought by a person from whom discovery is requested, or any other person affected by the discovery request. A protective order may be sought to protect against undue burden, unnecessary expense, harassment, annoyance, or invasion of personal, constitutional, or property rights. Although a person should not move for protection when an objection or assertion of privilege is appropriate, a motion for protective order will not waive the objection or privilege.

Compliance. There is one universal rule that applies regardless of the type of subpoena: Do Not Ignore It! A timely response could be required for several reasons, such as to avoid non-compliance or to preserve an applicable privilege. The following analysis should assist you in determining the appropriate response, both from a legal and practical standpoint:

Does the party at whose instance (i.e. on whose behalf) the subpoena was issued have legal authority to consent to the release of the records?

If YES → Produce the records as requested. Under these circumstances, the subpoena should be treated as a written request for the records.

- In a case regarding a child's records, a parent's attorney would be an authorized person, assuming the parent has the right to access the child's psychological records.
- Beware of partial compliance however, because the subpoena may still require you to show up and testify unless you are released by the person who issued the subpoena.

- involving the patient's mental or emotional health;
- a judicial proceeding affecting the parent-child relationship;
- any criminal proceeding, as otherwise provided by law; and
- a judicial or administrative proceeding where the court or agency has issued an order or subpoena.

If NO → You may not disclose the confidential information unless (1) authorized by the patient, (2) ordered to do so pursuant to a court order, or (3) authorized by Section 611.006 of the Health and Safety Code or TRE 510. By way of example, Section 611.006 authorizes a provider to disclose confidential information in:

- a judicial or administrative proceeding brought by the patient or the patient's legally authorized representative against a professional, including malpractice proceedings;
- a license revocation proceeding in which the patient is a complaining witness and in which disclosure is relevant to the claim or defense of a professional;
- a judicial or administrative proceeding in which the patient waives the patient's right in writing to the privilege of confidentiality of information or when a representative of the patient acting on the patient's behalf submits a written waiver to the confidentiality privilege;
- a judicial or administrative proceeding to substantiate and collect on a claim for mental or emotional health services rendered to the patient;
- a judicial proceeding if the judge finds that the patient, after having been informed that communications would not be privileged, has made communications to a professional in the course of a court-ordered examination relating to the patient's mental or emotional condition or disorder, except that those communications may be disclosed only with respect to issues

Upon being served with a subpoena issued at the instance of someone other than your patient, prudence suggests that you immediately notify the patient in writing that their confidential information is being sought, preferably by sending them a copy of the subpoena. This allows the patient an opportunity to contest the subpoena if they so choose, and possibly excuse you from compliance.

You would also be well advised to review, and if necessary comply with the provisions of HIPAA, 45 C.F.R. §164.512 prior to disclosing any confidential information. Generally speaking, if it is possible to comply with both state law and HIPAA, then you must do so. Although the Office of the Attorney General of Texas has issued a report discussing those Texas laws preempted by HIPAA¹, the infinite factual scenarios that providers may encounter when receiving a subpoena make a comprehensive analysis difficult to provide. You are encouraged to study the OAG's preemption analysis of the relevant Texas laws relating to confidential information (i.e. protected health information), which includes Ch. 611 of the Health and Safety Code, to determine whether state law, HIPAA, or both govern the disclosure of the information sought.

In the event that HIPAA does apply to your situation, the procedure that must be followed before a disclosure may be made is set forth in 45 C.F.R. §164.512(e). In summary, this rule requires that you receive satisfactory assurance

¹ See *Preemption Analysis of Texas Laws Relating to the Privacy of Health Information & the Health Insurance Portability & Accountability Act & Privacy Rules (HIPAA)* (November 1, 2004) (Tex. Att'y Gen.)

from the party seeking the confidential information that reasonable efforts were undertaken to (1) provide the patient with notice of the request for the confidential information, or (2) secure a qualified protective order. You will note that the requirements of HIPAA in this instance resemble Tex. R. Civ. P. 205 and 192.6. As an alternative to this approach, 45 C.F.R. §164.512(e)(1)(vi) authorizes you to make reasonable efforts to provide the patient with notice of the request for their confidential information, or secure a qualified protective order in lieu of seeking satisfactory assurance from the requesting party. A reasonable effort to provide a patient with notice under this alternative approach could consist of simply sending a copy of the subpoena to the patient or their attorney, with a letter explaining your intention to comply if an exception to confidentiality applies.

Once you have notified a patient that their records are being sought and they fail or refuse to give their consent or take steps to excuse your compliance with the subpoena, you must determine whether any of the exceptions found in Ch. 611 or TRE 510 apply. If the confidential information sought falls within one of the exceptions in Ch. 611 or TRE 510, you must produce the information. However, if no exceptions to disclosure apply, you must elect to do one of the following:

- Withhold the confidential information in accordance with the law, unless ordered to do otherwise by a court; or
- Seek a protective order or file a motion to quash.

To illustrate the interplay between state law and HIPAA, the following examples are provided:

Example 1. Father files a motion to modify child custody (i.e. a suit affecting the parent-child relationship or SAPCR) against his ex-wife who is the mother of the child at issue. During the course of discovery, Father's attorney issues a subpoena for the treatment records of Mother's new husband, who is not a party to the SAPCR, claiming

that the husband's mental condition renders him a danger to the child's safety. Although the treatment records are confidential, the request for the records fall within the exceptions found in Ch. 611.006(6) and TRE 510(d)(5). While the Father's attorney would need to comply with the various rules of procedure governing discovery from non-parties, the psychologist would need to comply with HIPAA, 45 C.F.R. §164.512(e) prior to complying with the subpoena.

Example 2. Driver is travelling down the road alone in his car when a semi-truck strikes his vehicle causing him severe injuries. Driver files suit against the trucking company for his injuries which include mental pain and anguish, and the trucking company's attorney issues a subpoena for the treatment records of Driver's wife from her psychologist. Although, the Driver's psychological treatment records would be discoverable under TRE 510(d)(5), neither party is relying upon the wife's mental health as a basis for their claims or defense in this lawsuit. Thus, the psychologist may not produce the requested information absent the patient's consent or a court order. Tex. Health & Safety Code Ann. §611.006(11) only authorizes a professional to disclose confidential information in response to a court order or subpoena issued by an administrative agency. Moreover, the psychologist should also comply with HIPAA, 45 C.F.R. §164.512(e) in this instance to ensure the patient has received notice of the attempt to subpoena her records.

As you can see from the brief summaries of the various laws governing the release of mental health records and the foregoing examples, the law is complex and fraught with opportunities for the inexperienced to make a mistake. Thus, you are strongly encouraged to consult with an attorney if you have any doubts about your

responsibilities following the service of a subpoena.

In the event you do not have an attorney, you should seek a reference from your friends, colleagues, or lawyer referral service, and examine your professional liability insurance policy to determine if the coverage provided includes hiring an attorney to assist you with responding to a subpoena or discovery efforts. In addition to the lawyer referral services provided by the various professional psychological associations, the State Bar of Texas provides referrals through the Lawyer Referral Information Service at 800-252-9690. While the Board's General Counsel can provide you with general information about how the Board interprets its rules, state laws, and HIPAA, she cannot provide a licensee with legal advice.

Responding to a Criminal Subpoena

Governing Law.

- ❖ Texas Code of Criminal Procedure Article 20.10

Authorizes the attorney representing the state (e.g., the prosecutor) and the Grand Jury Foreman to issue a subpoena requiring a witness within the county to appear before the Grand Jury.

- ❖ Texas Code of Criminal Procedure Articles 24.01, 24.02, and 24.04

These provisions allow a witness to be summoned by subpoena to appear before a court or grand jury. The subpoena may also specify any "instrument of writing or other thing desired as evidence" that the witness is to produce when they appear. These subpoenas are issued by the court clerk. Service may be accomplished by reading the subpoena within the hearing of the witness, delivering a copy to the witness, or sending it electronically or by certified mail.

- ❖ Texas Code of Criminal Procedure Article 35.27

This section provides for reimbursement of a non-resident witness's transportation, meal, and lodging expenses. The witness must reside outside the state or the county, and the expenses must be "reasonable and necessary" and be incurred by reason of the person's attendance as a witness.

- ❖ Texas Rule of Evidence 509(b)

This rule nearly eliminates the physician-patient privilege in the context of a criminal case. However, communications made to any person involved in the treatment or examination of alcohol or drug abuse, by a person being treated voluntarily or being examined for admission to such treatment are not admissible in a criminal proceeding.

Compliance. The detailed discovery procedures available in a civil case are not present in a criminal case, and a grand jury subpoena is the most comparable mechanism that you are likely to encounter. Furthermore, because of the broad exceptions to confidentiality set forth in Tex. Health & Safety Code Ann. §611.006(7) and HIPAA, 45 C.F.R. §164.512(f) there will be few instances where you may lawfully seek to withhold confidential information in a criminal proceeding. Again however, when in doubt about your duty to respond to a criminal subpoena, you are strongly encouraged to seek professional guidance, in order to ensure compliance with the law.

**Disciplinary Actions:
October 2012 Board Meeting**

John Murray Lehman, Ph.D., Licensed Psychologist (Richardson)

Complaint: Respondent failed to report a legal action within the time prescribed by law.

Sanction: Respondent was assessed an administrative penalty of \$500.

Francis J. Pirozzolo, Ph.D., Licensed Psychologist (The Woodlands)

Complaint: Respondent failed to provide the Board with proof of the required continuing education hours for the preceding year.

Sanction: Respondent was assessed an administrative penalty of \$750.

Laura Jan Warner, M.S., Licensed Psychological Associate (Dallas)

Complaint: Respondent failed to timely report an arrest.

Sanction: Respondent was assessed an administrative penalty of \$250.

**Disciplinary Actions:
February 2013 Board Meeting**

Bruce Mansbridge, Ph.D., Licensed Psychologist (Austin)

Complaint: Respondent failed to adequately document supervision activities of a licensed psychological associate providing services under his supervision.

Sanction: Respondent's license was reprimanded. Respondent was assessed a \$4,000 administrative penalty and was required to complete 12 hours of continuing education.

Patricia R. Owen, Ph.D., Licensed Psychologist (Helotes)

Complaint: Respondent failed to provide the Board with proof of the required continuing education hours within the time prescribed by law.

Sanction: Respondent was assessed an administrative penalty of \$750.

Santhi Periasamy, Ph.D., Licensed Psychologist (Houston)

Complaint: Respondent supervised an unlicensed and non-exempt individual who was providing psychological services.

Sanction: Respondent was assessed an administrative penalty of \$2,000 and was required to complete 3 hours of continuing education.

Francis J. Pirozzolo, Ph.D., Licensed Psychologist (The Woodlands)

Complaint: Respondent failed to provide the Board with proof of the required continuing education hours within the time prescribed by law.

Sanction: Respondent's license was reprimanded. Respondent was assessed an administrative penalty of \$1,250.

Kathryn Watson Soward, Ph.D., Licensed Psychologist (Corpus Christi)

Complaint: Respondent gave recommendations in a court case concerning custody and parenting arrangements without having conducted a proper forensic evaluation.

Sanction: Respondent's license was reprimanded. Respondent was assessed an administrative penalty of \$1,500, and was required to complete 12 hours of continuing education.

Laurel Lee Strahan, Ph.D., Licensed Specialist in School Psychology (Burleson)

Complaint: Respondent failed to timely renew her license and practiced on a delinquent license.

Sanction: Respondent's license was suspended for a period of two years, the entirety of which was probated. Respondent was assessed an administrative penalty in the amount of \$3,000, and was required to complete 6 hours of continuing education.

Lawrence Eligio Thompson, Ph.D., Licensed Psychologist (El Paso)

Complaint: Respondent failed to report a criminal action within the time prescribed by law.

Sanction: Respondent was assessed an administrative penalty of \$750 and was required to complete 3 hours of continuing education.

Jennifer Nichole Trapani, Ph.D., Licensed Psychologist (Austin)

Complaint: Respondent failed to properly obtain informed consent before providing therapy to a minor child. Respondent gave custody recommendations in a court case without having conducted a custody evaluation.

Sanction: Respondent's license was reprimanded. Respondent was assessed an administrative penalty of \$2,000, was required to complete 6 hours of continuing

education, and was required to have an informal practice monitor in place for a period of 1 year.

Allan D. Vreeland, Ph.D., Licensed Psychologist

(Dallas)

Complaint: Respondent failed to release requested materials to another qualified mental health professional after receiving a written release from the client.

Sanction: Respondent's license was reprimanded. Respondent was assessed an administrative penalty of \$3,000, was required to complete 12 hours of continuing education.