The PORTABLE LAWYER for MENTAL HEALTH PROFESSIONALS

An A–Z Guide to Protecting Your Clients, Your Practice, and Yourself

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WILEY
The Portable Lawyer for Mental Health Professionals
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Third Edition

Thomas L. Hartsell, Jr., JD  
and  
Barton E. Bernstein, JD, LMSW

WILEY
I dedicate this book to my Dad, Tom Hartsell, Sr., aka Pops, who we lost this summer, and miss greatly. Pops, you were the best man I will ever know. I will do my best to follow and live up to the example you set for me.

To Barbara, my inspiring and loving wife, whose ability to patiently cohabitate with me never ceases to amaze and please me. I appreciate all you do to keep the home fires stoked and inviting.

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—TLH, 2013

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Lawyers don’t know what therapists really do, so how can they know when (if) they do it wrong.
Anonymous; first heard by the authors about 30 years ago

The governmental regulation of the delivery of mental health services is now pervasive on both the state and federal level. It is virtually impossible to be a practicing mental health professional without having secured both a graduate degree in a mental health discipline and a license issued by a state board. If you choose to become licensed in more than one discipline, such as counseling and marriage and family therapy, you will need to complete the requisite course work required by each discipline while earning your graduate degree and then pass the licensing exam for each license as well as complete the supervised hours dictated for each license. When fully licensed in both disciplines, you may find yourself to be governed by two distinct state regulatory authorities.

Any license you receive is not permanent; it is loaned to the licensee, who may act only within the authority granted by the license. If a license violation occurs because of an ethical infraction, as defined by the licensing law; or continuing education credits are not sought and maintained; or a renewal is late; or a check for renewal does not clear the bank, the license can be revoked or suspended, thus ending or interrupting a professional career. The power of the licensing board is awesome and seriously applied. Also, malpractice suits have both intended and unintended consequences. Professional liability insurance coverage is always recommended.

With increased regulation has come greater oversight of mental health professionals. The authors have noticed that technical violations or mistakes by licensed practitioners often result now in published sanctions being imposed by regulatory authorities in lieu of advisory letters. The need for continuing education, therefore, both formal and informal, has never been greater. Mental health professionals face harsh consequences if they act negligently or unethically with clients, the institutions with which they are associated, or both. They may not be allowed to renew their malpractice insurance policies; or they may fail to qualify as managed care providers because of a blemish on their record. In short, accountability requires in-depth knowledge of the law as well as published ethical standards, which are promulgated by all licensing boards and most national organizations.

The Portable Lawyer is primarily directed to mental health professionals of all disciplines who can benefit from a quick and ready reference to legal and
ethical issues. The book is organized to cover over 36 general topics. When practitioners/providers of mental health services recognize a question or situation that has possible legal or ethical overtones, they can consult the contents listing and be guided toward rules and principles that apply to the specific problem at hand, without extensive research. Armed with fundamental knowledge and examples of relevant documents, together with the answers to questions suggested in this text, practitioners can make informed decisions, including consulting with a lawyer for further clarification and advice.

*The Portable Lawyer*, third edition, is secondarily directed to consumers of mental health services who feel something has gone wrong with the services available or already being provided. Because of the mystique surrounding mental health (from consumers’ point of view), the recipients of mental health treatment often do not know where to go to discover whether the actions of a therapist or provider are appropriate. This book offers a compendium of what can go wrong. A consumer can then decide whether the treatment received was appropriate or actionable. In most instances, we would hope that the therapy will be found competent, caring, appropriate, and helpful.

Since 2004 we have continued to conduct workshops and seminars, and to teach graduate level courses on Mental Health Law and Ethics. In addition, as a result of our publications and work as a consultant for CPH & Associates, an agency specializing in providing professional liability insurance to mental health professionals, we consult almost daily with mental health professionals from around the country with legal and ethical questions arising in their practices. These questions are often very specific and case oriented, and state-specific rules may come into play. It is apparent that many practitioners came out of their graduate studies with a good general overview of ethical principles to guide them in their professional work but very little knowledge of the technical rules by which they must practice. For example, practitioners will have a general sense that they must report child abuse, but when asked what the state law requires with respect to time to report or content of report, they are unable to provide an answer.

General principles are important to understand, but mental health professionals are also looking for guidance in specific situations for which technical statutory rules may apply. In this third edition, we will continue to build on the general principles described in the original works by including answers to the questions we have been most frequently asked over the past 8 years and by adding additional information and knowledge. As always we encourage readers to seek the advice of an attorney in their jurisdiction for clarification of explanations and principles included in this book. We will also continue to remind practitioners to ascertain the specific technical rules that may apply in the location where they practice.

We have amended and supplemented many of the forms from the previous editions as changes have been suggested to us over the years and as the literature, rules, statutes, case law, and practical examples indicated additions or changes
would better serve the provider. We have added new forms, such as Informed Consent Form: Psychological Testing (Chapter 8) and a Professional Limited Liability Company Member Agreement (Appendix F). These forms can be found in the appendixes of the book and can be downloaded in word format at the following internet address and link: www.wiley.com/portablelawyer. We caution practitioners to use these forms only in consultation with their own legal advisors to be sure the forms suit the individual practice needs of the practitioner and the laws and regulations of his or her state.

In the second edition of this book we included sections on the 1996 Health Insurance Portability and Accountability Act (HIPAA) Privacy and Security Rules and their implications for the delivery of mental health services. In this third edition we have included a discussion of, and references to, the Health Information Technology for Economic and Clinical Health (HITECH) Act that imposes additional responsibilities for breaches of information and expands coverage of significant portions of the Security Rule to nontreatment providers who come into contact with protected health care information. The Business Associate Agreement forms have been updated to reflect the requirements of the HITECH Act.

The Privacy and Security Rules are well established and the Office of Civil Rights, now charged with the duties of compliance and enforcement for both sets of rules, has become increasingly more active in performing those duties. It has become clear to us that larger health entities are well versed on the rules and in better compliance with them than small or solo mental health practitioners. Even for small or solo practices we have observed a startling lack of knowledge about the Security Rule even when there is a solid understanding of what the Privacy Rule requires. It is a rare practice today that does not create, receive, store, or disseminate some protected health information in electronic format, thereby requiring compliance with the Security Rule.

We have included references to each rule and the HITECH Act where appropriate in each chapter and encourage professionals to carefully review the chapters devoted specifically to these federal laws and regulations and bring themselves into compliance as quickly as possible. The federal authorities may come to call when you least expect it. One of the interesting aspects of the Privacy Rule is the seemingly unbridled right the federal authorities have to access you and your practice records in support of its compliance and investigatory duties. We find this to be a very ironic, and troubling, privacy exception created by the Privacy Rule. We cannot eliminate all practice risk for mental health professionals, but our goal is to provide them with current and helpful information to substantially lower that risk.

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We also want to give our heartfelt thanks to all the practicing mental health professionals who have the commitment and compassion to work in the trenches each day to make the world a better and brighter place for all of us, one client at a time. You are the true inspiration for our efforts.

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SECTION ONE

CLINICAL RECORDS
Protected or Not
Melody had been a client of Ms. Ford, MSSW and a licensed clinical social worker, for about five years, on and off. Melody called Ms. Ford during times of crisis but ignored her in between. There had been a 16-month lull between Melody’s last visit, and Ms. Ford assumed Melody was doing all right. Melody had called once, indicating she was in love and had found the ideal man. Ms. Ford dutifully recorded the call in Melody’s file. Within a few years Melody married and had a child. Then her marriage began falling apart. A contested divorce followed, in which custody or conservatorship was the issue. Both Melody and her husband petitioned the court to be designated as the primary parent of the child—the parent with whom the child would live, and who would receive child support. The other spouse would be allowed visitation only at certain specified times. As part of the custody battle, a process server shows up at Ms. Ford’s door with a subpoena, seeking all the clinical records Ms. Ford has maintained in Melody’s file.

Does Ms. Ford have to turn over the original records to the process server? If there is a deposition, does Ms. Ford have to appear and bring all Melody’s clinical records to the deposition? If there is a court hearing and Ms. Ford receives a subpoena duces tecum (she is to come in person and bring all Melody’s records), does she have to comply with the subpoena and testify, revealing every aspect of the records and commenting on each response given during cross-examination?

The ultimate question is: Are the records of a mental health professional protected from the curious or meddling, information-seeking public or an investigative reporter or the attorney for the opposition in a contested suit? When therapists pick up a pen or sit at a computer, do they have to keep in mind that whatever they write down for purposes of therapy can and might become part of the public domain? Is the therapist presented with a personal and professional conflict when clinical notes created to assist in the therapeutic process become involved in the legal process in a manner that was never intended? Does every therapist need to keep notes with the withering cross fire of cross-examination in mind?
Clinical Records/Clinical Notes Must Be Maintained

Long gone are the days when therapists could keep clinical records in their heads. When a threat of malpractice arises, or when a complaint is filed with the licensing board, the clinical notes are often the first line of defense. The board or the attorney for the plaintiff requests all clinical notes as the initial procedure in the investigation. The most common way a therapist testifies in legal proceedings is through the client file that is introduced into evidence.

Whether we like it or not, clinical notes—including electronic records—cannot be fully protected from disclosure in legal proceedings.

Every therapist must keep and maintain clinical notes, preserving them for 5 to 10 years for adults, or 5 to 10 years past majority for clients who are minors. The Health Insurance Portability and Accountability Act (HIPAA) Privacy and Security Rules require a minimum 6-year retention period regardless of state law, for all documentation required by these rules.

Customs of the profession indicate what records must be maintained. The operative issue is, What notes would a reasonable and prudent therapist keep under the same or similar circumstances? In addition, the ethical canons of many jurisdictions, usually stated in guidelines published by the various licensing boards, require that certain records be maintained on each client.

For example, in various states, the code of ethics and professional standards of practice might include these themes:

- **Therapist shall base all services on an assessment, evaluation, or diagnosis of the client.** This standard would suggest that therapists must maintain notes that contain clinical information and the rationale for the assessment, evaluation, and diagnosis of the client. It also implies that the treatment plan should be supported by the same factors.

- **Therapist shall evaluate a client’s progress on a continuing basis.** The notes on each client must be maintained and updated throughout the treatment process. All changes in the assessment, evaluation, prognosis, and diagnosis, as well as the treatment plan, are updated continuously, as long as the client is in treatment. When terminated, the record should record the reason for termination.

- **For each client, therapist shall keep records of the dates of services, types of services, and billing information.** Routine, accurate billing records and third-party payment forms provide the means of fulfilling this requirement.

- **Therapist shall not disclose any confidential information but will take reasonable action to inform medical or law enforcement personnel if the professional determines that there is a probability of imminent physical injury by the client to the client or others, or there is a probability of immediate mental or emotional injury to the client.**
Although the exact confidentiality requirements vary greatly from jurisdiction to jurisdiction, confidentiality canons should always raise a red flag. In general, confidentiality is to be maintained. But when the specter of homicide or suicide appears, the state statute must be consulted. In some jurisdictions, there is a duty to warn the identifiable, apparent intended victim; in others, the therapist must, or sometimes, may, alert the police or a medical treatment provider. In some instances, the therapist is required to call a client’s family to prevent a possible suicide; in other states, such a call might be a breach of confidentiality and could have secondary consequences including personal liability. Research the requirements of your state carefully when confidentiality is at issue. HIPAA’s Privacy Rule, discussed more thoroughly in Section Eleven, attempts to create a minimum floor for the protection of confidential health care information. Careful review reveals, however, that most preexisting state law exceptions to confidentiality survive HIPAA’s bold intentions.

In light of a therapist’s instincts and training to protect clients from harm the issue of what to document in the client’s clinical record can certainly conflict with the therapist’s duty to create and maintain records as required by licensing board and professional association dictates. When you overlay the fact that the clinical record is usually the first line of defense for the therapist in a malpractice case or board complaint the conflict becomes magnified. A helpful mind-set for the therapist to employ is to document the clinical record from the perspective of a subsequent therapist who is forced to take over treatment of the client in the event the original treatment provider suddenly dies. Document by answering the question: What would another therapist need to know to be able to step into my shoes and effectively resume treatment? If the therapist does this, the clinical file should be sufficient to meet the interests of all parties.

Can Clinical Records and Notes Be Protected?

Statutes granting the therapist–client privilege vary, so make sure to consult the statutes in your state and federal HIPAA law. In general, a client’s mental health information is not subject to disclosure to third parties. But, in reality, a different maxim is operative: What the big print giveth, the small print taketh away. That is, the guarantee of privilege is made hollow by exceptions to the statute. For example, generally there is no mental health privilege when a parent–child relationship is involved and custody is an issue; or when a crime has been committed; or when the mental health of a party is an issue in litigation; or when there is child or elder abuse; or when a suit is filed against a therapist.

There are states that allow a therapist to maintain personal notes. Records kept only for personal use by a therapist that are not part of the clinical record and not subject to disclosure. Even in the states that allow for and protect personal health privilege in parent–child custody situations.
notes they may be subject to in-camera inspections by a court to determine their qualification as protected personal notes and their admissibility into evidence. If you intend to rely on a state law that allows you to keep personal notes outside the clinical file, be sure to understand just how the law defines personal notes and what exceptions if any exist to their disclosure. Another point to remember is that once a therapist is called to testify, all the information stored in the therapist’s brain and not reflected in the client’s file may be drawn out by thorough questioning by the attorneys and the judge.

Personal notes may still be subject to an in-camera review by a judge.

When professionals discuss the confidentiality of mental health records, they have to inform clients of the limits of confidentiality, as mandated by the state and federal law. For the therapist’s protection, the limits on confidentiality should be clearly spelled out in the original intake and consent form signed by the client before therapy begins as well as in the Notice of Privacy mandated by HIPAA’s Privacy Rule. (See Chapter 6 and Appendix K for sample forms.)

Practitioners must also keep in mind that the privilege (i.e., the desire to protect the record) belongs to the client. If the client tells the therapist to make the record public, then the therapist must ordinarily do so. (The client’s request should be written, signed, and dated. In some states, it may have to be notarized. HIPAA’s Privacy Rule also requires specific language to be included in a client’s authorization and in order to release psychotherapy notes a written, signed consent from the client is required. Psychotherapy notes are the recordings of the communications between a therapist and the client.) If a therapist feels, as a matter of professional judgment, that the file should not be made public, he or she may file a motion with the appropriate court to restrict publication of the file. This motion will lead to a hearing and a judicial determination. The therapist does not possess the right to refuse to disclose the file if the client and court determine it should be made public. The burden of proof is on the therapist. The court must be shown that revealing the file to the client would be harmful to the client, and that the best interest of the client would be served by keeping the file confidential, even from the client. In several relatively new cases, therapists were able to protect and preserve the confidentiality of a child’s file from parents by showing the court that revealing the file to parents or the court would damage the child and would not be in the best interest of the child.

Two remedies are available when the therapist seeks to preserve the confidentiality of a file when a subpoena is served: (1) a motion to quash and (2) a motion for a protective order. Generally, a motion to quash points out a technical problem that renders a subpoena invalid. A motion for a protective order acknowledges the validity of the subpoena but argues against the scope of the subpoena. A therapist who wishes to introduce either of these legal remedies would be well advised to seek representation and engage an attorney. When the court rules on the motions, the therapist must, of course, abide by the ruling.
Answers to Frequently Asked Questions About:

Subpoenas
Subpoenas duces tecum
Fees for evaluation
Fees for court appearances
Problems when clients change attorneys

Question

I am in the final stages of conducting a custody evaluation. I have a signed agreement from both parents and both parents’ attorneys agreeing to a fee structure, initial deposit, and an understanding that both evaluation and any court testimony would be provided at a predetermined fee; that is, I would be compensated at my customary rate. During the latter part of the evaluation, one of the parents changed attorneys, then the new attorney subpoenaed me to court after his new client had fallen far behind in payments to me for the evaluation, and I had already applied all of his initial deposit to his bill. Should I honor the subpoena (not a bench subpoena from the judge but from the new attorney’s office)? Are there other ramifications of this situation?

Answer

In some states, attorneys have the legal authority to issue subpoenas to which you must comply. And this includes a subpoena duces tecum, whereby you have to bring the client’s records with you. (Take a copy as well as the original so the copy may be introduced into evidence if required, and you keep and preserve your original clinical notes.) Assuming this is true in your jurisdiction, you must appear in court at the time and date specified in the subpoena, even though one or more of the parties have breached their contractual obligation to pay your fees.

The issue with respect to the subpoena is not whether you must appear at the stated time and place but whether or not you can disclose confidential information or records once you do appear.

HIPAA’s Privacy Rule and many states provide that if the subpoena for records is accompanied by a document providing adequate assurance that the client whose records are sought was given prior notice of the requested disclosure and did not act to bar disclosure, the therapist is permitted to comply and provide the information or records without securing client consent or a court order.

In the absence of adequate assurance it is imperative to seek client consent to the disclosure. Further, assuming you have consent from the parties who hired you to disclose their confidential or privileged information, you must give testimony
and produce subpoenaed records. If you are uncomfortable or unwilling to do so, you should retain an attorney to file a motion to quash the subpoena or a motion for a protective order. In our opinion, it is unlikely the court will quash the subpoena in your case, since custody is an issue in the case and you may have relevant information on that issue. Since the parties and prior counsel agreed that you would be paid a predetermined fee for courtroom testimony, announce to each side what that fee will be. Mail or fax a letter to each party and their current counsel telling them what your fee is and that you expect payment prior to your appearance in court. Let the defaulting party and his or her attorney know the total charges due to you from that party. Send copies of each letter to the court. It is important to let the judge know what the agreement of the parties was regarding your services and what fees are due to you. The judge may be able to make a ruling on how, when, and by whom you get paid.

It is possible you will have to testify without getting paid what is owed you. An option is to file suit for your fees against the breaching party after the case is concluded. It usually (read: almost always) is unwise, however, to sue a client for a fee, although fee collection cases give rise to an exception to confidentiality. Suits over fees often result in malpractice and ethical complaint counterclaims, especially if the party sued is unhappy with the court’s ruling on the case in which the therapist gave testimony. It is better to chalk it up to a bitter learning experience, and consider it a reminder to charge future clients sufficient retainer fees up front, that is, in advance, to cover your evaluation time and courtroom testimony.

### Additional Thoughts

- Honoring a subpoena is important. If a subpoena is issued and there are technical issues with respect to the subpoena itself or service of the subpoena, it is still better to make arrangements to appear in court with the subpoenaed records. Defects in a subpoena can easily be cured, and usually, all dilatory actions do delay the inevitable.
- Suing a client for a fee, though legal and justified, is never a good idea.
- We, as lawyers, have defended many therapists before licensing boards when unhappy clients filed seemingly frivolous complaints inspired by collection efforts.
- Create a trust fund account. Whenever there is an evaluation or the possibility of a courtroom appearance, have the client make a deposit in trust. If the fund is used for professional services, the therapist keeps the trust money. If unused, it is cheerfully refunded to the client.
- Such trust funds are mandated for lawyers who often are in possession of sums of money belonging to clients. Your lawyer can help you set up the fund, as can your banker and accountant.
- If this client is angry with you to begin with, and further, if the client loses the case, the client will try to blame someone other then himself or herself. Who
is the obvious person to blame? You. And a complaint or malpractice suit is likely to follow costing you time, money, and emotion.

• You are entitled to be paid for court appearances, for making copies of clinical files, and for professional evaluations. Put it in a contract, get the money in advance, insist on trial preparation, but, if you do not get paid, forget it. Unpaid bills are a business risk.

**The Bottom Line**

• Clinical records must be maintained for every client.
• Clients have to be informed what is confidential and privileged and what is not confidential and privileged. Ms. Ford has an ethical and legal obligation to inform her clients what is and is not confidential and privileged before providing services.
• Subpoenas cannot be ignored. The therapist has to take affirmative action to protect a file.
• Electronic records are subject to subpoena.
• If a discipline requires a state license, the licensing board usually publishes guidelines that set out the minimum standards necessary for clinical records and notes.
• A therapist usually can maintain only one set of records. Private records, or personal notes are permitted in some states but may be subject to in-camera inspections by a court. If not permitted under state law, court testimony indicating that the therapist had two sets of records, one for the client and the other for the therapist, can be embarrassing. HIPAA’s Privacy Rule provides (with the usual exceptions) that psychotherapy notes (i.e., a therapist’s notes on what was said by the client and therapist during a session) can only be disclosed with specific written client authorization.
• Questions regarding homicide, suicide, and other duty-to-warn situations are in a constant state of legislative and judicial flux. When a problem arises, call your lawyer and your malpractice insurance carrier. A court decision or a new statute can change the rules between the time of publication and the time of the incident.
• If a record, in the interest of the therapist and the client, is to be protected, both, as a team, should consult a lawyer, who can then take the necessary legal steps to protect the file, the therapist, and the client.

Because the therapist records, protects, and maintains the file, keep in mind that every note contained in the file should be written with the possibility of disclosure in court, under oath, with a judge, lawyers, parties, possibly members of the public, and a court reporter present. Also keep in mind that your records will impact how a court or other third parties will view your level of competence and professionalism.

Clinical notes can never be fully protected, even when they may contain information detrimental to the client. Efforts can be made to protect confidentiality. The privilege that safeguards records must be exercised when necessary. Both clients and therapists must know the limits imposed by law.
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**Legal Lightbulb**

- A privilege must be granted by statute or there is no privilege.
- Don’t promise clients that everything they tell you will be kept confidential. In the intake and consent form along with the HIPAA Privacy Rule Privacy Notice, set out in writing all the exceptions to confidentiality. Don’t worry if the form is lengthy. Remember, the purpose of the consent form, carefully drafted by your lawyer, is to protect you.
- It takes a lawyer to help you protect a file.
- It only takes an evening to:
  - Read the state statutes concerning privilege and confidentiality and the federal Privacy Rule.
  - Read the state board requirements regarding clinical records and the duty to warn when a client is a danger to self and/or others.
  - Read the state and national standards for record keeping, if published.
- If a therapist attends a lecture, reads a book, or takes a class concerning therapy and law, the words of the lecturer are educational and not the practice of law. That is, a student or seminar participant can’t sue the professor if the participant follows the professor’s advice given in a lecture and the advice turns out to be incorrect. Hiring a lawyer is a different matter. If a lawyer is engaged, the lawyer is professionally responsible for the advice given. There is a difference, for professional liability purposes, between the practice of law and the educational experience.