The APSAC Handbook on CHILD MALTREATMENT

SECOND EDITION

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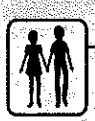

APSAC ***American Professional Society on the Abuse of Children***

other cases, discussion narrows the information requested.

What if my client does not want me to respond to the subpoena? As stated earlier, a client cannot override the duty to respond to a subpoena. At the same time, however, some subpoenas are invalid and can be resisted. For example, a subpoena may seek disclosure of information that is protected by the psychotherapist-patient privilege. A subpoena does *not* override this privilege. Sometimes, the client is too young to decide, yet the adults in the child's life are not making responsible decisions. What to do? If the client wants to resist the subpoena, or if resistance is in a child's best interest, the appropriate action is to file a motion in court to quash the subpoena. A motion to quash a subpoena may be filed by the child's attorney, a prosecutor, or the professional's attorney.

When a motion to quash is filed, a judge decides whether the subpoena is valid. The professional may have to testify at the hearing on the motion to quash. If the judge quashes the subpoena, the professional does not have to respond. The judge may decide, for example, that records sought by the subpoena are privileged. On the other hand, if the judge rules that the subpoena is valid, the professional must comply or risk being held in contempt of court.

Instead of a motion to quash, the Committee on Legal Issues (1996) of the American Psychological Association suggests that the professional may wish to write to the judge, sending a copy of the letter to the lawyers. The committee stated,

> The simplest way of proceeding, and perhaps the least costly, may be for the psychologist (or his or her attorney) to write a letter to the court, with a copy to the attorneys for both parties, stating that the psychologist wishes to comply with the law but that he or she is ethically obligated not to produce the confidential records or test data or to testify about them unless compelled to do so by the court or with the consent of the client. In writing such a letter, the psychologist (or his or her lawyer) may request that the court consider the psychologist's obligations to protect the interests of the client, the interests of third parties (e.g., test publishers or others), and the interests of the public in preserving the integrity and continued validity of the tests themselves. This letter may help sensitize the court about the potential adverse effects of dissemination. The letter might also attempt to provide suggestions, such as the following, to the court on ways to minimize the adverse consequences of disclosure if the court is inclined to require production at all:
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> 1. Suggest that, at most, the court direct the psychologist to provide test data only to another appropriately qualified psychologist designated by the court or by the party seeking such information.
> 2. Suggest that the court limit the use of client records or test data to prevent wide dissemination. For example, the court might order that the information be delivered, be kept under seal, and be used solely for the purposes of the litigation and that all copies of the data be returned to the psychologist under seal after the litigation is terminated. The order might also provide that the requester may not provide the information to any third parties.
> 3. Suggest that the court limit the categories of information that must be produced. For example, client records may contain confidential information about a third party, such as a spouse, who may have independent interests in maintaining confidentiality, and such data may be of minimal or no relevance to the issues before the court. The court should limit its production order to exclude such information.
> 4. Suggest that the court determine for itself, through in camera proceedings (i.e., a nonpublic hearing or a review by the judge in chambers), whether the use of the client records or test data is relevant to the issue before the court or whether it might be insulated from disclosure, in whole or in part, by the therapist-client privilege or another privilege. (p. 247)

What if my client receives a subpoena and calls me for advice? Needless to say, mental health and medical professionals do not give legal advice. For legal advice, the client is referred to a lawyer. The professional may work with the lawyer. Of course, the professional helps the client deal with the psychological aspects of testifying.

Verbal Evidence of Abuse: Hearsay

A child's statements to professionals, parents, and others may be powerful evidence of abuse. Yet, such statements are hearsay and cannot be repeated in court unless an

exception to the rule against hearsay applies. Although there are numerous exceptions to the hearsay rule, only four play a day-to-day role in child abuse cases: (a) the excited utterance exception, (b) the medical diagnosis or treatment exception, (c) the exception for prior consistent statements, and (d) the child hearsay exception.

Excited Utterance Exception

An excited utterance is a hearsay statement that relates to a startling or traumatic event. To be admissible in court, the excited utterance must be made while the child is still upset. To determine whether the child was sufficiently upset, the judge considers the following:

1. *Nature of the event.* The more startling and traumatic the event, the more likely a child's statement describing the event is an excited utterance.
2. *Lapse of time.* The more time that goes by between the startling event and the child's statement relating to the event, the less likely the statement qualifies.
3. *Emotional and physical condition.* If the child is upset, crying, or in pain when the statement is made, the odds increase that it is an excited utterance. On the other hand, if the child is calm, the odds decrease.
4. *Speech pattern.* The way the child speaks may indicate excitement. The words themselves may evidence excitement.
5. *Spontaneity and questioning.* The more spontaneous the child's statement, the more likely it is an excited utterance. Open-ended questions such as "What happened?" do not destroy spontaneity. As questions become suggestive, spontaneity may suffer.

Medical Diagnosis or Treatment Exception

Most states have an exception to the hearsay rule for certain statements to professionals providing diagnostic or treatment services. This exception includes statements of medical history, past and present symptoms, pain, and the cause of injury or illness. The exception applies to statements to medical professionals such as nurses and physicians. In most states, the exception applies to statements to mental health professionals.

To increase the probability that the medical diagnosis or treatment exception applies, professionals should document the following: (a) the child's understanding of the clinical purpose of the interview or examination, (b) the child's awareness of the importance of providing accurate and complete information, (c) why information provided by the child is pertinent to diagnosis or treatment, and (d) if the child identifies the perpetrator, why knowing identity is pertinent to the ability to treat or diagnosis the child.

Child Hearsay Exception

Most states have a hearsay exception for reliable statements that do not meet the requirements of traditional exceptions such as excited utterances and statements for medical diagnosis or treatment. The key issue under the child hearsay exception is reliability. Document anything that sheds light on reliability, including the following:

1. *Spontaneity and questioning.* The more spontaneous the child's statement, the better. Spontaneity is related to the suggestiveness of questioning.
2. *Consistency.* Consistency within and across interviews is a barometer of reliability, although complete consistency is not required.
3. *Developmentally unusual sexual knowledge.* Young children lack the knowledge to fabricate detailed and anatomically correct accounts of sexual acts (see Chapter 19, this volume). Of course, care is taken to rule out alternative explanations for a child's developmentally unusual sexual knowledge.
4. *Motive to lie.* Does the child or an adult have a motive to lie?

Prior Consistent Statements

When a child testifies, the defense may cross-examine the child to undermine the child's credibility. When the cross-examiner's questions leave the impression that the child's testimony is fabricated, the judge may allow adults to describe the child's earlier statements that are consistent with the child's testimony in court.

Documentation

Professionals who interview and treat children should do two things: First, professionals should record children's hearsay statements. Do not paraphrase. Exact quotes are preferred. In addition to recording the child's words, it is important to document the questions that elicited the child's statements. Second, professionals should document the factors judges use to determine whether children's hearsay statements meet the requirements of an exception to the rule against hearsay. The Verbal Evidence Checklist provided in Figure 16.1 can be used to document the necessary information.

Conclusion

Child abuse and neglect are complex problems requiring complex solutions. The past 30 years have taught us that no single profession has all the answers. Interdisciplinary cooperation is indispensable. Yet, professional jealously and narrow-mindedness ("My way is the best way") are facts of life. To bridge the gap between professions, we need to "sit around the same fire," spend time with each other, and learn about each other. Greater understanding leads to greater appreciation. It is hoped that this chapter sheds a little light on the legal system for readers who had the good sense not to go to law school.