

ETHICS ISSUES 2018

BRUCE A. MCCURDY, ED.D.
GEORGE T. DAVIS, PH.D. J.D.
NOVEMBER 1, 2018



Slides will be available at: [www.TennLegal.com/Downloads/](http://www.TennLegal.com/Downloads/2018%20TPA%20Conference)
"2018 TPA Conference:" [near bottom]



On Phone browser or Computer:

www.pollev.com/conf2017

On Phone using text:

Text **CONF2017** to **22333**

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2018 TPA Conference:



LTE 35% 11:08 PM

< 22333



11:06 AM CONF2017



You've joined George Davis' session (CONF2017). When you're done, reply LEAVE

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D



You can't vote any more on this poll. To clear your

Enter message

SEND



Background

Bruce McCurdy, Ed.D.

E.D. Counseling Psychology, 1995

Counseling Psychologist, Health Service Provider and
Director of the Counseling Center at Christ
Community Church, Franklin, TN

Adjunct Professor Trevecca University

Department of Graduate Counseling since 2006

Adjunct Professor Lipscomb University

Contact Dr. McCurdy at

bruce.mccurdy@christcommunity.org

Background

George T. Davis, Ph.D. J.D.

Ph.D. Clinical Psychology 1984

J.D. Law 1999

Consultant with SSA disability determination since 1986

Adjunct Professor at Vanderbilt/Peabody Human

Development and Counseling Program since 2006

Legislative Liaison Tennessee Psychological Association

Private Practice in Family Law

Contact Dr. Davis at GeorgeDavis@TennLegal.com



Disclaimer

- Anything we say may be wrong and immediately refuted by those more knowledgeable
- Don't rely on anything we say



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D



You can't vote any more on this poll. To clear your

Enter message

SEND



Test poll

Record retention: You can delete a record of a disturbed client you fear will sue you as soon as the mandatory retention period is passed?

Yes, always

Yes, in the regular course of business procedures

No, because you suspect they may sue you

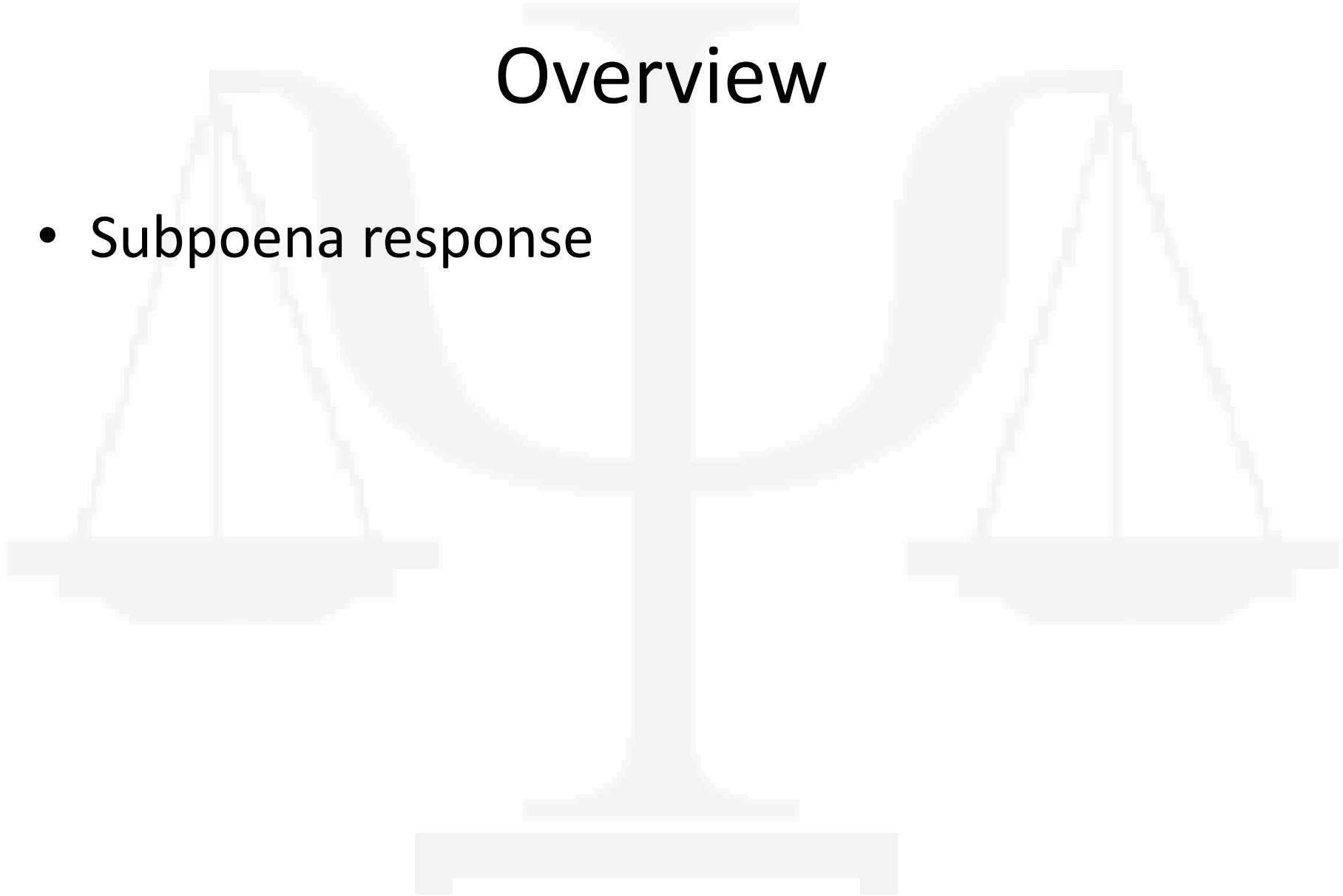
No, because they are incompetent

Overview



Overview

- Subpoena response



Overview



- Subpoena response
- Conflicting values between clients and therapists



Overview

- Subpoena response
- Conflicting values between clients and therapists
- Employer considerations

Overview



- Subpoena response
- Conflicting values between clients and therapists
- Employer considerations
- Abuse, neglect or dangerous clients

Overview



- Subpoena response
- Conflicting values between clients and therapists
- Employer considerations
- Abuse, neglect or dangerous clients
- Electronic issues impacting therapists

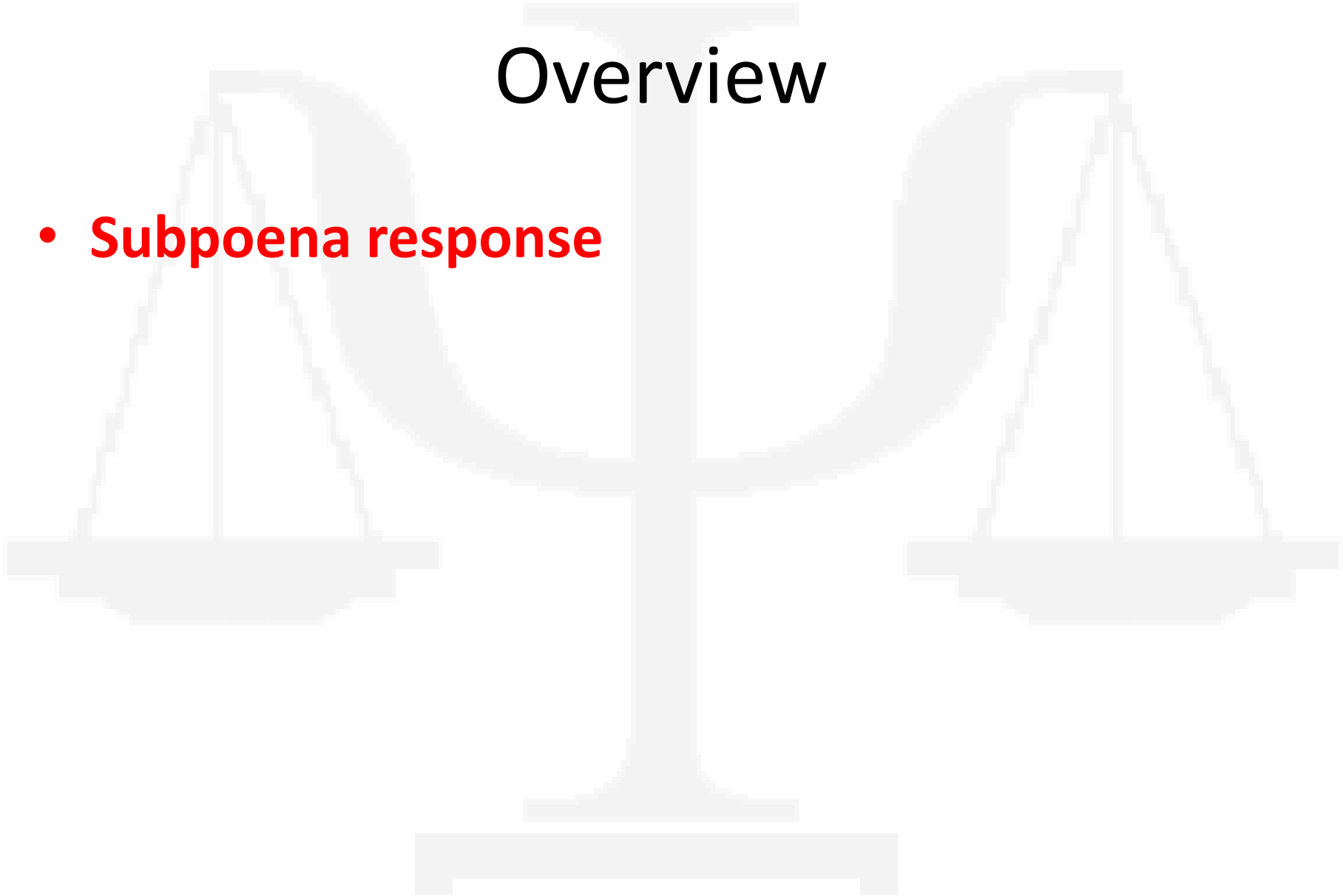
Overview



- Subpoena response
- Conflicting values between clients and therapists
- Employer considerations
- Abuse, neglect or dangerous clients
- Electronic issues impacting therapists
- Social media world

Overview

- **Subpoena response**





SUBPOENA

Do I have to go?

Is it valid?

What about the other spouse, do they have to give permission?

What about pay, do I have to go if I'm not paid?



SUBPOENA

How does confidentiality fit in? APA code of ethics?

SUBPOENA DEFINITION

The obligation of the individual to attend the court as a witness is enforced by a process of the court, particular process being the subpoena ad testificandum, commonly called the subpoena in the United States. This writ, or form, commands the witness, under penalty, to appear at a trial to give testimony. Thus, the subpoena is the mechanism for compelling the attendance of a witness.

DUCES TECUM

“Bring with thee.” A writ commonly called a subpoena duces tecum, commanding the person to whom it is directed to bring with him some writings, papers, or other things therein specified and described, to a deposition, to counsel for litigants in an action, or before the court. In general, all relevant papers in the possession of the witness must be produced, but to this general rule there are exceptions. E.g., attorneys and solicitors who hold the papers of their clients cannot be compelled to produce them, unless the client could have been so compelled; neither can documents that are covered by the 5th Amendment's protection against self-incrimination.



SUBPOENA

- Created by attorney



SUBPOENA

- Created by attorney
- Signed by clerk



SUBPOENA

- Created by attorney
- Signed by clerk
- No judge input

STATE OF TENNESSEE DAVIDSON COUNTY Circuit Court	<h1 style="margin: 0;">SUBPOENA</h1>	CIVIL ACTION DOCKET NO. 9D-1234
<input checked="" type="checkbox"/> DUCES TECUM <input type="checkbox"/> MEDICAL RECORDS (SEE HIPAA REQUIREMENT BELOW)		

PLAINTIFF SMITH, BOB	DEFENDANT vs. SMITH, SALLY
---------------------------------------	---

TO: (NAME, ADDRESS & TELEPHONE NUMBER OF WITNESS) George Davis, Ph.D. 6307 Ramsgate Court Brentwood, TN 37027 615-498-1014	Method of Service: <input type="checkbox"/> Davidson County Sheriff <input checked="" type="checkbox"/> Personal Service <input type="checkbox"/> Out of County Sheriff
---	---

You are hereby commanded to appear at the time, date and place specified for the purpose of giving testimony. In addition, if indicated, you are to bring the items listed. Failure to appear may result in contempt of court which could result in punishment by fine and/or imprisonment as provided by law.

TIME 11/15/12	DATE 9am	ITEMS TO BRING: all records, testing
PLACE Circuit Court Clerk 1 Public Square, Room 302 Nashville, TN 37201 (OR) Dewey, Cheatem & Howe 123 Main Street Nashville, TN 37219		<input type="checkbox"/> Additional List Attached

This subpoena is being issued on behalf of <input type="checkbox"/> PLAINTIFF <input checked="" type="checkbox"/> DEFENDANT	DATE ISSUED 11/1/12
---	----------------------------

Attorney: (NAME, ADDRESS & TELEPHONE NUMBER) Attorney Dewey 123 Main Street Nashville, TN 37219	<u>RICHARD R. ROOKER</u> Circuit Court Clerk
--	---



SUBPOENA

Is it valid?

- Signed by clerk
- Out of state... *International Shoe v Washington*
- To deposition or to trial?

SUBPOENA

International Shoe v Washington

The basic formulation is: a state may exercise personal jurisdiction over an out-of-state defendant, so long as that defendant has "sufficient minimum contacts" with the forum state, from which the complaint arises, such that the exercise of jurisdiction "will not offend traditional notions of fair play and substantial justice . . ."
See 326 U.S. 310 (1945).

If it is an out of state subpoena, you likely can ignore it unless you own land there.

TCA 24-9-101

24-9-101. Deponents exempt from subpoena to trial but subject to subpoena to deposition — Award of fees and expenses if court grants motion to quash. —

(a) Deponents exempt from subpoena to trial but subject to subpoena to a deposition are:

- (1)** An officer of the United States;
 - (2)** An officer of this state;
 - (3)** An officer of any court or municipality within the state;
 - (4)** The clerk of any court of record other than that in which the suit is pending;
 - (5)** A member of the general assembly while in session, or clerk or officer thereof;
 - (6)** A practicing physician, **psychologist, senior psychological examiner**, chiropractor, dentist or attorney;
 - (7)** A jailer or keeper of a public prison in any county other than that in which the suit is pending; and
 - (8)** A custodian of medical records, if such custodian files a copy of the applicable records and an affidavit with the court and follows the procedures provided in title [68](#), chapter 11, part 4, for the production of hospital records pursuant to a subpoena duces tecum.
- (b)** If the court grants a motion to quash a subpoena issued pursuant to subsection (a), the court may award the party subpoenaed its reasonable attorney's fees and expenses incurred in defending against the subpoena.



SUBPOENA

Is it valid?

- Signed by clerk
- Out of state... *International Shoe v Washington*
- To deposition or to trial?
- Is there a privilege that applies? Confidentiality

TENNESSEE RULES FOR CIVIL PROCEDURE (TRCP)

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party

TCA 63-11-213

63-11-213. Privileged communications. —

For the purpose of this chapter, the confidential relations and communications between licensed **psychologist** or, **psychological examiner** or, **senior psychological examiner** or certified psychological assistant and client are placed upon the same basis as those provided by law between attorney and client; and nothing in this chapter shall be construed to require any such privileged communication to be disclosed.

TENNESSEE RULES FOR CIVIL PROCEDURE (TRCP) 26

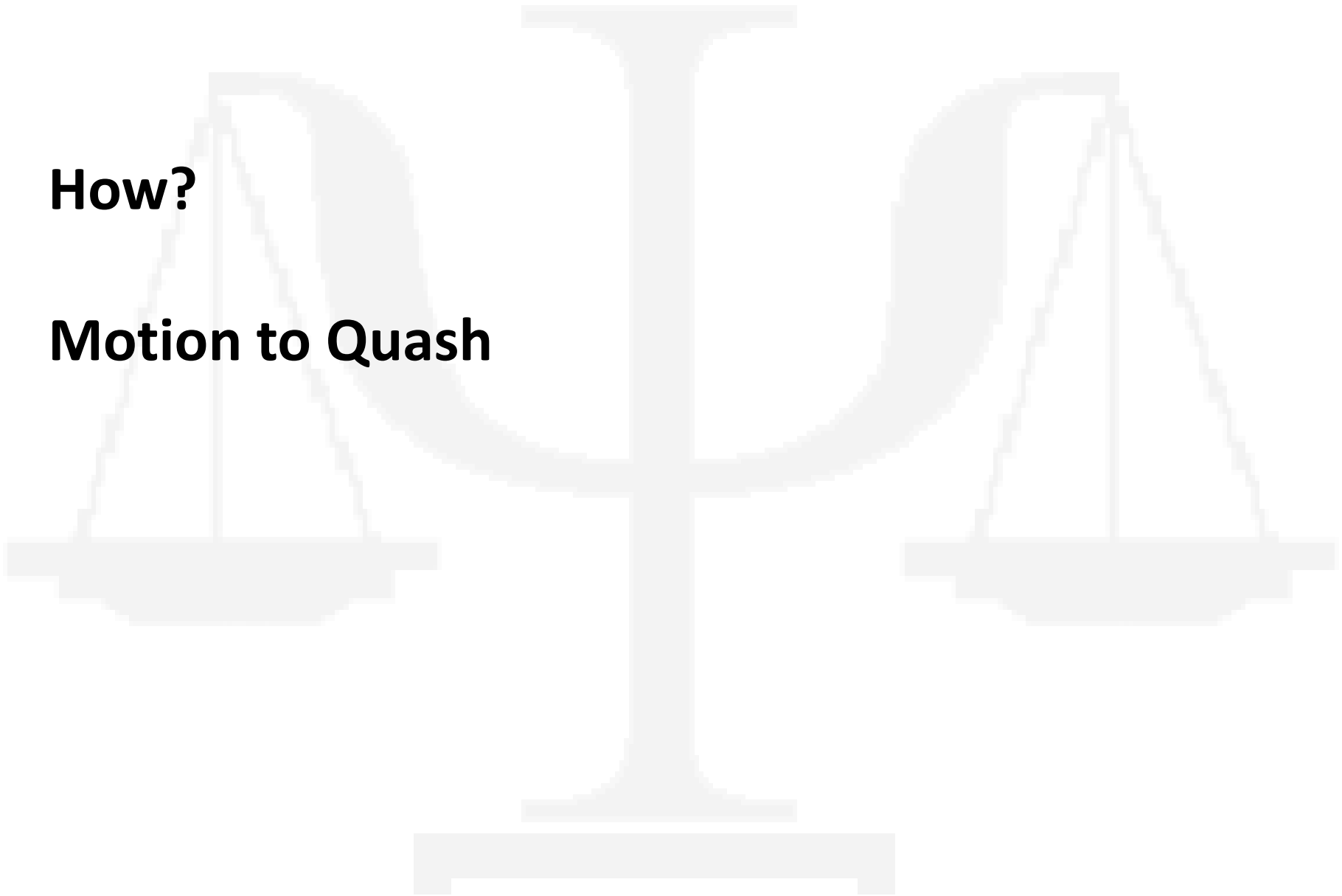
When a party withholds information otherwise discoverable under the rules by claiming that it is privileged or subject to protection as trial preparation material, **the party shall make the claim expressly** and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, **will enable other parties to assess the applicability of the privilege protection**

How?

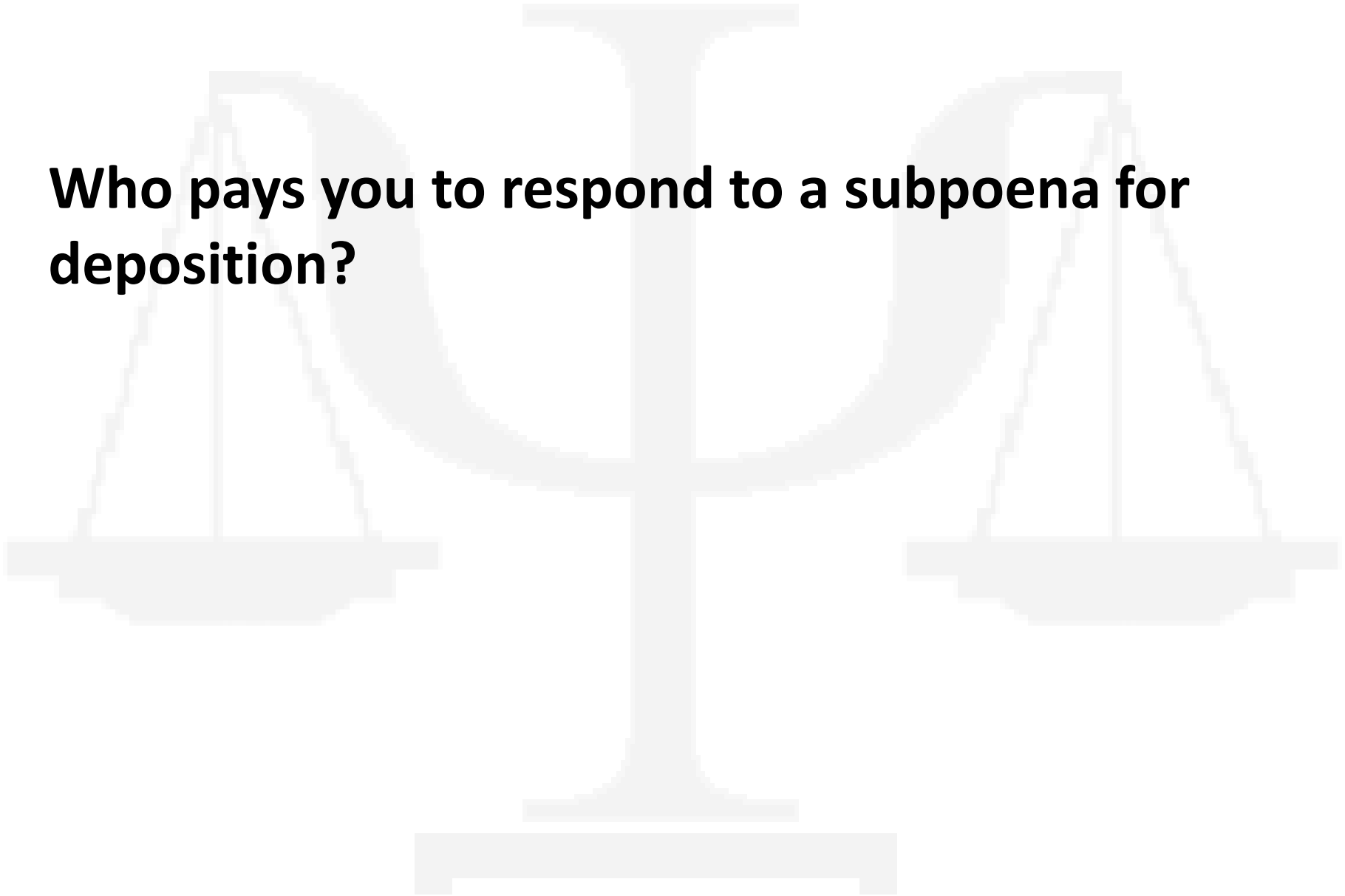


How?

Motion to Quash

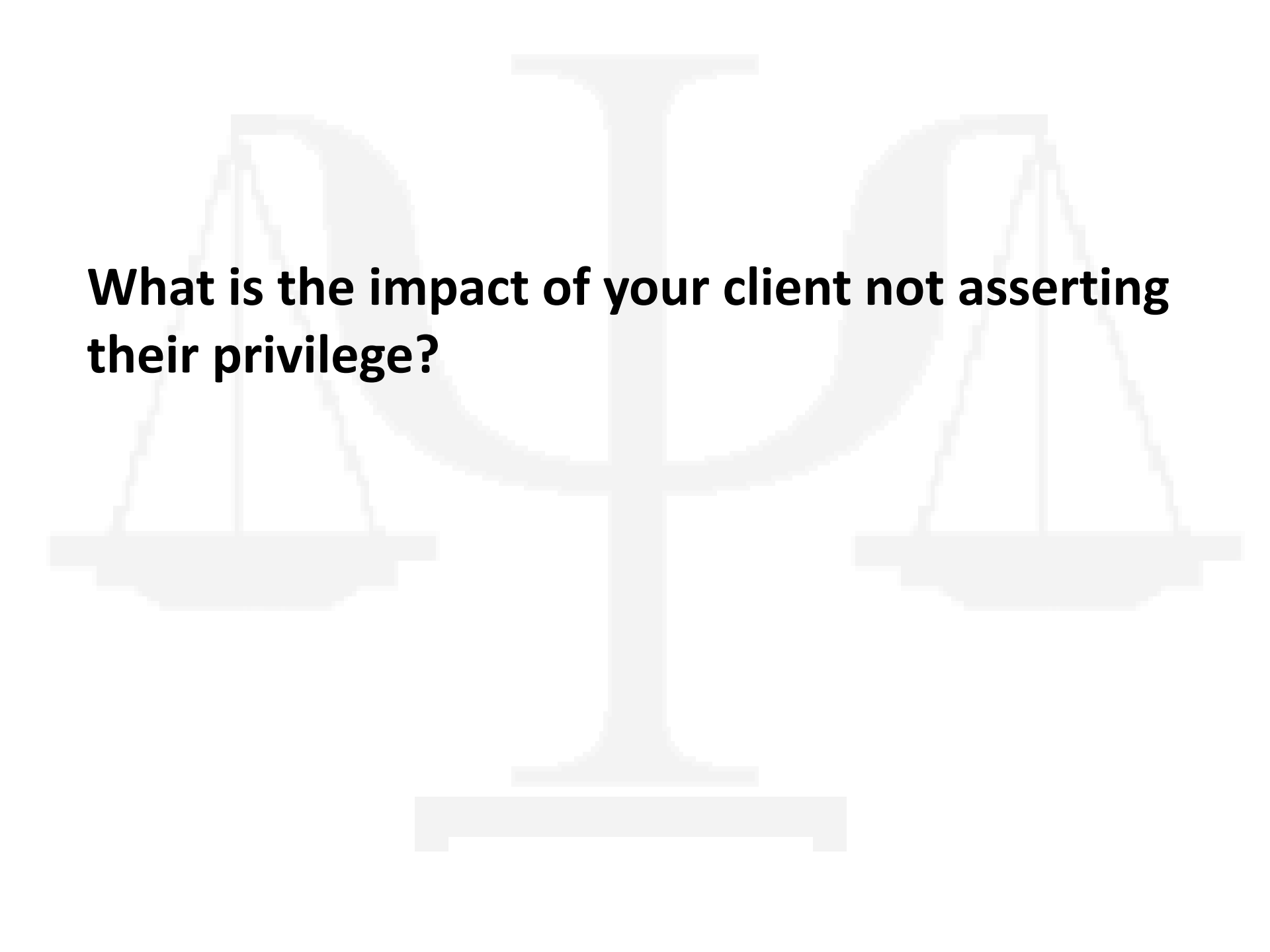


Who pays you to respond to a subpoena for deposition?



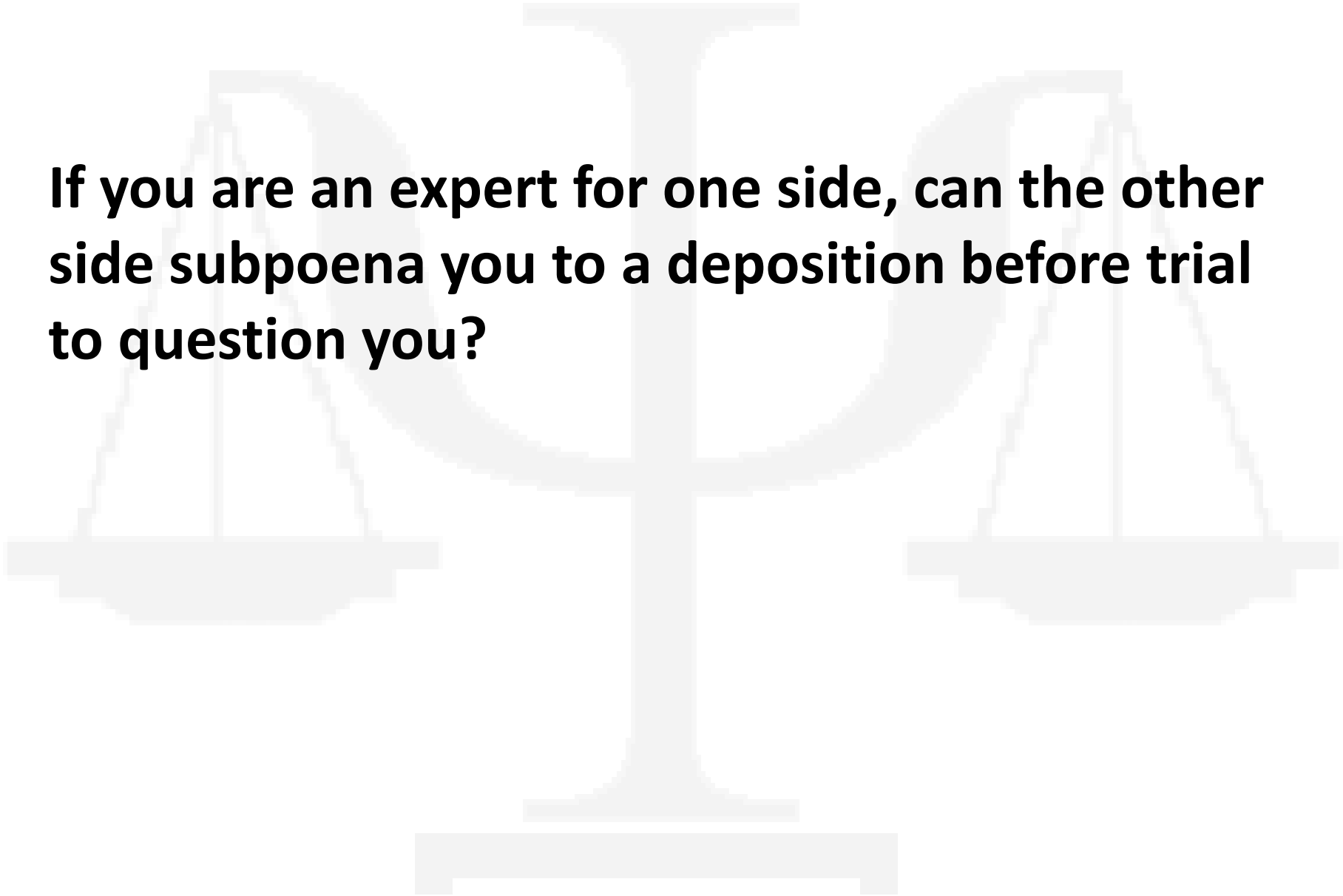
TENNESSEE RULES FOR CIVIL PROCEDURE (TRCP)

Unless manifest injustice would result, (i) the court shall require that **the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery** under subdivisions (4)(A)(ii) and (4)(B) of this rule.



What is the impact of your client not asserting their privilege?

If you are an expert for one side, can the other side subpoena you to a deposition before trial to question you?



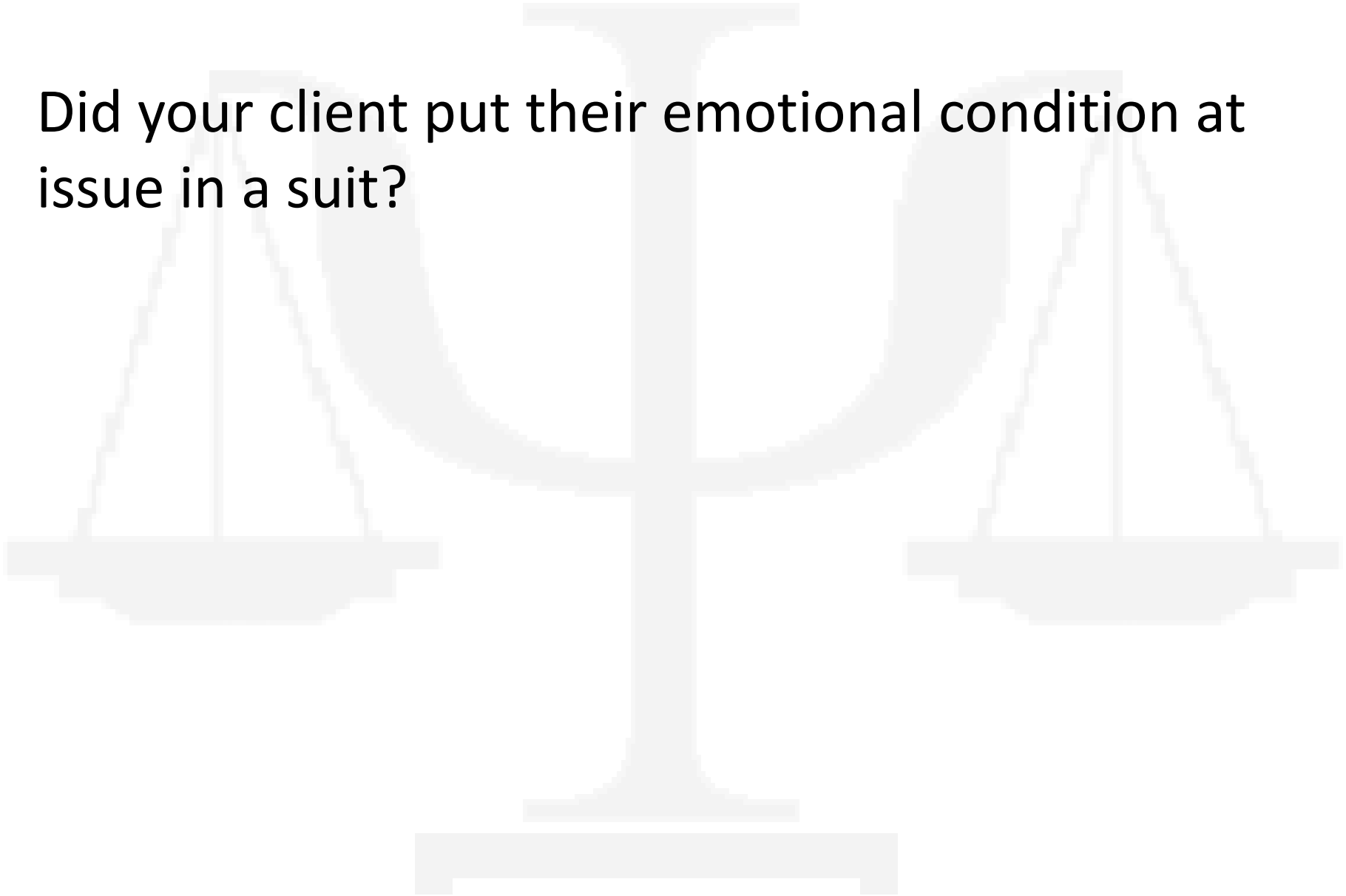
TENNESSEE RULES FOR CIVIL PROCEDURE (TRCP)

Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

...

(ii) A party may also depose any other party's expert witness expected to testify at trial.

Did your client put their emotional condition at issue in a suit?



Did your client put their emotional condition at issue in a suit?

- If so you will want to meet with client to understand issues in suit and the benefits and risks of having your records in the proceedings
- Federal Court v Tennessee state courts
 - Does Jaffee apply? www.jaffee-redmond.org
- Consider a motion to quash or to limit access ([*Kirchner v Mitsui*](#) 43 Fed.R.Serv.3d 110)



Are you subpoenaed by one spouse in a marital case?

- Discuss with both parties separately the benefit and risk of the evidence in your record/memory regarding them only (not spouse)
- If only one wants you to testify, do so only with careful practice to avoid all reference to the other party

- Call attorney who subpoenaed you. Determine who they represent (your client, other party or both).
- Call client to see what information they want revealed and what information they might not want revealed. Educate them on their privilege.
- Call attorney for your client to consider either filing a Motion to Quash or to limit access to records (*Kirchner v Mitsui* 43 Fed.R.Serv.3d 110) if the client has put their mental state at issue (e.g., a claim of mental anguish). Give 21 working days to file objection; If no objection, the privilege is waived.
- Determine whether you are being called as a fact witness or expert witness
- Get paid in advance if you are being called for your client. Most bill by the ½ day if you are being called as an expert.

Expert Witness v. Fact Witness



Fact witness only tells what they heard, saw or experienced; they **cannot** give opinions.

An expert does not have to have any first hand experience with the parties. They testify based on professional standards and give opinions.

Expert Witness v. Fact Witness

Therapist as Expert Witness:

- Has to be qualified as an expert based on experience and training.
- In Federal Court must be listed ahead of time as expert.
- Has to be paid by those calling him/her to court based on prevailing rate/misplaced opportunity rate.
- Gives opinions regarding causation, future impairment
- Formulates opinions for trial/deposition
- Prepares for trial/deposition
- Should be objective, reporting on aspect for and against a case
- Paid by the other side to depose you

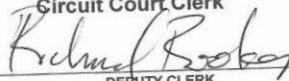
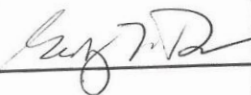
Expert Witness v. Fact Witness

Therapist as Fact Witness:

- Is not qualified as an expert based on experience and training.
- Is not listed ahead of time as expert.
- Is paid witness rate (\$40/day in Fed. Court) or not paid
- Only states what they know first hand, no opinions
- No preparation for trial/deposition
- Treating professional may form opinions during treatment, for the purposes of treatment. Cannot rely on specialized knowledge.
- Less objective, should acknowledge this to Court

Therapist as Expert Witness

If attorney refuses to pay you as an expert but at trial qualifies you as a witness and/or asks your professional opinion, ask the judge before leaving the stand, “Your Honor, could you please order the attorney who subpoenaed me to pay my fee of \$_____ which they have refused to do.”

STATE OF TENNESSEE DAVIDSON COUNTY Circuit Court	SUBPOENA <input type="checkbox"/> TESTIMONY/PRODUCTION REQUIRED (SEE NOTICE BELOW) <input checked="" type="checkbox"/> MEDICAL RECORDS (SEE HIPAA REQUIREMENT BELOW)	CIVIL ACTION DOCKET NO. <u>17-D1234</u>						
PLAINTIFF SMITH, BOB								
vs. DEFENDANT SMITH, MARY								
TO: (NAME, ADDRESS & TELEPHONE NUMBER OF WITNESS) D. Bradley, LMFT 123 Main Street Franklin, TN 37064	Method of Service: <input type="checkbox"/> Davidson County Sheriff <input checked="" type="checkbox"/> Personal Service <input type="checkbox"/> Out of County Sheriff							
You are hereby commanded to appear at the time, date and place specified for the purpose of giving testimony. In addition, if indicated, you are to bring the items listed. Failure to appear may result in contempt of Court which could result in punishment by fine and/or imprisonment as provided by law.								
<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 20%; padding: 2px;">TIME</td> <td style="padding: 2px;">DATE</td> </tr> <tr> <td style="padding: 2px;">4/22/17</td> <td style="padding: 2px;">9am</td> </tr> </table>	TIME	DATE	4/22/17	9am	ITEMS TO BRING: all medical records	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="padding: 2px;">PLACE</td> <td style="padding: 2px;"> Circuit Court Clerk 1 Public Square, Room 302 Nashville, TN 37201 (OR) Office of George Davis, Esq. 6307 Ramsgate Court Brentwood, TN 37027 </td> </tr> </table>	PLACE	Circuit Court Clerk 1 Public Square, Room 302 Nashville, TN 37201 (OR) Office of George Davis, Esq. 6307 Ramsgate Court Brentwood, TN 37027
TIME	DATE							
4/22/17	9am							
PLACE	Circuit Court Clerk 1 Public Square, Room 302 Nashville, TN 37201 (OR) Office of George Davis, Esq. 6307 Ramsgate Court Brentwood, TN 37027							
This subpoena is being issued on behalf of <input checked="" type="checkbox"/> PLAINTIFF <input type="checkbox"/> DEFENDANT Attorney: (NAME, ADDRESS & TELEPHONE NUMBER) George Davis, Esq. 6307 Ramsgate Court Brentwood, TN 37027		<input type="checkbox"/> Additional List Attached DATE ISSUED: <div style="text-align: center;"> RICHARD R. ROOKER Circuit Court Clerk  BY: _____ DEPUTY CLERK </div>						
ATTORNEY'S SIGNATURE:  DESIGNEE: _____ DESIGNEE'S SIGNATURE: _____	<input checked="" type="checkbox"/> Testimony/Production required. <div style="text-align: center;">TESTIMONY/PRODUCTION NOTICE</div> <p>The failure to serve an objection to this Subpoena within twenty-one (21) days after the day of service of the Subpoena waives all objections to the Subpoena, except the right to seek the reasonable costs for producing books, papers, documents, electronically stored information, or tangible things.</p>							
<input checked="" type="checkbox"/> Medical Records Requested – HIPAA notice required. <div style="text-align: center;">HIPAA NOTICE</div> <p>A copy of this Subpoena has been provided to counsel for the patient or the patient by mail or facsimile on the <u>19th</u> day of <u>April</u>, 20<u>17</u>, so as to allow him/her twenty-one (21) days to:</p> <p>(A) Serve the recipient of the Subpoena by facsimile with a written objection to the Subpoena, with a copy of the Notice by facsimile to the party that served the Subpoena, and</p> <p>(B) Simultaneously file and serve a Motion for a Protective Order consistent with the requirements of T.R.C.P. 26.03, 26.07 and Local Rule §22.10.</p> <p>If no objection is made within twenty-one (21) days of the above date, you shall process this Subpoena and produce the documents by the date and time specified in the Subpoena. The signature of counsel or party on the Subpoena is certification that the above Notice was provided to the patient.</p>								

SUBMIT: Original, Witness Copy & File Copy

[Revised 7/23/13]



Subpoena poll #1

Which statement is true regarding how a subpoena can be served:

By certified mail

By handing to you in person

By Handing to your secretary
or office manager

Any of the above



Subpoena poll #2

When you receive a subpoena, how is it best handled?

Find out if your client wants to
fight it

Assert a privilege and don't
respond, if you client agrees

Respond immediately or be in
violation of a court order

If it wasn't hand delivered,
you can ignore it



Subpoena poll #3

If the subpoena says "Duces Tecum", you must:

Bring all the medical records
and psychotherapy notes

Bring only the medical records,
but not psychotherapy notes

Bring only the items listed to
bring

Destroy any psychotherapy
notes and bring only the
medical records

STATE OF TENNESSEE
DAVIDSON COUNTY
Circuit Court

SUBPOENA

CIVIL ACTION

- TESTIMONY/PRODUCTION REQUIRED (SEE NOTICE BELOW)
 MEDICAL RECORDS (SEE HIPAA REQUIREMENT BELOW)

DOCKET NO. 17-D1234

PLAINTIFF
SMITH, BOB

DEFENDANT
vs. SMITH, MARY

TO: (NAME, ADDRESS & TELEPHONE NUMBER OF WITNESS)
D. Bradley, LMFT
123 Main Street
Franklin, TN 37064

Method of Service:

- Davidson County Sheriff
 Personal Service
 Out of County Sheriff

You are hereby commanded to appear at the time, date and place specified for the purpose of giving testimony. In addition, if indicated, you are to bring the items listed. Failure to appear may result in contempt of Court which could result in punishment by fine and/or imprisonment as provided by law.

TIME
4/22/17

DATE
9am

ITEMS TO BRING:
all medical records

PLACE
Circuit Court Clerk
1 Public Square, Room 302
Nashville, TN 37201
(OR)
Office of Court Reporters

What to bring?



There are typically five parts of a clinical file:

1. Medical records
2. Psychotherapy notes
3. Medical records received from third parties
4. Test results
5. Test forms

What to bring?



Medical records (Rule 1180-1-.06)

- (i) modalities and frequencies of treatment furnished
- (ii) results of clinical tests
- (iii) counseling session start and stop times
- (iv) summaries of:
 - (I) diagnosis
 - (II) functional status
 - (III) treatment plan
 - (IV) symptoms
 - (V) prognosis
 - (VI) progress to date

What to bring?

Not included in patient records are:

- (i) **test data** – raw and scaled scores, client/patient responses to test questions or stimuli, and notes and recordings concerning client/patient statements and behavior during an examination.
- (ii) **test materials** – manuals, instruments, protocols, and test questions or stimuli.
- (iii) **psychotherapy notes** – notes recorded (in any medium) by a psychologist, senior psychological examiner or psychological examiner, who is designated as a health service provider as defined in Rule 1180-1-.01, that document or analyze the contents of conversation during a private counseling session or a group, joint, or family counseling session and that are separated from the rest of the individual's patient record.

What to bring?

STATE OF TENNESSEE DAVIDSON COUNTY Circuit Court		SUBPOENA		CIVIL ACTION	
		<input type="checkbox"/> TESTIMONY/PRODUCTION REQUIRED (SEE NOTICE BELOW)			
		<input checked="" type="checkbox"/> MEDICAL RECORDS (SEE HIPAA REQUIREMENT BELOW)			
PLAINTIFF SMITH, BOB		DEFENDANT SMITH, MARY		DOCKET NO. 17-D1234	
TO: (NAME, ADDRESS & TELEPHONE NUMBER OF WITNESS) D. Bradley, LMFT 123 Main Street Franklin, TN 37064		Method of Service: <input type="checkbox"/> Davidson County Sheriff <input checked="" type="checkbox"/> Personal Service <input type="checkbox"/> Out of County Sheriff			
You are hereby commanded to appear at the time, date and place specified for the purpose of giving testimony. In addition, if indicated, you are to bring the items listed. Failure to appear may result in contempt of Court which could result in punishment by fine and/or imprisonment as provided by law.					
TIME 4/22/17	DATE 9am	ITEMS TO BRING: all medical records			
PLACE	Circuit Court Clerk 1 Public Square, Room 302 Nashville, TN 37201 (OR)				

What to bring?



There are typically five parts of a clinical file:

1. Medical records
2. Psychotherapy notes
3. Medical records received from third parties
4. Test results
5. Test forms

What to bring?



There are typically five parts of a clinical file:

1. Medical records
2. Psychotherapy notes
- ~~3. Medical records received from third parties~~
4. Test results
5. Test forms

What to bring?



There are typically five parts of a clinical file:

1. Medical records
2. Psychotherapy notes
- ~~3. Medical records received from third parties~~
4. Test results
- ~~5. Test forms~~

What to bring?

There are typically five parts of a clinical file:

1. Medical records
2. Psychotherapy notes ???? (If “all records”)
- ~~3. Medical records received from third parties~~
4. Test results
- ~~5. Test forms~~

What to bring?

There are typically five parts of a clinical file:

1. Medical records
2. Psychotherapy notes ???? (If “all records”)
- ~~3. Medical records received from third parties~~
 - Test results (if “all records” omit raw and scaled scores, client/patient responses to test questions or stimuli, and notes and recordings concerning client/patient statements and behavior during an examination.)
- ~~1. Test forms~~



Subpoena poll #4

When you receive a subpoena to testify at a hearing you should:

Call the issuer of the subpoena to inquire whether you are being called as an expert or fact witness

Assume you are being called as an expert witness

Give causation and recommendations for future treatment

Only go if you are paid in advance



Subpoena poll #5

In Davidson County, the time to assert an objection to a subpoena is:

21 days from your receipt of the subpoena

14 days from your receipt of the subpoena

21 days from notice of subpoena to opposing counsel

14 days from notice of subpoena to opposing counsel

DESIGNEE'S SIGNATURE:

To request an ADA accommodation, please contact Dart Gore at 880-3309.

Testimony/Production required.

TESTIMONY/PRODUCTION NOTICE

The failure to serve an objection to this Subpoena within twenty-one (21) days after the day of service of the Subpoena waives all objections to the Subpoena, except the right to seek the reasonable costs for producing books, papers, documents, electronically stored information, or tangible things.

Medical Records Requested – HIPAA notice required.

HIPAA NOTICE

A copy of this Subpoena has been provided to counsel for the patient or the patient by mail or facsimile on the 19th day of April, 2017, so as to allow him/her twenty-one (21) days to:

- (A) Serve the recipient of the Subpoena by facsimile with a written objection to the Subpoena, with a copy of the Notice by facsimile to the party that served the Subpoena, and
- (B) Simultaneously file and serve a Motion for a Protective Order consistent with the requirements of T.R.C.P. 26.03, 26.07 and Local Rule §22.10.

If no objection is made within twenty-one (21) days of the above date, you shall process this Subpoena and produce the documents by the date and time specified in the Subpoena. The signature of counsel or party on the Subpoena is certification that the above Notice was provided to the patient.

SUBMIT: Original, Witness Copy & File Copy

[Revised 7/23/13]

After receiving a subpoena, you receive information from the opposing counsel who states they are filing an opposition to the subpoena. You should:

Respond to the subpoena if you don't get a copy of their Motion to Quash

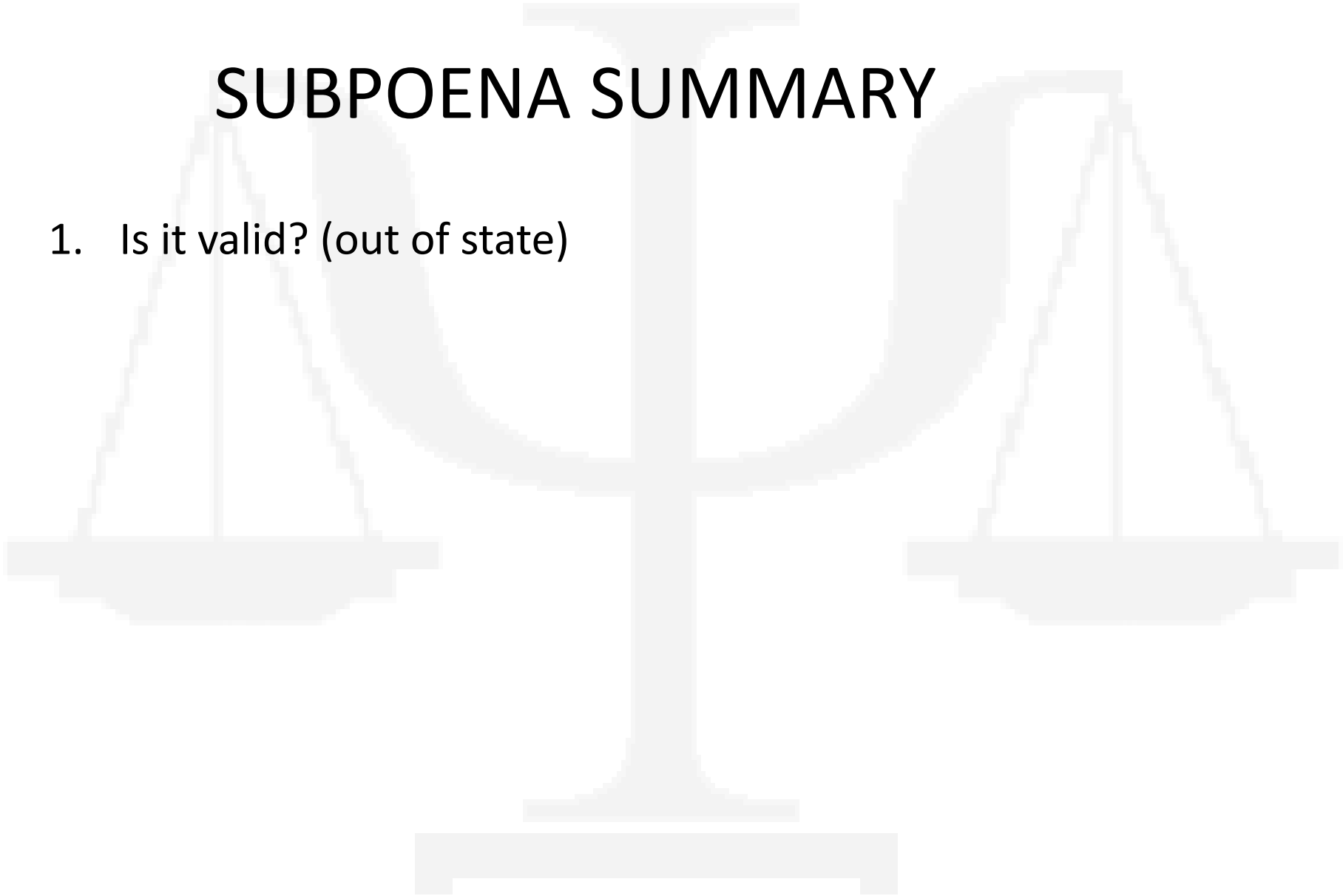
Don't respond to the subpoena until the hearing on the Motion to Quash occurs

Respond if you believe the opposing counsel failed to take action

Don't respond until you received a signed Order from the Court

SUBPOENA SUMMARY

1. Is it valid? (out of state)



SUBPOENA SUMMARY



1. Is it valid? (out of state)
2. Did your client put their emotional issues at trial v a snooping party... Motion to limit or quash

SUBPOENA SUMMARY



1. Is it valid? (out of state)
2. Did your client put their emotional issues at trial v a snooping party... Motion to limit or quash
3. Does privileged communication apply.... Motion to Quash

SUBPOENA SUMMARY



1. Is it valid? (out of state)
2. Did your client put their emotional issues at trial v a snooping party... Motion to limit or quash
3. Does privileged communication apply.... Motion to Quash
4. Is it for trial or for deposition... don't have to testify for trial (unless you are an expert)

SUBPOENA SUMMARY



1. Is it valid? (out of state)
2. Did your client put their emotional issues at trial v a snooping party... Motion to limit or quash
3. Does privileged communication apply.... Motion to Quash
4. Is it for trial or for deposition... don't have to testify for trial (unless you are an expert)
5. Educate client on Jaffee and future of Tennessee access to therapist records

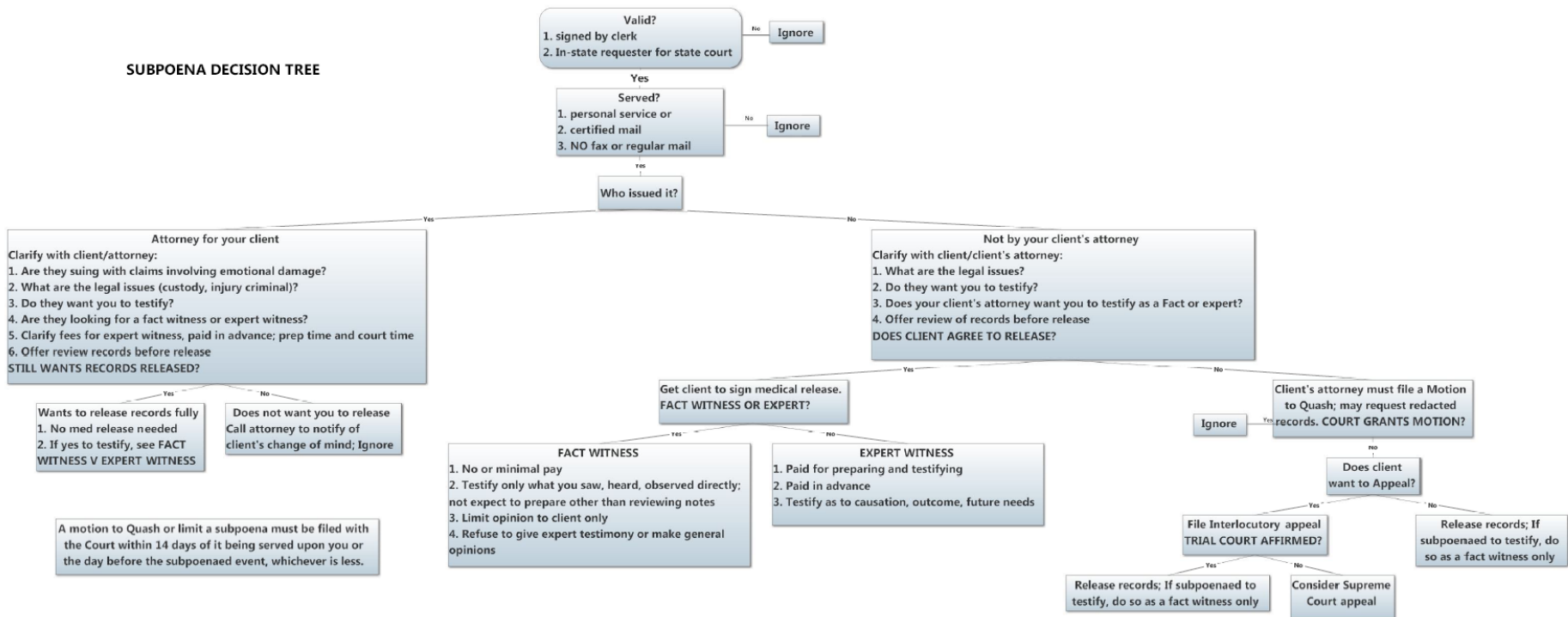
SUBPOENA SUMMARY

1. Is it valid? (out of state)
2. Did your client put their emotional issues at trial v a snooping party... Motion to limit or quash
3. Does privileged communication apply.... Motion to Quash
4. Is it for trial or for deposition... don't have to testify for trial (unless you are an expert)
5. Educate client on Jaffee and future of Tennessee access to therapist records
6. Practice testimony if only one spouse grants permission.

SUBPOENA SUMMARY

1. Is it valid? (out of state)
2. Did your client put their emotional issues at trial v a snooping party... Motion to limit or quash
3. Does privileged communication apply.... Motion to Quash
4. Is it for trial or for deposition... don't have to testify for trial (unless you are an expert)
5. Educate client on Jaffee and future of Tennessee access to therapist records
6. Practice testimony if only one spouse grants permission.
7. Clarify fact v. expert witness status
8. Get paid for testimony, in advance!

SUBPOENA DECISION TREE



Overview



- Subpoena response
- **Conflicting values between clients and therapists**

Overview



- Subpoena response
- Conflicting values between clients and therapists
- **Employer considerations**

Therapist Sexual Misconduct Victims Compensation Act

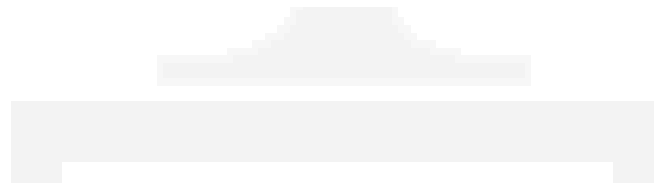
29-26-201. Short title.

The title of this part is, and may be cited as, the "Therapist Sexual Misconduct Victims Compensation Act." (2012)

29-26-202. Intent.

It is the intention of the general assembly to provide victims of sexual misconduct by a therapist with a legal remedy, including significant compensatory damages and a more reasonable statute of limitations. It is intended to prevent sexual misconduct by a therapist by imposing significant liability upon any therapist who engages in this type of misconduct. This is necessary due to the inadequacy of the current system of health care liability where the statute of limitations fails to address the specific problems associated with sexual misconduct by a therapist. This part also clarifies the legal landscape and attempts to prevent most instances of sexual misconduct by making employers liable if they refuse to take simple and reasonable steps to avoid endangering their patients.

29-26-203. Part definitions.



(7) (A) "Sexual misconduct" means any of the following, regardless of the consent of the patient:

(i) Any intrusion into an opening of the patient's body by any part of the therapist's body, or an object used by the therapist to effect an intrusion for the purpose of sexual arousal or gratification;

(ii) Any intrusion into an opening of the therapist's body by any part of the patient's body, or an object used by the patient to effect an intrusion for the purpose of sexual arousal or gratification where the therapist has consented to the conduct verbally or by acquiescence;

(iii) Touching of the patient's body by the therapist for the purpose of sexual arousal or gratification; or

(iv) Touching of the therapist's body by the patient for the purpose of sexual arousal or gratification where the therapist has consented to the conduct verbally or by acquiescence; **(B)** Sexual misconduct includes attempts by the therapist to engage in the conduct described in subdivisions (7)(A)(i) -- (iv), inclusive; and

(8) "Therapist" means any person who performs therapy regardless of whether the person is licensed by the state; and

(9) "Therapy" means action by a person who represents that the person is and does practice the professional treatment, assessment, or counseling of a mental or emotional disorder, illness, condition or symptom. "Therapy" includes, but is not limited to, marital counseling, substance abuse treatment, and family counseling. Therapy begins the first time the patient seeks the therapist's assistance as a therapist. "Therapy" includes services provided without charge if they otherwise meet the definition.

29-26-204. Elements.

A cause of action for sexual misconduct exists for a claimant where the sexual misconduct occurred:

(1) During the time when the patient was receiving therapy from the therapist; or

(2) After the patient has stopped receiving therapy from the therapist if the patient is still emotionally dependent upon the therapist or the sexual misconduct was the result of deception; or

29-26-206. Employer liability.

(a) An employer of a therapist may be liable under §29-26-204 if sexual misconduct occurred as provided in §29-26-204, and either of the following applies:

(1) The employer fails to take reasonable action when the employer knows or has reason to know that the therapist has engaged in sexual misconduct with any patient; or

(2) The employer fails to make inquiries of a former employer concerning past sexual misconduct of the therapist and the:

(A) Former employer's name and address has been disclosed to the employer;

(B) Therapist was employed by the former employer as a therapist within five (5) years of the date of employment as a therapist for the employer and during the period of prior employment the therapist engaged in sexual misconduct.

(b) An employer or former employer of a therapist may be liable under §29-26-204 if:

(1) Sexual misconduct occurred as provided in §29-26-204;

(2) The employer or former employer receives a written request from another employer or prospective employer concerning sexual misconduct by the therapist;

(3) The employer or prospective employer is considering the therapist for a therapist position; and

(4) The employer or former employer knows or has reason to know of the sexual misconduct and fails or refuses to disclose to the requesting employer the occurrence of sexual misconduct by the therapist.

(c) An employer or former employer who gives information concerning sexual misconduct by a therapist when presented with a request for such information by a prospective employer of the therapist is absolved from any legal liability due to the therapist's failure to find employment or damage to the therapist's reputation as a result of the information provided, unless the information is false and the reporting employer knew or should have known that the information was false.

(d) Nothing in this section is intended to affect in any way the application of employer liability if such liability rests upon negligence by the employer in supervising the therapist or where the scope of employment would encompass the sexual misconduct.

The image features a large, faint, light gray watermark of a pair of scales of justice in the background. The scales are centered and consist of a vertical pillar with a horizontal beam at the top and another at the base. Two pans are suspended from the top beam by thin vertical lines. The text "Employer poll #1" is overlaid in the center of the scales.

Employer poll #1

The Therapist Sexual Misconduct Victims Compensation Act (TCA 29-26-201ff) sets forth various employer responsibilities.

An employer can be held responsible for the acts of an employee:

If employer knows or has reason to know that the therapist has engaged in sexual misconduct with a patient

If the employer fails to inquire with previous employers of the therapist

If the employer fails to respond to inquiries about a previous employee and knows or has reason to know of sexual misconduct by the therapist in the past.

All the above



Employer poll #2

Therapist inquiries into the past employment record of a new therapist-employee regarding any previous sexual misconduct on the part of the therapist-employee should go back:

2 years

5 years

7 years

As far back as the therapist
has been licensed



Employer poll #3

Can an employer be held to negligently supervise an employee?

No, as employers are not required to supervise an independently licensed employee-therapist

Yes, only if the employee-therapist required supervision

Yes, only if the court finds the supervision to be inadequate

No, as there is no standard for supervision that can be used in court



Employer poll #4

If an employer responds to an inquiry about a previous therapist-employee, asking whether the former employee had engaged in any sexual misconduct, the employer can be liable to the former employee who HAD engaged in sexual misconduct:

Never; the employer is not liable for any report of sexual misconduct

Perhaps; the employer is not liable for any report of sexual misconduct, unless their termination had a “non-disclosure clause” that forbid the employer from disclosing

Yes if the result is deemed slander/loss of reputation

Yes if the therapist successfully sues for lack of employability



Employer poll #5

if employer responds to an inquiry about a previous therapist-employee, by responding whether the former employee had engaged in any sexual misconduct, the employer can be liable to the former employee who had NOT engaged in sexual misconduct:

Yes, only if the employer files a false report

No, the employer cannot be sued in responding to any inquiry

Yes, only if the employee fails to obtain the job or is fired due to the employer report

No, the employer cannot be sued even if the report was not accurate

29-26-206. Employer liability.

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Overview



- Subpoena response
- Conflicting values between clients and therapists
- Employer considerations
- **Abuse, neglect or dangerous clients**

Overview



- Subpoena response
- Conflicting values between clients and therapists
- Employer considerations
- Abuse, neglect or dangerous clients
- **Electronic issues impacting therapists**

Electronic Considerations



- Recording
- Electronic surveillance
 - Emails of others
 - Phone conversations

Recording

- A client can record sessions without your permission.
- You violate ethical guidelines by recording a client without permission.
- It is legal for any one party to record a telephone conversation without the other's knowledge or permission in Tennessee, as long as the party recording is on the call.
- There are severe penalties to recording conversations, when you are not on the call.
- Access of another communications without permission (email, voice) is a Class D Felony. If a spouse gives their partner permission to access one's email as a trust issue, get it in writing.

There was an NPR story in October 2015 regarding this:

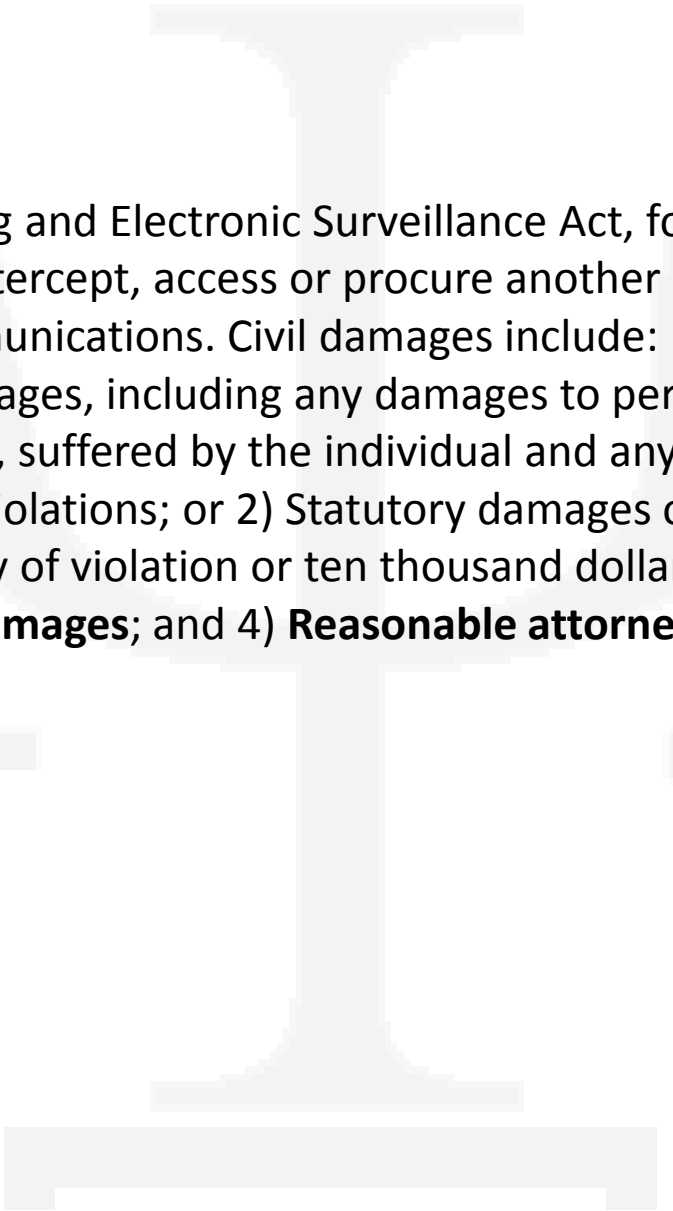
- Staff Sgt. Eric James, an Army sniper who served two tours in Iraq, paused before he walked into a psychiatrist's office at Fort Carson, Colo. It was April 3, 2014. James clicked record on his smartphone, and then tucked the phone and his car keys inside his cap as he walked through the door to the chair by the therapist's desk.
- As he sat there sharing his fears and telling the therapist he'd been thinking about suicide — all while secretly recording the entire session — James was inadvertently helping to bring a problem within the Army to light: As it tries to deal with thousands of soldiers who misbehave after returning from Iraq and Afghanistan and then being diagnosed with mental health disorders and traumatic brain injuries, the military sometimes moves to kick them out of the service rather than provide the treatment they need.
- The Army tried to dismiss James in 2013, because he had been stopped for drunken driving two years earlier. This despite pledges by Army commanders and a 2009 congressional edict to make sure such misconduct is not the result of mental issues brought home from the wars.
- Saying he wanted evidence to protect himself, James made secret recordings of more than 20 hours of sessions with therapists and officers at Fort Carson. In the recordings, counselors can be heard berating him for suggesting he has serious mental health problems. They try to convince him his experiences in Iraq were not too traumatic — and even seem to ignore him when he talks about wanting to commit suicide.

TCA §39-13-601

(a)(1) Except as otherwise specifically provided in §§ 39-13-601 – 39-13-603 . . . a person commits an offense who:

(A) **Intentionally intercepts, endeavors to intercept, or procures** any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication; (C) Intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or **electronic communication** in violation of this subsection (2) A violation of subdivision (a)(1) shall be punished as provided in § 39-13-602 and shall be subject to suit as provided in § 39-13-603.

(5) ***It is lawful*** under §§ 39-13-601 – 39-13-603 and title 40, chapter 6, part 3 *for a person not acting under color of law to intercept a wire, oral, or electronic communication*, where the person is a party to the communication ***or where one of the parties to the communication has given prior consent to the interception***, unless the communication is intercepted for the purpose of committing any criminal or tortious act in violation of the constitution or laws of the state of Tennessee.



The Tennessee Wiretapping and Electronic Surveillance Act, for example, makes it a Class D felony to intentionally intercept, access or procure another person to intercept or access unauthorized communications. Civil damages include:

The sum of the actual damages, including any damages to personal or business reputation or relationships, suffered by the individual and any profits made by the violator as a result of the violations; or 2) Statutory damages of one hundred dollars (\$100) per day for each day of violation or ten thousand dollars **(\$10,000), whichever is greater;** and 3) **Punitive damages;** and 4) **Reasonable attorney's fees** and other litigation costs incurred.

Klumb v. Goan, 2-09-Cv-115 (E.D. Tenn.; July 19, 2012) Federal District Case Plaintiff Roy Klumb brought this action alleging defendant Crystal Goan, formerly is wife, violated the federal Wiretap Act, 18 U.S.C. 2510 et seq., and the Tennessee Wiretap Act, Tenn. Code Ann. 39-13-601et seq., **by installing spyware on his computers without his consent to intercept his incoming email**. A bench trial was held and, having heard all the evidence, the Court concludes that defendant Crystal Goan did violate the two wiretap statutes, that the plaintiff is entitled to the statutory damages of \$10,000, and that defendant's violation of the wiretap acts was part of a larger scheme to gain advantage of the plaintiff during their divorce thereby warranting **punitive damages in the amount of \$10,000. The plaintiff is also entitled to reasonable attorney's fees and costs.** An appropriate judgment shall be entered.

Robinson v. Fulliton, Court of Appeals May 2002

This is a wiretapping case. A husband and a wife were experiencing marital difficulties. During that time, the husband tape recorded a telephone conversation between his wife and her brother without the knowledge of either. When the brother found out, he filed a lawsuit against the husband, his brother-in-law, seeking damages under the civil damages provision of the Tennessee wiretapping statutes, Tenn. Code Ann. § 39-13-603. The trial court, sitting without a jury, held that the husband was liable to his brother-in-law, and awarded nominal compensatory damages, litigation expenses, and attorney's fees. The husband and the brother-in-law both appeal that decision, arguing that the damage award was erroneous. We reverse the trial court's award of damages, finding that the statute requires that, when a violation is established, **the trial court must award either the actual damages or the statutory minimum penalty of \$10,000, whichever is greater.**

Lawrence v. Lawrence, Ct. Appeals November 2010

Leigh Ann Lawrence (“Mother”) secretly tape recorded her 2 1/2-year-old daughter’s telephone conversation with the child’s father, Chris Lawrence (“Father”), during the course of a divorce and custody dispute. After the divorce was concluded, Father filed a complaint against Mother seeking damages for, among other things, wiretapping in violation of Tenn. Code Ann. §39-13-601 (2006). Father filed a motion for partial summary judgment which the trial court denied upon finding that “[n]o set of facts would create liability under §39-13-601 et seq. for [Mother’s] interception of [Father’s] communication with his daughter.” The court then entered partial summary judgment in favor of Mother and certified the judgment as final. Father appeals. “Accordingly, we hold that, as a matter of law, **Mother had the right to consent**, as that term is used in Tenn. Code Ann. §39-13-601, **vicariously to intercepting, recording and disclosing the child’s conversation with Father.**”



CAR MONITORING

TCA § 39-13-606—Electronic tracking of motor vehicles (as of 2012) reads, as follows:
(a) (1) Except as provided in subsection (b), it is an offense for a person to knowingly install, conceal or otherwise place an electronic tracking device in or on a motor vehicle **without the consent of all owners of such vehicle** for the purpose of monitoring or following an occupant or occupants of such vehicle. (2) As used in this section, “person” does not include the manufacturer of the motor vehicle.



Electronic issues poll #1

Audio recording of therapy sessions is permitted:

For the therapist in order to protect against false accusations

For the client only if the therapist also agrees

For the client with or without therapist agreement

For the therapist if only capturing the therapist voice



Electronic issues poll #2

The therapist can video the therapy session:

If given permission by the client

If the video has no audio and only captures the therapist

If the legally collected electronic media is stored on a HIPAA compliant computer

All the above



Electronic issues poll #3

You client is in the midst of a divorce. They want to monitor their spouse. Which is true?

It is illegal to put a tracer on their car, to know where they travel.

It is illegal to record phone calls by installing monitoring equipment on their spouse's phone.

It is legal to put a voice recorder on their own phone and capture a conversation with the spouse

All the above



Electronic issues poll #4

Same client in the midst of a divorce. They have access to their spouse's computer/email. Which is NOT true?

Since a divorce has started, it is illegal for your client to view their spouse's emails

Your client can look at their spouse's emails if the spouse previously gave them access when no divorce was filed

Your client can look at their spouse's emails if the spouse left their computer on and open

Your client can open a computer if the spouse previously gave them the password

Overview



- Subpoena response
- Conflicting values between clients and therapists
- Employer considerations
- Abuse, neglect or dangerous clients
- Electronic issues impacting therapists
- **Social media world**



QUESTIONS?

ETHICS ISSUES 2018

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NOVEMBER 1, 2018



Slides will be available at: www.TennLegal.com/Downloads/
"2018 TPA Conference:" [near bottom]