

## Ethics Interface

# How to Handle Copyrighted Material in Compliance with Subpoena Duces Tecum?

Nancy Mitchell, M.A., OTR/L, ATP, CLCP, FIALCP

This column is the collaborative effort of Nancy Mitchell, Mary Barros-Bailey, Sherry Latham, Bobbi Dominick, and Ann Neulicht. The author is grateful for their editorial support, wisdom, and collective experience.

The column is meant to be an educational forum for life care planners. It is not designed to offer an authoritative opinion from the editor or editorial board of the *Journal of Life Care Planning*, the board of the International Academy of Life Care Planners, or the board of its parent organization, the International Association of Rehabilitation Professionals, nor is it designed to represent or replace official opinions from the certifying body or other organizations associated with the practice of life care planning.

Author's Note: A hearty word of thanks goes to the Honorable Judy LaBuda as she ends her involvement as a consultant to the *Ethics Interface* column. Her thoughtful wisdom has been a gift to the author and our committee. Attorney Bobbi Dominick has graciously agreed to provide legal consultation and oversight to the column. We welcome her to the *Ethics Interface* family.

### Dilemma

Today I received a subpoena *duces tecum* that requested I bring to my deposition a variety of materials I relied upon, which are protected by copyright including articles, books, software, and psychometric instruments. How do I legally and ethically handle copyrighted materials but also comply with the subpoena?

### Response

This is a common request for life care planners. The codes of ethics for life care planners require obeying the law and copyright laws are no exception.

Unless the materials requested are in the public domain or permission from the copyright holder has been obtained, peer-reviewed research articles, books, theses/dissertations, and other such materials contain intellectual property that is typically covered by copyright law. Sharing these materials is illegal and against any code of ethics that is central to a life care planner's practice. Life care planners can share these materials with the permission of the copyright holder or with a court order demanding distribution of the requested resources.

An Internet or library database search or the review of the item itself can determine if the material is copyrighted or

in the public domain. Those items not covered by copyright, within the public domain (e.g., government data), or allow for partial dissemination under Creative Commons or open source publications, as well as the Internet link to the sources, can be shared in a bibliography. A life care planner may be requested to provide copyrighted materials as part of a subpoena *duces tecum* (subpoena which requests documents) in a court action. A subpoena is a court order but issued only by an attorney. Court rules generally provide an opportunity for an objection when the subpoena requires disclosure of "privileged or other protected material" (*Federal Rule of Civil Procedure* 45(d)(2)(B) — state rules may vary.) Because copyrighted material is "protected" under the law, the life care planner should not produce copyrighted material until after an objection is entered and a court overrules the objection. At that point, the life care planner should provide the materials to the court for copying, without making copies him/herself. This protects both the life care planner from an unethical act of breaching the copyright, and provides the copyright holder with some protection by assuring the material is copied only for use in court proceedings.

### Relevant Organizational Standards

From the *International Academy of Life Care Planning Standards of Practice* (2015):

2. STANDARD: The life care planner shall practice in an ethical manner and follow the Code of Ethics of his or her respective professions, roles, certifications and credentials.

#### MEASUREMENT CRITERIA:

- a. Follows the Code of Ethics for his or her profession.
- b. Follows the Code of Ethics for his or her professional roles, certifications, and credentials.

From the *Commission on Health Care Certification* (2015):

#### X. PRINCIPLES AND ASSOCIATED RULES

##### Principle 1 - Professional and Legal Standards

*ICHCC certificants shall behave in legal, ethical, and professional manner in the conduct of their profession, maintaining the integrity of the Code of the Professional Ethics and avoiding any behavior, which would cause harm to other entities and/or individuals.*

##### Rules of Professional Conduct:

R1.1 ICHCC Certificants shall obey the laws and statutes in the legal jurisdiction in which they practice and are subject to disciplinary action for any violation, the

extent that such violation suggests the likelihood of professional misconduct.

From the *Commission for Case Manager Certification Code, Professional Conduct for Case Managers* (2015):

#### PRINCIPLES

Principle 7: Board-Certified Case Managers (CCMs) will obey all laws and regulations.

#### STANDARDS FOR BOARD-CERTIFIED CASE MANAGER (CCM) CONDUCT

##### Section 2 – Professional Responsibility

S 4 – Legal and Benefit System Requirements Board-Certified Case Managers (CCMs) will obey state and federal laws and the unique requirements of the various reimbursement systems by which clients are covered.

From the *CDMSC Code of Professional Conduct* (2014):

#### PRINCIPLES

Principle 7: Certificants shall obey all laws and regulations, avoiding any conduct or activity that could harm others.

RPC 1.12 – Misconduct: Certificants shall not engage in professional misconduct.

From the *Code of Professional Ethics for Rehabilitation Counselors* (2010):

#### CONFLICTS BETWEEN ETHICS AND LAWS.

Rehabilitation counselors obey the laws and statutes of the legal jurisdiction in which they practice unless there is a conflict with the Code. If ethical responsibilities conflict with laws, regulations, or other governing legal authorities, rehabilitation counselors make known their commitment to the Code and take steps to resolve conflicts.

From the American Association of Nurse Life Care Planners, *Nurse Life Care Planning Scope and Standards of Practice* (2014):

#### Standard 7. Ethics

The Nurse Life Care Planner practices ethically.

*Competencies:* The Nurse Life Care Planner:

- Uses the current ANA *Code of Ethics for Nurses with Interpretive Statements* and AANLCP *Code of Professional Ethics and Conduct for Nurse Life Care Planners with Interpretive Statements* to guide practice.
- American Board of Vocational Experts Code of Ethics: “Vocational experts will obey the laws and statutes of the legal jurisdiction in which they practice” (p. 6, Canon 1. R.1.1.).
- Certified Disability Management Specialist Commission *Code of Conduct*: “The Principles are fundamental assumptions to guide professional conduct.... They are not intended to relieve

certificants of their obligation to be aware of and follow the applicable laws and regulations that govern their practice” (p. 3).

- International Commission on Health Care Certification *Code of Professional Ethics*: “ICHCC Certificants shall obey the laws and statutes in the legal jurisdiction in which they practice and are subjected to disciplinary action for any violation....” (p. 28, R.1.).
- Commission on Case Manager Certification *Code of Professional Conduct for Case Managers*: “Certificants will obey all laws and regulations” (p. 2, Principle 7).
- Commission on Rehabilitation Counselor Certification *Code of Professional Ethics for Rehabilitation Counselors*: Standard I.4.a. requires rehabilitation counselors to “observe copyright laws” (p. 26) and Standard J.9.a. requires rehabilitation counselors to protect intellectual property in research and publication that includes copyright (p. 30).

This journal welcomes the submission of real world ethical dilemmas. Submissions will be altered to promote confidentiality and kept in strict confidence. Please send submissions via email to nancymitchellot@gmail.com.

#### References

- American Association of Nurse Life Care Planners. (2014). *Nurse life care planning scope and standards of practice*. Salt Lake City, UT: Author.
- Certification of Disability Management Specialists Commission. (2014). *CDMS Code of professional conduct*. Retrieved from [http://www.cdms.org/uploads/files/CDMS\\_Code\\_of\\_Professional\\_Conduct.pdf](http://www.cdms.org/uploads/files/CDMS_Code_of_Professional_Conduct.pdf)
- Commission for Case Manager Certification. (2015). *Code of professional conduct for case managers for standards, rules, procedures, and penalties*. Retrieved from <http://ccmcertification.org/content/ccm-exam-portal/code-professional-conduct-case-managers>
- Commission on Health Care Certification. (2015). *Standards and examination guidelines*. Retrieved from <http://www.ichcc.org/chcc%20standards%20and%20guidelines%20manual%202008.pdf>
- Commission on Rehabilitation Counselor Certification. (2010). *Code of professional ethics for rehabilitation counselors*. Schaumburg, IL: Author. Retrieved from <http://www.crccertification.com/>
- International Academy of Life Care Planners. (2015). *Standards of practice for life care planners* (3rd ed.). International Academy of Life Care Planners, The Life Care Planning Section of The Association of Rehabilitation Professionals. Retrieved from <http://www.rehabpro.org/sections/ialcp/life-care-planning/standards/ialcpSOP.pdf>

## Continuing Education Credit Questions

Name: \_\_\_\_\_

Phone Number: \_\_\_\_\_

Questions are based on the ethical dilemma and discussion beginning on page 47, Volume 14, Number 2.

### Dilemma Questions:

#### 1. Public domain documents are:

- a. subject to copyright and cannot be copied and disseminated.
- b. not subject to copyright and can be copied and disseminated.
- c. partially subject to copyright and can only be copied in some jurisdictions.
- d. can only be copied if used for legal purposes.

#### 2. If served with a subpoena duces tecum for all peer-reviewed journal articles or book chapters underlying one's opinion, the life care planner should:

- a. provide a bibliography of the materials until an objection is ruled upon and a court order issued.
- b. copy the materials and provide these to the retaining counsel.
- c. copy the materials and provide these to opposing counsel.
- d. provide a bibliography of the materials relied upon but not copy them even with a court order.

#### 3. A life care planner can share any copyrighted material contained in her/his file with:

- a. a properly executed subpoena has been received from opposing counsel.
- b. a letter of request from opposing counsel.
- c. a letter of request from the retaining source.
- d. an order issued by the court after a subpoena objection creating an exception to the copyright protection.

#### 4. A life care planner's copy of an article in the *Journal of Life Care Planning* is generally:

- a. unavailable for copying, except for those who subscribe to the journal.
- b. not covered by copyright.
- c. covered by Creative Commons.
- d. available for copying and dissemination to anyone.

#### 5. If a source is copyrighted, in his/her report, the life care planner could:

- a. not disclose it.
- b. provide a copy with the report.
- c. provide a copy to the opposing expert witness.
- d. include the source in a bibliography.

#### 6. When asked to produce psychometric instrument protocols used in the evaluation, the life care planner can:

- a. allow the court reporter to make a copy of the protocols as an exhibit.
- b. only send a copy to evaluators who are qualified to interpret the results.
- c. make a copy and provide it to the retaining counsel.
- d. make a copy and provide it to the opposing counsel.

#### 7. If the judge in a case issues a court order for the life care planner to provide copyrighted materials, the life care planner should:

- a. provide a bibliography of the materials relied upon but not copy them.
- b. copy the materials and provide these to opposing counsel.
- c. provide materials for the retaining party to copy.
- d. copy the materials and provide these to all the parties.

#### 8. If a document is published in an open source publication, it can be:

- a. copied and provided by the life care planner.
- b. cited and referenced only.
- c. copied with only a court order.
- d. be merely included in the life care planner's report.

#### 9. Creative Commons and copyright designations are:

- a. identical with respect to the life care planner's ability to provide a copy of the source.
- b. opposite with respect to the life care planner's ability to provide a copy of the source.
- c. both allowed to be copied with a subpoena.
- d. both not allowed to be copied with a subpoena.

#### 10. The life care planner could provide a copy of copyrighted material without a court order if permission is granted by the:

- a. paying source.
- b. court reporting firm taking the deposition.
- c. copyright holder.
- d. search engine where the source was located.

See Page 50 for CEU Application form