



# Solving the Subpoena Puzzle: The Art of Testifying

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CAMFT Staff Attorney

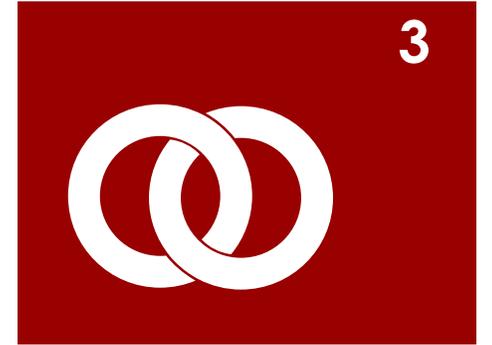


# Disclaimer

- The information provided in this workshop is for educational purposes only.
- It is not intended to serve as legal advice or to act as a substitute for independent legal advice.

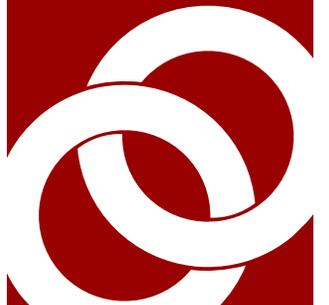
# Workshop Agenda

- Subpoenas – What are they & why do they matter?
- The notification process
- A deep dive into subpoenas
- Testifying
- The Psychotherapist-Patient Privilege
- Ethical considerations when testifying



# Subpoenas

What are they & why do they matter?



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## The Attorney's Toolbox

- One of the tools attorneys use to figure out what is going on with a case is called “discovery”
- “Discovery” is the process by which the parties to a legal case collect and exchange information in preparation for trial
- During the “discovery” process attorneys have many formal tools including subpoena power
- The subpoena power is the only way for attorneys to gain access to a non-party's records/testimony





## Let's Get Some Definitions Out of the Way



Subpoena comes from the Latin for “under penalty”



A subpoena is defined to mean a “writ commanding a person to appear before a court or other tribunal, subject to a penalty for failing to comply.”



*Subpoena ad testificandum* is a “subpoena ordering the witness to appear and and give testimony.”

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## Types of Testimony



DEPOSITION



HEARING



TRIAL OR  
ARBITRATION



## Purpose of a *subpoena ad testificandum*

- It is an order to appear at a particular time and place to give testimony as a witness
  - This testimony will be taken under oath
- You may have previously provided records in conjunction with a *subpoena duces tecum* (a subpoena for records) or one may accompany the subpoena for testimony
- Parties to litigation have the right to seek testimony from a non-party witness
- There is no requirement that the attorney include an affidavit showing cause for why they are seeking your testimony

Example: The attorney representing a former patient who is involved in litigation and has alleged some type of emotional harm may subpoena your appearance at a hearing to testify as to what your patient shared during session about a particular incident.



## But Why My Testimony?

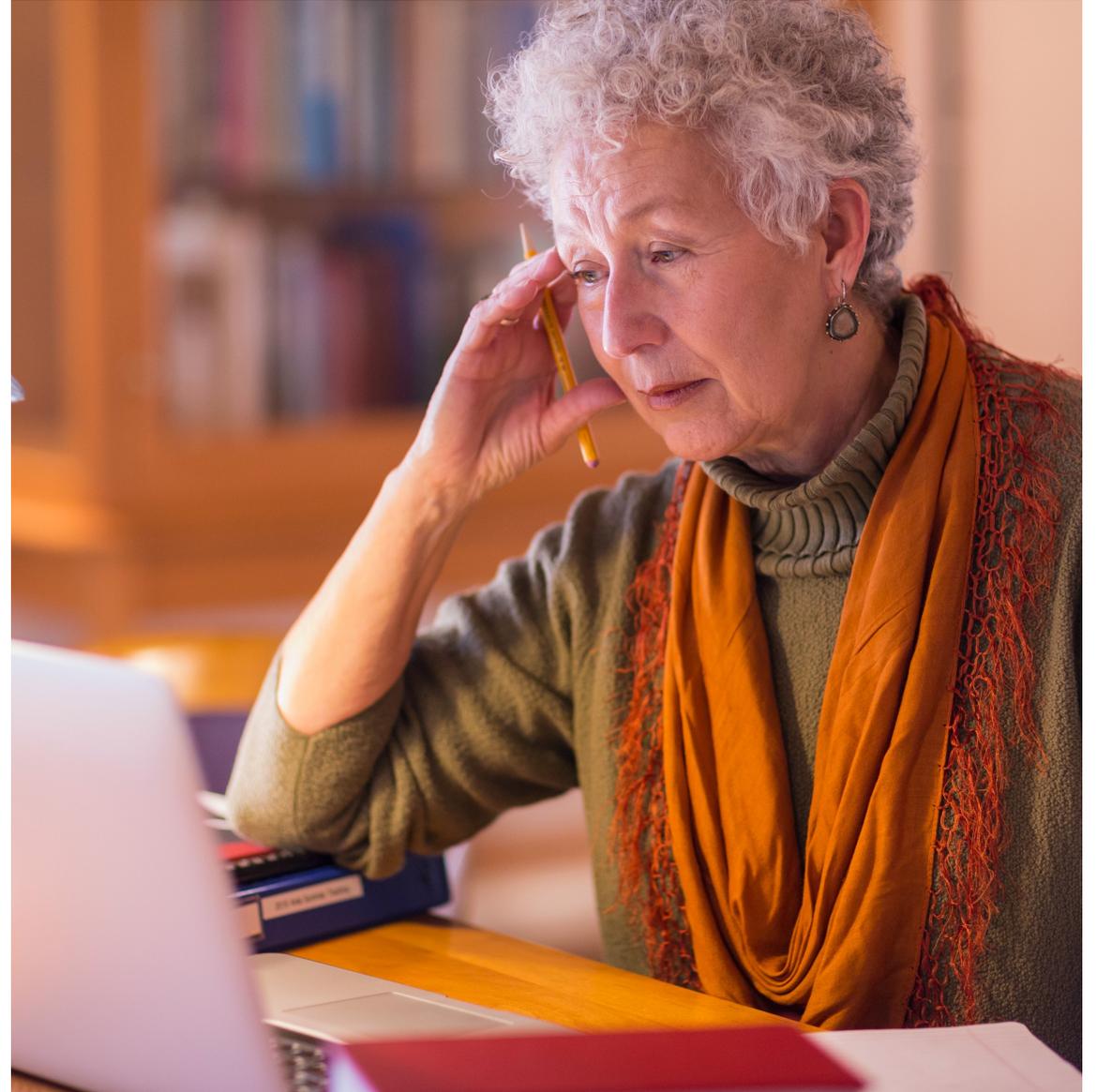
- You likely treated this individual and the attorney who issued the subpoena received your name and contact information from your patient through the discovery process
  - Or (less likely though it does happen) someone has indicated on a discovery document or in their own testimony that you did treat them even though you may never have provided them any care.

**Attorney Insight:** If the patient alleges in their complaint that they have suffered some type of emotional distress as a result of the alleged incident and the attorney believes you may have testimony relevant to that allegation, it would be malpractice for an attorney to fail to seek that testimony from you.

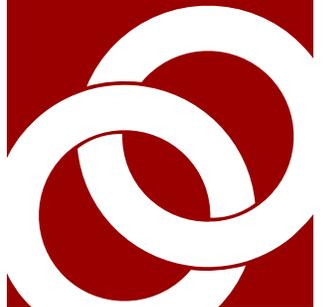
## Subpoenas Require Action

You **must** appear in response to a subpoena unless excused in writing by the attorney who issued the subpoena or a judge orders the subpoena quashed.

- Attorneys can and do issue valid subpoenas
- A valid subpoena issued and signed by an attorney requires a response
- With a subpoena for testimony, the requirement is to appear at the time and place indicated on the subpoena **unless** excused in writing by the attorney who issued the subpoena
- Failure to respond to a subpoena is considered misuse of the discovery process under CCP § 20.23.010 and could result in the therapist being held in contempt of court



# The Notification Process





# Attorneys Often Outsource Work

- Attorneys often hire vendors to serve subpoenas (e.g., Knox Services, Titan Legal Services, U.S. Legal Services, etc.).
- The vendor/attorney may reach out to you directly before attempting service of the subpoena to confirm your availability to be served.
- The vendor/attorney may inquire as to whether you would be willing to accept “alternative service” such as to receive the subpoena via e-mail or fax to avoid an in-person service of the subpoena.

**Practice Pointer:** It is not a breach of your patient’s confidentiality to confirm your address, nor to have a discussion about how the vendor may serve you with the subpoena.



## Avoiding Service

- It is not uncommon to want no part in your patient's legal fight.
- This can, unfortunately, result in attempts to avoid service of a subpoena.
- Remember, a process server has been hired to serve the subpoena so whatever tricks you may have up your sleeve (running from the process server, throwing a beverage on them in a mini-mart, or wearing your best disguise), the process server has seen it all.

**Practice Pointer:** It is **not** a breach of confidentiality to accept service of a subpoena.



# The Deposition Subpoena





# What is a Deposition?



A deposition is a formal interview to take the statement of a witness under oath.



Each party to litigation has an opportunity to conduct the deposition of relevant witnesses to a case.



Depositions may be either in written form (i.e., answering a list of questions in writing) or oral form (i.e., in person asking & answering questions)



# Why Would a Therapist Be Deposed?

- First – and hopefully never the case – if you are a party to litigation
  - In your personal capacity, e.g., if you are injured in a car accident; or
  - In your professional capacity, e.g., if you are sued in a malpractice case
  
- Second – as a witness
  - In your personal capacity, e.g., as a witness to a car accident;
  - As an expert witness who has never treated the individual whom they are expressing a professional opinion regarding; or
  - In your professional capacity as the treating therapist for an individual who is involved in litigation
    - You could be called to provide testimony regarding treatment that is somehow related to the parties involved in litigation, e.g., a minor whose parents are parties to litigation



# Are Depositions Common?

- Depositions are very effective, but can be very expensive
- They're relatively common in certain types of litigation (e.g., personal injury and medical malpractice)
- Attorneys generally use other discovery tools first before seeking a deposition:
  - Attorneys get to ask questions of and request records from the other party(ies)
  - Once attorneys receive responses and documents from the opposing side they try to figure out what more they need
  - At that point attorneys will issue subpoenas for the production of records, including business records (e.g., your files)
  - Generally, at this point an attorney typically makes the determination as to whether a deposition is appropriate, though they may seek a deposition prior to requesting records



## Why are Depositions Effective?

- Depositions are probative in nature
- If an attorney is able to secure a witness's story or opinion prior to trial they can then use that testimony to support their position
- Depositions permit attorneys to get a sense of whether you make a great witness.
  - If you come across as a rockstar witness who might easily sway a jury if the case goes to trial that can influence how the case proceeds
- At the end of the day, the deposition is used to obtain testimony and evidence from a non-party witness.





# The Deposition Subpoena



Attorneys can and do issue subpoenas that require action



Until you are served with a deposition subpoena you are not obligated to appear for a deposition



Depositions come in 4 flavors:

Production of Records

Production of Records & Testimony

Written Deposition

Oral Deposition



## Service of a Deposition Subpoena

- You are entitled to be “served” with the deposition subpoena via “personal service”
  - This is the “you’ve been served” moment in movies
  - You can elect for alternate service such as via e-mail or facsimile.
  - **It is not a breach of confidentiality to request alternate service from the process server.**
- CCP § 2025.270(a): An oral deposition must be scheduled at least 10 days after service of the deposition notice.
- CCP § 2025.270 (b): If you are commanded by a deposition subpoena to produce consumer (patient) records, the deposition shall be scheduled at least 20 days after the subpoena is issued.





# Do I Need a Lawyer?



**An attorney who represents you at a deposition may be beneficial depending on the type of litigation, your expected role, and your comfort level with the legal system**



**Your malpractice insurance policy may include an attorney to represent you at the deposition.**

Call your malpractice insurance company to find out if your policy includes this benefit!



**An attorney can object to a question asked of you, instruct you not to answer a question, or make sure the other attorneys do not elicit testimony that is outside your scope**

An attorney who represents someone other than you cannot give you these instructions or point you in the right direction

# Breaking Down a Deposition Subpoena



ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):

Kristin W. Roscoe, CA 296840  
7901 Raytheon Road  
San Diego, CA 92111

TELEPHONE NO.: (858) 292-2638

FAX NO. (Optional):

E-MAIL ADDRESS (Optional):

ATTORNEY FOR (Name): John Grisham

**FOR COURT USE ONLY**

**SUPERIOR COURT OF CALIFORNIA, COUNTY OF San Diego**

STREET ADDRESS: 330 West Broadway

MAILING ADDRESS: 330 West Broadway

CITY AND ZIP CODE: San Diego, CA 92101

BRANCH NAME: Hall of Justice

PLAINTIFF/ PETITIONER: Sherlock Holmes

DEFENDANT/ RESPONDENT: John Grisham

**DEPOSITION SUBPOENA  
FOR PERSONAL APPEARANCE AND PRODUCTION OF DOCUMENTS AND THINGS**

CASE NUMBER:  
21-cv-00123

**THE PEOPLE OF THE STATE OF CALIFORNIA, TO (name, address, and telephone number of deponent, if known):**

Arthur Fraser, 123 Therapy Lane, Temecula, CA 92590

1. **YOU ARE ORDERED TO APPEAR IN PERSON TO TESTIFY AS A WITNESS in this action at the following date, time, and place:**

Date: July 1, 2021

Time: 10:00 a.m.

Address: 500 West Broadway San Diego, CA 92101

- a.  As a deponent who is not a natural person, you are ordered to designate one or more persons to testify on your behalf as to the matters described in item 4. (Code Civ. Proc., § 2025.230.)
- b.  You are ordered to produce the documents and things described in item 3.
- c.  This deposition will be recorded stenographically  through the instant visual display of testimony and by  audiotape  videotape.
- d.  This videotape deposition is intended for possible use at trial under Code of Civil Procedure section 2025.620(d).
2. The personal attendance of the custodian or other qualified witness and the production of the original records are required by this subpoena. The procedure authorized by Evidence Code sections 1560(b), 1561, and 1562 will not be deemed sufficient compliance with this subpoena.
3. The documents and things to be produced and any testing or sampling being sought are described as follows:
- Continued on Attachment 3.

### Attachment #3

1. Please produce any and all DOCUMENTS (as used herein, the term “DOCUMENTS” includes all writings, recordings, electronic communications, and photographs, the term includes the original, all drafts, and any and each copy bearing notations or marks not found on the original or draft, of any written, recorded, electronically communicated or graphic matter, however produced or reproduced, including but not limited to, any typed or printed matter, microfilm, photographs, correspondence, letters, interoffice communications, electronic mail (“e-mail”) communications, diaries, calendars, memoranda, statements of account, receipts, summaries, progress notes, psychotherapy notes, intake forms, patient questionnaires, any electronic media on which responsive information is stored or recorded, and any other data compilations or electronic transmissions from which information can be obtained or translated) related to Sherlock Holmes.

4. If the witness is a representative of a business or other entity, the matters upon which the witness is to be examined are described as follows:

Continued on Attachment 4.

5. **IF YOU HAVE BEEN SERVED WITH THIS SUBPOENA AS A CUSTODIAN OF CONSUMER OR EMPLOYEE RECORDS UNDER CODE OF CIVIL PROCEDURE SECTION 1985.3 OR 1985.6 AND A MOTION TO QUASH OR AN OBJECTION HAS BEEN SERVED ON YOU, A COURT ORDER OR AGREEMENT OF THE PARTIES, WITNESSES, AND CONSUMER OR EMPLOYEE AFFECTED MUST BE OBTAINED BEFORE YOU ARE REQUIRED TO PRODUCE CONSUMER OR EMPLOYEE RECORDS.**
6. *At the deposition, you will be asked questions under oath. Questions and answers are recorded stenographically at the deposition; later they are transcribed for possible use at trial. You may read the written record and change any incorrect answers before you sign the deposition. You are entitled to receive witness fees and mileage actually traveled both ways. The money must be paid, at the option of the party giving notice of the deposition, either with service of this subpoena or at the time of the deposition. Unless the court orders or you agree otherwise, if you are being deposed as an individual, the deposition must take place within 75 miles of your residence or within 150 miles of your residence if the deposition will be taken within the county of the court where the action is pending. The location of the deposition for all deponents is governed by Code of Civil Procedure section 2025.250.*

**DISOBEDIENCE OF THIS SUBPOENA MAY BE PUNISHED AS CONTEMPT BY THIS COURT. YOU WILL ALSO BE LIABLE FOR THE SUM OF \$500 AND ALL DAMAGES RESULTING FROM YOUR FAILURE TO OBEY.**

Date issued: June 1, 2021

*Kristin W. Roscoe*

(SIGNATURE OF PERSON ISSUING SUBPOENA)

Kristin W. Roscoe

Staff Attorney

(TYPE OR PRINT NAME)

(TITLE)

(Proof of service on reverse)



# Proof of Service Page

## PROOF OF SERVICE OF DEPOSITION SUBPOENA FOR PERSONAL APPEARANCE AND PRODUCTION OF DOCUMENTS AND THINGS

1. I served this *Deposition Subpoena for Personal Appearance and Production of Documents and Things* by personally delivering a copy to the person served as follows:
  - a. Person served (*name*):
  - b. Address where served:
  - c. Date of delivery:
  - d. Time of delivery:
  - e. Witness fees and mileage both ways (*check one*):
    - (1)  were paid. Amount: . . . . . \$ \_\_\_\_\_
    - (2)  were not paid.
    - (3)  were tendered to the witness's public entity employer as required by Government Code section 68097.2. The amount tendered was (*specify*): . . . . . \$ \_\_\_\_\_



# Deposition Notice

- Deposition notices on their own can only compel the appearance of a party for oral testimony at a deposition
- A deposition notice may be combined with the deposition subpoena packet
- If, as a non-party, you only receive a notice of deposition **without** a deposition subpoena you are not obligated to appear for the deposition

10                   **SUPERIOR COURT FOR THE STATE OF CALIFORNIA**  
11                                   **COUNTY OF LOS ANGELES**

12   Coordination Proceeding  
13   Special Title (Rule 1550(b))

14   **ANTELOPE VALLEY GROUNDWATER  
15   CASES**

16   \_\_\_\_\_  
17   **RICHARD A. WOOD**, an individual, on  
18   behalf of himself and all others similarly  
19   situated,

20                                   Plaintiff,

21                                   v.

22   **LOS ANGELES COUNTY**  
23   **WATERWORKS DISTRICT NO. 40; et**  
24   **al.**

                                  Defendants.

Judicial Council Coordination  
Proceeding No. 4408  
(Honorable Jack Komar)

Case No.: BC 391869

**NOTICE OF DEPOSITION OF  
MARK RITTER, TRUSTEE**

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that Plaintiff Richard Wood will take the  
3 deposition of Mark Ritter (the “DEPONENT”), in his capacity of successor trustee  
4 of the Edgar Carl Ritter and Paula Elaine Ritter Family Trust dated October 6,  
5 1987 (the “RITTER FAMILY TRUST”), on January 22, 2016, at 10:00 a.m., at 34  
6 Hermosa Avenue, Hermosa Beach, California 90254.

7 The deposition shall be taken before a Certified Shorthand Reporter or  
8 other qualified notary, and each shall continue from day to day or to some other  
9 stipulated date until completed.

10 Plaintiff reserves the right to videotape the deposition for possible use at  
11 trial under Code of Civil Procedure Sections 2025.220, 2025.340 and 2025.620,  
12 specifically including, but not limited to, 2025.620(d).

# The Deposition





# To Appear or Not to Appear



Appear: Unless you are excused by the attorney who issued the subpoena from appearing at the date and time on the deposition subpoena you must appear



Even if your client instructs you to assert the psychotherapist-patient privilege you are required to appear unless excused



If the date and/or time do not work with your schedule you can request that it be “re-calendared” by the attorney who issued the subpoena

This might occur if you have a pre-planned vacation and can provide evidence that you have already booked a hotel/airline, etc. **Note, the attorney does not have to agree to re-calendar a properly noticed deposition!**



## Where Will the Deposition Take Place?

- The attorney who “notices” the deposition gets to choose where the deposition takes place (CCP § 2025.250)
  - The location must either be within 75 miles of the therapist’s residence; or
  - Within the county where the action is pending AND within 150 miles of the therapist’s residence
- There may be a custom and practice amongst attorneys in your area to “notice” the deposition of a treating healthcare provider in either their office or their attorney’s office
  - Either you or your attorney can request the location of the deposition be changed, however in the absence of any such custom and practice it will be up to the attorney who issued the subpoena to determine whether they wish to grant the requested change



## Virtual Depositions Might Be An Option

California Rule of Court 3.1010(d): A nonparty deponent may appear at his or her deposition by telephone, videoconference, or other remote electronic means with court approval upon a finding of good cause and no prejudice to any party. The deponent must be sworn in the presence of the deposition officer or by any other means stipulated to by the parties or ordered by the court. **Any party may be personally present at the deposition.**

CCP § 2025.310(a): A deponent is not required to be physically present with the deposition officer when being sworn in at the time of the deposition.

CCP § 2025.310(b): Any party or attorney of record **may**, but is not required to, **be physically present at the deposition at the location of the deponent.**

CCP § 2025.340: The area used for recording the deponent's oral testimony shall be suitably large, adequately lighted, and reasonably quiet.



COUNTY OF ORANGE, LAMOREAUX JUSTICE CENTER

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\_\_\_\_\_,  
Petitioner,  
vs.  
\_\_\_\_\_  
Respondent.

) Case No. XXXXXXXX  
)  
) **NOTICE OF TAKING REMOTE**  
) **DEPOSITION**  
)  
) Date: \_\_\_\_\_  
) Time: \_\_\_\_\_  
) Place: Remotely via **ZOOM**

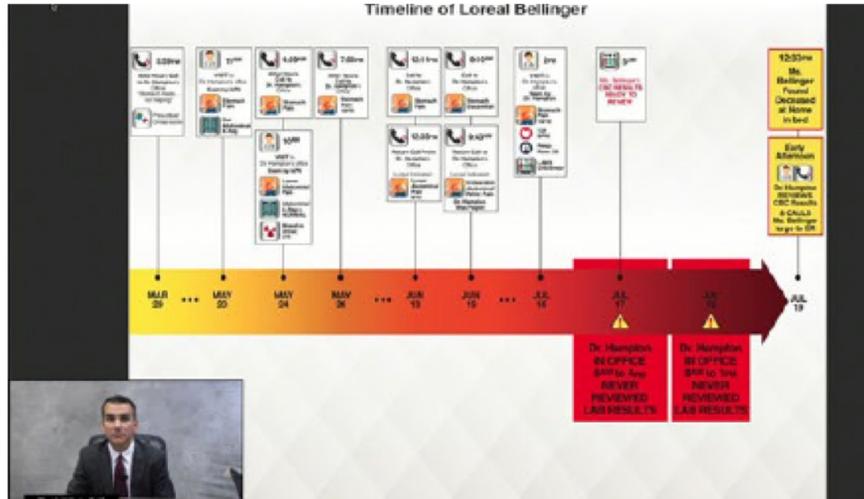
**TO ALL PARTIES AND TO THEIR RESPECTIVE ATTORNEYS OF RECORD:**

**PLEASE TAKE NOTICE** that [PARTY DESIGNATION], [NAME HERE] (hereinafter “[PARTY DESIGNATION]”) will take the Deposition of [PARTY DESIGNATION], [NAME HERE], on [DATE] at [TIME] Counsel for the parties, the witness and the court reporter will all appear remotely via ZOOM video link.

This deposition will be taken under the provisions of sections 2017.010 et. seq., 2019.010



# Considerations for a Remote Deposition



- Log in 15 minutes early to ensure AV & WiFi functionality
- Avoid busy backgrounds
- Mute cell phone & other devices
- Ensure pets, family, supervisors, employees, friends, etc. are **not** in the room with you

- If hardcopy exhibits were provided to you before the deposition make sure to have those in the room with you for reference
- Don't forget to leave your preparation materials outside of the deposition room
- If stepping away for a break be sure to turn off both audio and video and then restore those functions upon return
  - Remember, you might be in your living room, but it is still a formal proceeding & you will be under oath!



## How Long is a Deposition?

- Code of Civil Procedure § 2025.290(a) requires depositions be limited to seven hours of total testimony.
  - There are limited exceptions to this requirement including if you are testifying as an expert witness
- If you are testifying as a treating healthcare provider it will be rare for a deposition to meet that seven hour cutoff
- Generally, the deposition of a treating healthcare provider is unlikely to exceed two hours in length
- Remember: There are only so many questions even the most dedicated attorney can ask you regarding a client you saw five times





## Will I Get Paid?

- Yes, but how much will depend on the role in which you are called to provide testimony
- If you are called as a percipient witness in a civil action you are entitled to receive \$35.00 a day plus actual roundtrip mileage calculated at \$0.20 per mile. Government Code § 68093.
- If you are called as the treating therapist, you are entitled to witness fees as a treating health care practitioner. (CCP § 2034.430)
  - These fees should be your **reasonable and customary hourly** or daily fee
  - A daily fee shall only be charged for a full day of attendance at a deposition where you were required to be available for the full day and you had to forgo all business you otherwise would have conducted.
  - Requesting this fee from the attorney who issued the subpoena is appropriate if you anticipate you will be asked to provide either opinion or factual testimony regarding diagnosis or reasons for a particular treatment decision



## Who is in the Room (in Person & Virtual)?

- In addition to you and your attorney, if represented, you can expect:
  - A Court Reporter
  - The attorney who issued the subpoena (or someone filling in for that attorney)
  - The attorney for the opposing party or parties
  - Possible, with the likelihood depending on your role, a certified videographer
  - Possible, though unlikely, parties to the litigation





## Who Isn't In the Room (In Person & Virtual)?

- Your friends and family (even if you are at home!)
  - Unless you happen to be represented by a friend or family members it is best to go to a deposition alone
- If you are a pre-licensee, your supervisor will not be present
- Depending on the location of the deposition there may not be a waiting room for your loved one to wait in
- Depositions can be long so if you think you need moral support you can always arrange to meet a friend for coffee in the morning or drinks once the deposition has concluded





## What to Wear



A deposition is a formal legal proceeding so counsel for the parties will generally dress professionally.



If your deposition is being video recorded you want to make sure you are comfortable with how you might look to a jury



Make sure you are comfortable

Wear layers and something you can sit in for up to 7 hours (it shouldn't take this long but better to be prepared!)



## What to Expect

- A deposition is recorded stenographically by a court reporter. This means everything that is said is recorded.
  - It may also be video recorded. A certified videographer will record your image (and maybe your attorney's elbow) as well as all audio.
- What the court reporter produces is called a deposition transcript. You will be given an opportunity to review the document and make any changes you deem necessary.
  - These changes are often correcting typographical errors (e.g., “read” to “red”)
- If you make a substantive change (e.g., a “yes” to a “no” that may affect your credibility at the time of trial or arbitration)



## What to Expect

- The attorney who issued the subpoena may not be the attorney to take your deposition
- For strategic reasons, a different attorney may take your deposition
  - For example, if the attorney wants you to feel more comfortable to share something you might otherwise be reticent to share, the attorney may be someone with whom you could easily build rapport
- If a different attorney appears it may just be because the other attorney had an unavoidable scheduling conflict, so you don't want to read too much into it





## Your Testimony is Under Oath

- The oath is administered by the court reporter at the beginning of the deposition.
- The oath is your formal attestation that the testimony you will provide is the truth.
- If you **knowingly** provide false testimony regarding a material fact you risk prosecution for perjury.
  - Perjury is a felony with the penalty of up to four years imprisonment. Penal Code § 126.17





# Asserting the Psychotherapist-Patient Privilege

- Remember, even if your client has instructed you to assert the psychotherapist-patient privilege you still must appear unless excused in writing by the attorney who issued the subpoena
- When you are asked questions regarding your treatment of a patient be prepared to respond to the question along the lines of:
  - I decline to answer on the basis of the psychotherapist-patient privilege.
- If you assert the privilege enough times a few things could happen.
  - The attorney asking the questions may grow frustrated but will continue to ask the prepared questions (possible)
  - The attorney may call the judge to request the judge order you to answer the questions (more likely if your testimony is vital to the proceedings)



THE

RESIDENT FOX

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# Ground Rules

Once you are sworn in under oath, the attorney taking the deposition will go over the ground rules of the deposition so that everyone will have a common understanding of what is about to occur.

1. You are under oath.
  - Even if you are in the informal setting of your office, the testimony you provide has the same force and effect as if you were in a court of law.
2. The court reporter is the most important person in the room.
  - The court reporter can only record one person speaking at a time.
  - It is important to wait until a question is fully asked before you respond.
  - Attorneys prize a “clean record” and will remind you of this request.



## Ground Rules

3. You must give audible responses.
  - If your response is “uh-huh” you will be prompted to provide an audible “yes” or “no” response.
  - In that moment you might know what you meant but it could be unclear in the deposition transcript (particularly if the deposition is not video recorded).
4. Do not answer a question before it is asked.
  - Until a question is asked you do not actually know what it is going to be.
  - You might know the direction the question is going but you may inadvertently volunteer information that was not asked.
  - Remember Rule # 2. Don't make the court reporter's job more difficult.



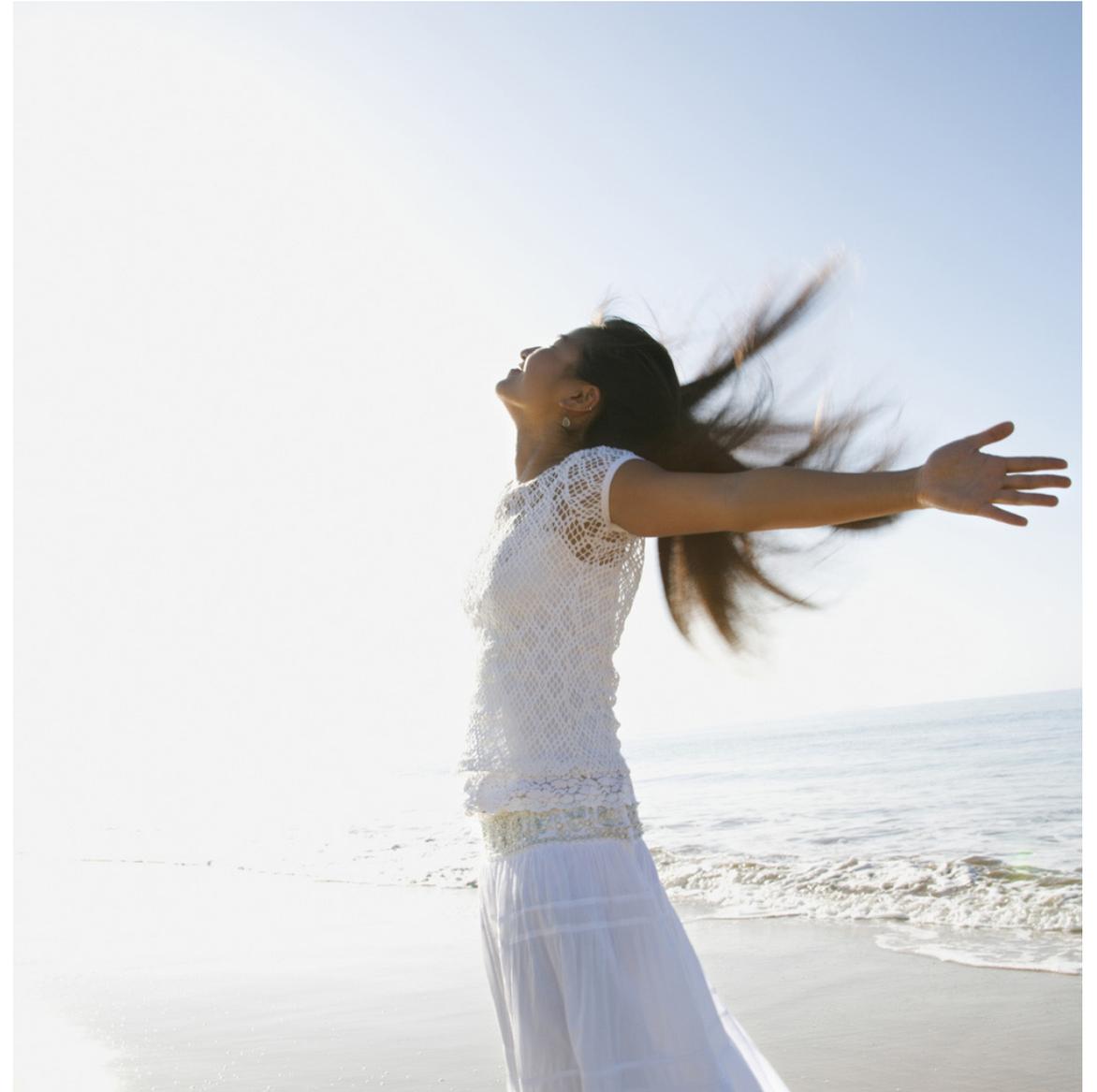
## Ground Rules

5. Do not guess.
  - This admonishment reminds you of your ethical duty to provide truthful testimony.
  - You may be asked to provide your “best estimate.” This is different than a “guess” and is a permissible question.
  
6. If you do not understand a question ask for it to be rephrased.
  - Attorneys, whether by choice or accident, may ask questions that are either confusing or make absolutely no sense.
  - If you have any doubts about what was actually asked of you ask for the question to be rephrased.
  - Sometimes attorneys realize they’re making no sense. If this occurs they will stop, state “strike that,” and begin with a (hopefully) rephrased question.



## Ground Rules

7. You can ask to take a break.
  - Remember you might be at a deposition for hours.
  - You have a right to take any breaks that you need.
  - You will be required to answer any pending question before you are permitted to take the requested break.



# Breaking Down a Subpoena to Testify at a Hearing or Trial



SUBP-002

ATTORNEY OR PARTY WITHOUT ATTORNEY (*Name, State Bar number, and address*):

Kristin W. Roscoe, CA 296840  
 7901 Raytheon Road  
 San Diego, CA 92111

TELEPHONE NO.: (858) 292-2638

FAX NO.:

E-MAIL ADDRESS: kristin@fakemail.com

ATTORNEY FOR (*Name*): Mary Feinberg

FOR COURT USE ONLY

NAME OF COURT: **Superior Court of California, County of San Diego**

STREET ADDRESS: 330 West Broadway

MAILING ADDRESS: 330 West Broadway

CITY AND ZIP CODE: San Diego, CA 92101

BRANCH NAME: Hall of Justice

PLAINTIFF/ PETITIONER: Natasha Feinberg

DEFENDANT/ RESPONDENT: Mary Feinberg

**CIVIL SUBPOENA (DUCES TECUM) for Personal Appearance and  
 Production of Documents, Electronically Stored Information, and Things at  
 Trial or Hearing and DECLARATION**

CASE NUMBER:  
 21-cv-00148

**THE PEOPLE OF THE STATE OF CALIFORNIA, TO (name, address, and telephone number of witness, if known):**

Marjorie Grant, 456 Mindful Place, Encinitas, CA 92007

1. **YOU ARE ORDERED TO APPEAR AS A WITNESS** in this action at the date, time, and place shown in the box below **UNLESS** your appearance is excused as indicated in box 3b below or you make an agreement with the person named in item 4 below.

a. Date: July 1, 2021	Time: 11:00 a.m.	<input checked="" type="checkbox"/>	Dept.: 32	<input type="checkbox"/>	Div.:	<input type="checkbox"/>	Room:
b. Address: 330 West Broadway San Diego, CA 92101							

2. **IF YOU HAVE BEEN SERVED WITH THIS SUBPOENA AS A CUSTODIAN OF CONSUMER OR EMPLOYEE RECORDS UNDER CODE OF CIVIL PROCEDURE SECTION 1985.3 OR 1985.6 AND A MOTION TO QUASH OR AN OBJECTION HAS BEEN SERVED ON YOU, A COURT ORDER OR AGREEMENT OF THE PARTIES, WITNESSES, AND CONSUMER OR EMPLOYEE AFFECTED MUST BE OBTAINED BEFORE YOU ARE REQUIRED TO PRODUCE CONSUMER OR EMPLOYEE RECORDS.**

3. **YOU ARE** (*item a or b must be checked*):

- a.  Ordered to appear in person and to produce the records described in the declaration on page two or the attached declaration or affidavit. The personal attendance of the custodian or other qualified witness and the production of the original records are required by this subpoena. The procedure authorized by Evidence Code sections 1560(b), 1561, and 1562 will not be deemed sufficient compliance with this subpoena.
- b.  Not required to appear in person if you produce (i) the records described in the declaration on page two or the attached declaration or affidavit and (ii) a completed declaration of custodian of records in compliance with Evidence Code sections 1560, 1561, 1562, and 1271. (1) Place a copy of the records in an envelope (or other wrapper). Enclose the original declaration of the custodian with the records. Seal the envelope. (2) Attach a copy of this subpoena to the envelope or write on the envelope the case name and number; your name; and the date, time, and place from item 1 in the box above. (3) Place this first envelope in an outer envelope, seal it, and mail it to the clerk of the court at the address in item 1. (4) Mail a copy of your declaration to the attorney or party listed at the top of this form.

4. **IF YOU HAVE ANY QUESTIONS ABOUT THE TIME OR DATE YOU ARE TO APPEAR, OR IF YOU WANT TO BE CERTAIN THAT YOUR PRESENCE IS REQUIRED, CONTACT THE FOLLOWING PERSON BEFORE THE DATE ON WHICH YOU ARE TO APPEAR:**

a. Name of subpoenaing party or attorney: Kristin W. Roscoe

b. Telephone number: (858) 292-2638

5. **Witness Fees:** You are entitled to witness fees and mileage actually traveled both ways, as provided by law, if you request them at the time of service. You may request them before your scheduled appearance from the person named in item 4.

**DISOBEDIENCE OF THIS SUBPOENA MAY BE PUNISHED AS CONTEMPT BY THIS COURT. YOU WILL ALSO BE LIABLE FOR THE SUM OF FIVE HUNDRED DOLLARS AND ALL DAMAGES RESULTING FROM YOUR FAILURE TO OBEY.**

Date issued: June 20, 2021

Kristin W. Roscoe

(TYPE OR PRINT NAME)

*Kristin W. Roscoe*

(SIGNATURE OF PERSON ISSUING SUBPOENA)

Staff Attorney

(TITLE)

(Declaration in support of subpoena on reverse)

The production of the documents, electronically stored information, or other things sought by the subpoena on page one is supported by *(check one)*:

the attached affidavit or  the following declaration:

**DECLARATION IN SUPPORT OF CIVIL SUBPOENA (DUCES TECUM) FOR PERSONAL APPEARANCE AND PRODUCTION OF DOCUMENTS, ELECTRONICALLY STORED INFORMATION, AND THINGS AT TRIAL OR HEARING  
(Code Civ. Proc., §§ 1985,1987.5)**

1. I, the undersigned, declare I am the  plaintiff  defendant  petitioner  respondent  attorney for *(specify)*: Defendant Mary Feinberg  other *(specify)*:  
in the above-entitled action.
2. The witness has possession or control of the documents, electronically stored information, or other things listed below, and shall produce them at the time and place specified in the Civil Subpoena for Personal Appearance and Production of Records at Trial or Hearing on page one of this form *(specify the exact documents or other things to be produce; if electronically stored information is demanded, the form or forms in which each type of information is to be produced may be specified)*:  
Any and all DOCUMENTS, including but not limited to progress notes, intake forms, patient questionnaires, assessments, billing records, correspondence, calendar entries, pertaining to the the treatment of Natasha Feinberg.

3. Good cause exists for the production of the documents, electronically stored information, or other things described in paragraph 2 for the following reasons:

Marjorie Grant, LMFT, is the treating therapist for Plaintiff Natasha Feinberg. LMFTs in California are required by law to keep and maintain mental health records. Marjorie Grant is a sole practitioner and the custodian of records for Natasha Feinberg's records as delineated in paragraph 2.

Continued on Attachment 3.

4. The documents, electronically stored information, or other things described in paragraph 2 are material to the issues involved in this case for the following reasons:

Marjorie Grant, LMFT, is Natasha Feinberg's treating therapist. At her deposition, Natasha Feinberg testified that she told Marjorie Grant about the June 10, 2020 incident, which underlies the basis of her intentional infliction of emotional distress claim. Natasha Feinberg further testified that as a result of the June 10, 2020 incident, she continues to experience severe anxiety for which she has received treatment regarding from Marjorie Grant. As Natasha Feinberg's treating therapist, Marjorie Grant has information material to the allegations contained in Natasha Feinberg's complaint against Mary Feinberg.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: June 20, 2021

Kristin W. Roscoe

*Kristin W. Roscoe*

(TYPE OR PRINT NAME)

(SIGNATURE OF  SUBPOENAING PARTY  ATTORNEY FOR  
SUBPOENAING PARTY)

### Requests for Accommodations

Assistive listening systems, computer-assisted real-time captioning, or sign language interpreter services are available if you ask at least 5 days before the date on which you are to appear. Contact the clerk's office or go to [www.courtinfo.ca.gov/forms](http://www.courtinfo.ca.gov/forms) for *Request for Accommodations by Persons With Disabilities and Order* (form MC-410). (Civil Code, § 54.8.)

(Proof of service on page 3)

# The Hearing or Trial





## Will I Get Advanced Notice?

- Yes, but just how much depends!
- You are entitled to personal service
- If you are asked to bring records with you, you must be served at least 20 days before you are required to attend (unless the court has ordered a shorter timeframe) CCP § 1987(c).
- If you are just asked to appear and give testimony you are only obligated to receive “reasonable time for preparation and travel to the place of attendance.” CCP § 1987(a).



# Will I Get Paid? Yes!

Government Code § 68092.5:

- (a) A party requiring testimony before any court, tribunal, or arbiter in any civil action or proceeding from any expert witness, other than a party or employee of a party, who is ... (1) an expert... (2) a treating physician and surgeon or **other treating health care practitioner** who is to be asked to express an opinion during the action or proceeding, ..., shall pay the **reasonable and customary hourly or daily fee for the actual time consumed in the examination of that witness by any party attending the action or proceeding**. ... A daily fee shall **only** be charged for a full day of attendance at a deposition or where the expert was required by the deposing party to be available for a full day and the expert necessarily had to **forego all business** he or she would have otherwise conducted that day but for the request that he or she be available all day for the scheduled deposition.
- (e) An express contract entered into between a person and the party requesting or requiring the person to testify, relating to compensation, shall be enforceable and shall prevail over the provisions of this section.



# The Courtroom

- Remember everything that applied to a deposition? Now add in a judge, courtroom staff, a bailiff, and an audience!
- Be sure to plan sufficient time to find parking and go through security at the courthouse.
- Before entering the courtroom, the judge will have certain rules, such as turn off phone or place phone on vibrate, posted to the courtroom doors. **Don't be the person whose cell phone rings while court is in session!**
- Remember that the judge should be afforded certain courtesies such as referring to them as “Your Honor” or “Judge” when you address them.
- Some courtrooms will have a bailiff or court staff whom you can check in with prior to providing testimony. If you aren't sure of the protocols, take a seat, look for the “suits,” and wait to see what other people do when they first enter the courtroom.



# The Psychotherapist-Patient Privilege





## Client Direction

- It is important to contact your patient upon receipt of the subpoena with one question – What do you want me to do?
- Be prepared to tell your patient about the subpoena:
  - The party who issued the subpoena (Is it from your client's attorney or opposing counsel);
  - What is asked of you (Is it just to testify or also to produce records)
  - When the deposition/hearing/trial is set to take place
- At the end of the day, you need to know if you can testify freely or assert the psychotherapist-patient privilege and wait for the judge to order you to testify
  - Be sure to get your client's written authorization to testify freely (or with limits) and/or produce records





# The Psychotherapist-Patient Privilege

The psychotherapist-patient privilege is an evidentiary privilege in California law (Evidence Code § 1014) that provides:

[T]he patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist if the privilege is claimed by:

- (a) The holder of the privilege.
- (b) A person who is authorized to claim the privilege by the holder of the privilege.
- (c) The person who was the psychotherapist at the time of the confidential communication, but the person may not claim the privilege if there is no holder of the privilege in existence or if he or she is otherwise instructed by a person authorized to permit disclosure.



# The Psychotherapist-Patient Privilege

A “confidential communication between patient and psychotherapist” (Evidence Code § 1012) is defined as:

“[I]nformation, including information obtained by an examination of the patient, transmitted between a patient and his psychotherapist in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation, or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the psychotherapist is consulted, and includes a diagnosis made and the advice given by the psychotherapist in the course of that relationship.”



# Joint Holders of Privilege

Evidence Code § 912(b):

Where two or more persons are joint holders of a privilege provided by Section . . . 1014 (psychotherapist-patient privilege), . . . a waiver of the right of a particular joint holder of the privilege to claim the privilege does not affect the right of another joint holder to claim the privilege. In the case of the privilege provided by Section 980 (privilege for confidential marital communications), a waiver of the right of one spouse to claim the privilege does not affect the right of the other spouse to claim the privilege.



## Exceptions to the Psychotherapist-Patient Privilege



While the psychotherapist-patient privilege is broad there are exceptions.



Evidence Code § 1016:

“There is no privilege ... as to a communication relevant to an issue concerning the mental or emotional condition of the patient if such issue has been tendered by ... [t]he patient.”



Evidence Code § 1018:

If your services were “sought or obtained to enable or aid anyone to commit or plan to commit a crime or a tort or to escape detection or apprehension after the commission of a crime or a tort.”



# Who Can Waive Privilege?

- An adult who is not subject to conservatorship is able to waive their own privilege
- A minor child is entitled to the privacy granted by the psychotherapist-patient privilege. *In re Daniel C.H.* (1990) 220 Cal. App 3d. 814.
- Parents generally do not have the right to waive or invoke privilege on behalf of their child.
  - When an attorney has been appointed by the court to represent a minor, that attorney can claim and waive privilege on behalf of the minor.
  - If the minor has been appointed a *guardian ad litem*, that person (who may or may not be a parent) may invoke or waive privilege on behalf of the child.

**Practice Pointer:** Don't forget, when your patient is a couple or family unit, you need a signed waiver from all members of your patient in order to testify about the patient.

# Ethical Considerations

Applying the CAMFT Code of Ethics to Testimony





# Obligation to Provide Truthful Testimony

CAMFT Code of Ethics § 10.1 provides:

- Marriage and family therapists who give testimony in legal proceedings testify truthfully and avoid making misleading statements.
- Marriage and family therapists inform the court of any conflicts between the expectations of the court and their ethical obligations or role limitations.
- Marriage and family therapists should anticipate that clients, attorneys, or the court, might ask them to offer opinions or information beyond the limits of their knowledge base or expert role. In such circumstances, marriage and family therapists safeguard their professional objectivity by clarifying these issues with the court and respectfully declining to offer such testimony.



# Obligation to Remain Impartial

CAMFT Code of Ethics § 10.5 provides:

- Marriage and family therapists, regardless of their role in a legal proceeding, remain impartial and do not compromise their professional judgment or integrity.
- Marriage and family therapists understand that their testimony and opinions are impactful on legal outcomes.
- Marriage and family therapists use particular caution when drawing conclusions or forming or expressing opinions from limited observations or sources of information.



# Expressing Professional Opinions

CAMFT Code of Ethics § 10.7 provides:

- Marriage and family therapists shall only express professional opinions about clients/patients they have treated or examined.
- Marriage and family therapists, when expressing professional opinions, specify the limits of the information upon which their professional opinions are based.
- Such professional opinions include, but are not limited to, mental conditions, emotional conditions, or parenting abilities.



# Professional Communications

CAMFT Code of Ethics § 10.12 provides:

- Marriage and family therapists are aware of the potential impact of the adversarial nature of legal disputes on their actions, observations, and opinions.
- When communicating with clients/patients, parents, counsel, the court, or other parties, marriage and family therapists ensure that their communications are properly authorized, unbiased, and accurate.
- Marriage and family therapists decline to communicate when there is insufficient data to form a reliable opinion or where the opinion is inconsistent with their role.

Thank you for  
attending!

