MonashHealth

South Eastern CASA
Centre Against Sexual Assault & Family Violence

Can my client records be subpoenaed

In Victoria, this falls under the *Evidence (Confidential Communications) Act 1998*.

> *"The purpose of this Act is to protect from disclosure in legal proceedings confidential communications between the victim or alleged victim of a sexual offence and a medical practitioner or counsellor. The Act enables a court to order disclosure but specifies matters about which the court must be satisfied before doing so."*

A communication may be made in confidence even if it is made in the presence of a third party if the third party's presence is necessary to facilitate communication or further the treatment or counselling process.

Exclusion of evidence of confidential communications

Your client record cannot be used as evidence in a legal proceeding if it would disclose a confidential communication between you and your counsellor unless the court grants permission to bring it in as evidence.

In addition the party requesting the information must, not less than 14 days before the evidence is proposed to be brought into argument, give notice in writing of their intention to both you and your counsellor. The court may however waive this requirement.

When a subpoena for your records is received, you and your counsellor may make submissions to the court to argue that the information is a confidential communication. The court may order that the document be produced to inspect it but must not make the document available, or disclose its contents, to the person requesting the records.

Restriction on granting the use of the communication as evidence

A court must not allow a party to bring into court as evidence confidential communications unless it is satisfied, on the balance of probabilities, that;

- the evidence will, either by itself or in conjunction with other evidence, be sufficiently useful to prove something important in a trial; and
- other evidence of similar or greater value concerning the matters to which the protected evidence relates is not available; and
- the public interest in preserving the confidentiality of confidential communications and protecting you from harm is substantially outweighed by the public interest in admitting your records as evidence.

The court must also take into account the likelihood, and the nature or extent, of harm that would be caused to you if your records are allowed as evidence.

Whatever the court decides, it must state its reasons for giving or refusing to allow your records in as evidence. If the application for bringing the communication into evidence is refused, the court must not allow this to be known to the jury.

Limitations on the legislation

This legislation does not prevent the evidence being brought into court if you, or if you are under 14 years of age, your guardian, gives consent for the records to be used as evidence.

It also does not protect information acquired by a registered medical practitioner by physical examination (including communications made during the examination) of you in relation to the sexual offence.

How the court may try to reduce harm

If leave is given to bring your client records into evidence, the court may;

- order that all or part of the evidence be heard in camera.
- order the suppression of publication of all or part of the evidence given before the court,
- make orders relating to disclosure of protected identity information as necessary to protect the safety or welfare of you or your counsellor.