

You've Been Served: How to Handle the Stress of Subpoenas

Contributed by Brenda Gray

The innocent-looking envelope you've received contains a letter that ominously commands you to "APPEAR UNDER PENALTY OF LAW." Congratulations. Like thousands of social workers and case manager/therapists, you've joined the ranks of the subpoenaed. So, best practice dictates that you file the paper away, wait for the court date, and dutifully take your case file to the courthouse prepared to walk into the courtroom to divulge numerous details about your client, right? {mosgoogle right}

Wrong. By doing so, you may have just violated your client's state- and federally-mandated privacy rights, wasted hours of precious productivity time sitting in a courthouse hallway, and blemished your professional reputation. However, by arming yourself with knowledge of this process and what you can do to prepare for it, you can minimize these potential outcomes.

What is a subpoena?

Contrary to popular belief, an ordinary subpoena is not a court order from a judge. At the most, it is a document filed by an attorney that compels you to come to the courthouse at a particular time. The important thing to remember is that the subpoena does not give you permission to divulge any information about your client to the attorney or to the court. The Health Insurance Portability and Accountability Act of 1996 (HIPAA) and most states require that you obtain permission of the client before disclosing anything under these circumstances absent a court order signed by a judge. According to Sherri Morgan, Associate Counsel for the National Association of Social Workers, ignoring this fact is one of the biggest mistakes a social worker can make—a mistake that may result in substantial consequences. "Disclosing information based on a subpoena without client permission or a court order may be a basis for a licensing board complaint or an ethics complaint," she says.

Another mistake Morgan cautions workers against: ignoring the subpoena altogether. By doing so, you may be exposing yourself to contempt of court charges.

What should I do? Do I really have to go?

Let your client know that you've received a subpoena. Your client may be eager for you to testify, or may have been referred to you for treatment through a court-ordered case plan. If so, ask your client to sign a release for you to discuss the case with the attorney and the court. If he or she does not want you to disclose any information, contact your agency's in-house attorney or privacy officer. The attorney can file a motion with the court to get you out of the subpoena, called a "motion to quash." If you do not have someone at your agency who serves in this capacity, you can call the subpoenaing attorney to let them know that you don't have permission to talk about the case. Then, the burden is on that attorney to get permission from your client or a court order signed by a judge.

Whether or not you have a cooperative client, you may not have to attend the court date. In many instances, the subpoena will instruct you to contact the attorney if you have a conflict with the date or are otherwise unable to appear. Like most social workers, your schedule is probably filled weeks in advance, so a conflict is likely. Often, the hearing will not occur as planned as a result of continuances or a resolution in the case. So, call the attorney to see if your appearance is really necessary. If you must appear and you have permission to talk about the case, you can answer the attorney's questions. You may be told that you don't have to appear if your statements don't help his or her case. At a minimum, ask that you be placed "on call," which means that you will be called in on the court date if your testimony is still necessary. By taking these steps, you may be able to avoid waiting for hours in a crowded courthouse, only to be told late in the day that the case has been settled or continued.

Getting ready

Assuming hurdles regarding confidentiality are overcome and you are a necessary witness, you should insist upon being prepared for the hearing by the subpoenaing attorney. Ideally, you should meet in person. He or she will ask you direct, "open ended" questions about you, starting with your education and employment history, and then progressing to the case at hand. Remind the attorney that you are ethically bound to only answer questions within your role as the social worker on the case. "Limit your responses to information based on the services you provided to the client—avoid making recommendations or speculating about issues that you did not evaluate, or that are beyond the scope of your competence," Morgan says. For example, if you are a therapist who is treating a child involved in a custody dispute, you cannot answer the question of "who should have custody," since your role is that of a therapist. You can answer questions regarding diagnosis, treatment, and events you witnessed firsthand. The attorney should also give you an idea of the questions that will be asked by opposing counsel during cross examination. These questions will be "leading" and will usually elicit a yes or no response. The intent of these questions is to "poke holes" in your testimony, so knowing what these questions may be should make this aspect of the hearing less intimidating. If the attorney has asked to inspect records, do not provide the original case file; certified copies of records will suffice. Finally, if the case is particularly contentious, ask the attorney to make arrangements for you to wait in a separate area of the courthouse, to avoid an unpleasant scene with family members or opposing parties.

And speaking of opposing parties, you may be contacted by the opposing counsel prior to the hearing. Just remember that the same rules apply: you cannot disclose information without permission from the client or a court order.

At the courthouse

If you're called to the courthouse, make sure you are dressed professionally and take reading material--this could take a while. Upon arrival, check in with the court's bailiff or receptionist. Although the subpoena may state that the hearing begins at a certain time, an actual hearing will probably begin much later. Attorneys will meet to discuss the case and possibly negotiate a settlement. They may also meet with the judge and begin the hearing without letting you know, so feel free to check in with court personnel to determine the status of the case. Attorneys sometimes move on to other cases without alerting witnesses, so be assertive. If you have heard that the case has been resolved, don't leave the courthouse without letting court personnel know.

If you testify, you will be sworn in and the attorney who subpoenaed you will ask the open-ended questions you discussed earlier. Pause slightly before answering any questions, to give the parties a chance to object. If it is unclear if you should answer a question after an objection, look to the judge to see if you may proceed. Only answer what is asked, no more and no less. If you don't understand the question, say so. If you are asked a hypothetical question and you can't answer it because of possible variables involved, say so. If you feel that a question is outside your area of expertise, say so. Social workers tend to be helpful by nature, but don't provide more information than is asked for or engage in speculation. During cross examination, you may be asked questions in an aggressive manner, since the attorney is attempting to highlight any weaknesses in your direct testimony. Some attorneys may become confrontational with you, or may dwell on seemingly inconsequential details. They may have a weak case themselves, or they may be trying to make a thorough record for appeal purposes. Whatever the case, remember that you should not take it personally! Even if the judge isn't particularly charming during the hearing, keep this in mind. Stay as calm as you can, and take pride in the fact that you are presenting yourself in a professional manner.

What happens if things don't proceed as planned?

All of the above information presupposes that you are dealing with competent, responsive participants. However, this may not reflect reality. Attorneys may not return your phone calls, or you may not be able to meet with them ahead of time. Nevertheless, do what you can to protect your client and your reputation. See if your client will give you permission to discuss the case. Go over your credentials, and review the case file with your supervisor. When you go to court, check in and try to find the person who subpoenaed you. If you don't have permission to discuss the case, say that you can't reveal information without it. If you are still compelled to take the witness stand, repeat this to the judge as soon as you are asked any questions about your client, and describe your duty to protect confidentiality under HIPAA, state law, and your profession's ethical guidelines. Morgan advocates additional measures to further protect your client. "Take other available steps to protect the client's confidentiality in the proceedings, such as requesting that the record be sealed or that confidential records be destroyed or returned at the conclusion of the proceedings," she says.

Remember, it's your license and reputation on the line. With adequate preparation, you can turn a process that is fraught with anxiety into a learning experience that underscores your confidence, competence, and professionalism.

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This article is intended to provide general information about this subject and is no substitute for legal advice. For assistance with a specific legal problem or situation, readers are urged to seek advice from an attorney.