

Social Workers and Subpoenas

A Brief Summary

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(June 1997)

Social workers are becoming involved in clients' lawsuits more frequently than they would like. Domestic relations matters, drunk driving accidents, and sexual harassment or other work-related problems can lead to litigation for clients who are in family counseling, therapy, or employee assistance programs. In addition, social workers are required to report acts or suspicions of child or elder abuse and may have to testify about these reports. Further, troubled clients may be involved in legal proceedings such as child custody contests, workers' compensation hearings, civil damage suits, or criminal matters including domestic violence and violation of probation orders.

These and similar matters may result in litigation involving social workers and the subpoena of their records. The type of subpoena, whether it must be obeyed, whether the client has provided a valid written release of information, and whether original records must be provided are some issues that must be addressed. The first step in sorting out how to treat a subpoena is to understand the concepts and rules on which a subpoena is based. Armed with some information about the purpose of a subpoena and the legal and ethical rules that generally apply, social workers can analyze how to respond and also can formulate legal questions for an attorney.

What is a subpoena?

To assist in the lengthy and complex process of litigation, courts and legislative bodies have adopted numerous rules to promote efficiency, fairness, and the pursuit of truth. Federal and state statutes provide courts and attorneys involved in litigation or administrative hearings with a command to compel production of witnesses and evidence. This order is known as a "subpoena".

A *subpoena* is a mandate, lawfully issued in the name of the court, compelling the attendance of an individual as a witness and/or the production of documents or things to the court. A subpoena is used to assist in the discovery of evidence before trial and to compel testimony or the production of evidence during trial. *Discovery* is the process of gathering information to prepare for trial and to ensure that all relevant information is available to all involved parties. Subpoenas are served on individuals or corporations that have information or evidence that bears on claim or case pending before the court. The court is authorized to impose sanctions on the person who does not comply with the court's order. Social workers who receive a subpoena will want to protect client interests and confidentiality while cooperating to the extent legally required and meeting all ethical obligations.

Responding to a subpoena

Social workers who receive a subpoena must act quickly to establish the parameters for a proper response that takes into consideration both ethical concerns and legal duties. The checklist below notes points that should be considered before responding to a subpoena.

- Receiving a subpoena can be intimidating, but the social worker should remember that the court has not made a decision about the validity of the subpoena.
- Although an attorney has broad power in issuing a subpoena, the social worker must not be misled into mistakenly producing privileged materials.
- When considering how to respond to a subpoena, the social worker must always remember the rights of the client and the authority of the court. The failure to respond correctly can lead to the disclosure of privileged information without the client's consent or the imposition of contempt sanctions by the court
- The social worker should thoroughly read a subpoena, noting the date for response, the action required, and the court and attorney issuing it. The social worker should contact the client and provide him or her with a copy. If the client consents to the release of information, he or she should provide a written release to the social worker. If the client is uncertain or objects to the release of information, his or her records generally may not be provided or discussed. Absent an appropriate basis for doing so, federal and state law and the *NASW Code of Ethics* may require or permit release of records without the client's consent. Records should never be released before thoroughly verifying and documenting the legal and ethical mandates for doing so and, if possible, advising the client.
- The social worker should obtain the client's written consent to discuss the subpoena with the client's attorney and to provide the attorney with a complete set of the subpoenaed documents or the documents the clients wants the attorney to review.
- The social worker who does not understand what the subpoena is requesting, with the client's written consent, can contact the client's attorney. The court clerk may be able to provide some assistance if the client does not have an attorney or the social worker may retain his or her own counsel.
- The social worker should generally not provide any information if contacted by the issuing attorney and the client has not consented to a release of information. The *NASW Code of Ethics* should be reviewed.
- After understanding what is required and what the client is permitting, the social worker can contact the issuing party to arrange for a convenient time and place for compliance.
- The social worker may be entitled to witness and mileage fees or the payment of copying costs. These should be discussed with attorney issuing the subpoena.
- If the material requested is privileged or the subpoena is procedurally improper, the social worker has the right to object by filing written objections, requesting a protective order, or filing a motion to quash or modify the subpoena. The issuing party than cannot gain access to the information without first receiving a court order.
- If a claim of privilege is asserted on behalf of the client, the social worker must still attend the deposition or trial and state this claim on the record and be ready to provide some basis for the assertion.
- At any time during the subpoena process the social worker may consult or retain an attorney. Often, however, the client's attorney can provide necessary information that protects the client's interest.
- The social worker employed by or under contract with an agency, employee assistance program, managed care facility, hospital, or other entity providing social work services should give a copy of the subpoena to the attorney for the facility with a request for consultation regarding a proper response.
- The social worker should document for the client's file all activity regarding the response to the subpoena.

This article is excerpted from "Social Workers and Subpoenas: Office of General Counsel Notes." For a copy of the complete report, call the Chapter office at (212) 668-0050.

