

YOU'VE RECEIVED A SUBPOENA FOR RECORDS OR DEPOSITION NOW WHAT?

An Examination of the Interplay Between the Legal Processes
and the Illinois Confidentiality Act for Mental Health
Practitioners

Doherty & Progar LLC

June 4, 2019

Presented by:

Michael T. Sprengnether, Partner

**A SUBPOENA IS
NOT A COURT
ORDER**

You have received a subpoena for records, a deposition, or trial

NOW WHAT DO YOU DO?

- Say as little as possible
- Refer the matter to your professional liability insurance carrier

WHY SAY AS LITTLE AS POSSIBLE?

▶ Because the Illinois Mental Health and Developmental Disabilities Confidentiality Act, 740 ILCS 110 demands it and protects all client communications to a therapist from disclosure.

▶ “No party to any proceeding described under paragraphs (1), (2), (3), (4), (7), or (8) of subsection (a) of this Section, nor his or her attorney, shall serve a subpoena seeking to obtain access to records or communications under this Act unless the subpoena is accompanied by a written order issued by a judge or by the written consent under Section 5 of this Act of the person whose records are being sought, authorizing the disclosure of the records or the issuance of the subpoena.”

▶ “No person shall comply with a subpoena for mental health records or communications pursuant to Section 10 of the ... (Act), unless the subpoena is accompanied by a written order that authorizes the issuance of the subpoena and the disclosure of records or communications or by the written consent under Section 5 of that Act of the person whose records are being sought.”

(740 ILCS 110/10(d))

- The Act defines “therapist” as a “psychiatrist, physician, psychologist, social worker or nurse providing mental health or developmental disabilities services or any other person not prohibited by law from providing such services or from holding himself out as a therapist . . .”
- Thus any mental health practitioner whose license allows him or her to provide counseling or therapy is considered a “therapist” under the Act and is governed by it.
- The Act itself is liberally construed by the courts, thus all mental health practitioners regardless of licensure should practice confidentiality according to the Act.

Another main reason why you should say as little as possible upon receipt of a subpoena, is to avoid inadvertent disclosure.

- ▶ Remember that the Act states that all communication between the therapist and recipient (client) are confidential and cannot be disclosed.
- ▶ But also importantly, for your purposes when you receive a subpoena, is that the Act also includes as confidential communication “information which indicates that a person is a recipient”
- ▶ When you receive a subpoena, you will violate the Act if you acknowledge that you have information or records relating to the person named in the subpoena.

Potential consequences of a breach of confidentiality under the Act:

- ▶ “Any person aggrieved by a violation of this Act may sue for damages, an injunction, or other appropriate relief. Reasonable attorneys fees and costs may be awarded to the successful plaintiff in any action under this Act (740 ILCS 110/15)
- ▶ “Any person who knowingly and willfully violates any provision of this Act is guilty of a Class A misdemeanor” (740 ILCS 110/16)
- ▶ Potential sanctions to your license imposed by the Illinois Department of Financial and Professional Regulation (IDFPR).

Why immediately contact your professional liability insurance company?

- ▶ Most, if not all, professional liability policies provide coverage for subpoena compliance, for giving a deposition, and proceedings in front of the Disciplinary Commission.
- ▶ Check your policy terms or the declarations (Dec.) page.



Limits of Liability		Coverage Part
EACH OCCURRENCE <i>(Per individual claim)</i>	AGGREGATE <i>(Total amount per policy year)</i>	
\$1,000,000	\$5,000,000	Professional Liability
N/A	N/A	Commercial General Liability Includes: General Liability, Fire & Water Legal Liability, and Personal Liability
N/A	N/A	Property Coverage
\$1,000,000	\$5,000,000	Supplemental Liability
Unlimited	Unlimited	Defense Expense Coverage
\$35,000	\$35,000	State Licensing Board Investigation Defense Coverage
\$15,000	\$15,000	Assault Coverage
\$10,000	\$35,000	Deposition Expense Benefit
\$5,000/person	\$50,000	Medical Expense Coverage
\$15,000	\$15,000	First Aid Coverage

COVERAGE A - PROFESSIONAL LIABILITY COVERAGE	LIMITS OF LIABILITY	PREMIUM
Individual - Each Incident:	\$1,000,000	\$277.00
Aggregate:	\$5,000,000	
Association, Partnership or Corporation - Each Incident:	\$N/A	
Aggregate:	\$N/A	
COVERAGE B - SUPPLEMENTAL LIABILITY COVERAGE		(Included)
Each Incident:	\$1,000,000	
Aggregate:	\$5,000,000	
STATE LICENSING BOARD INVESTIGATION DEFENSE COVERAGE		\$0.00
Each Incident:	\$35,000	
Aggregate:	\$35,000	

C. ADDITIONAL POLICY BENEFITS

1. Deposition Expense

We will pay for reasonable legal expenses incurred by you for appearance at a deposition to which you are required to submit, and that involves the professional occupation shown in the Declarations. No insured will be reimbursed more than \$10,000 per professional incident.

This benefit is subject to a limitation of \$35,000 per deposition received.

2. State Licensing Board Investigation Expenses

We will pay reasonable expenses that you incur resulting from an investigation or proceeding by a state licensing board or other regulatory body provided that the investigation or proceeding arises out of events which could result in claims covered by this policy. We will not be responsible for conducting such investigation or providing such defense. The maximum aggregate amount we will pay for this benefit is \$35,000. Reasonable expenses will include those you or we incur for legal defense, including the production of expert witnesses, as well as your travel expenses to such proceedings.

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The
Confidentiality
Act only allows
disclosure of
ANY
communication
with a recipient
by a proper
consent or
appropriate
court order.

▶ A subpoena will sometimes include an attached correct consent under the Act, but rarely includes the appropriate court order. Most often, the order attached to the subpoena is the standard medical HIPAA order, which does not comply with the Illinois Confidentiality Act.

▶ Your attorney should ensure the correct consent or order is given before acknowledging you have information regarding recipient and certainly before any communications are submitted in response to the subpoena.

- ▶ Once you turn the matter over to your insurance carrier, it should retain a competent attorney on your behalf, who will deal with the subpoenas in an appropriate manner.
- ▶ Some policies of professional liability insurance allow you to retain your own attorney and it will reimburse reasonable attorneys fees. Be sure to retain a competent attorney, which means someone familiar with your profession, familiar with litigation, and most importantly, familiarity with the Illinois Confidentiality Act.



CONSENT REQUIREMENTS UNDER THE ACT

“(b) Every consent form shall be in writing and shall specify the following:

- (1) the person or agency to whom disclosure is to be made;
- (2) the purpose for which disclosure is to be made;
- (3) the nature of the information to be disclosed;
- (4) the right to inspect and copy the information to be disclosed;
- (5) the consequences of a refusal to consent, if any; and
- (6) the calendar date on which the consent expires, provided that if no calendar date is stated, information may be released only on the day the consent form is received by the therapist; and
- (7) the right to revoke the consent at any time.”

(740 ILCS 110/5)

ADDITIONAL REQUIREMENTS FOR A PROPER CONSENT

- ▶ Has to be signed by the recipient and witnessed.
- ▶ Only relevant information can be disclosed.
- ▶ A blanket consent of unspecified information is not valid.
- ▶ The information may not be re-disclosed by the person receiving the information. (740 ILCS 110/5)

▶ “Records and communications may be disclosed in a civil, criminal or administrative proceeding in which the recipient introduces his mental condition or an aspect of his services received for such condition as an element of his claim or defense, if and only to the extent the court in which the proceedings have been brought . . . finds, after an *in camera* examination of the testimony or other evidence, that it is relevant, probative, not unduly prejudicial or inflammatory, and otherwise clearly admissible; that other satisfactory evidence is demonstrably unsatisfactory as evidence of the facts sought to be established by such evidence; and that disclosure is more important to the interests of substantial justice than protection from injury to the therapist-recipient relationship or to the recipient or other whom disclosure is likely to harm.” (740 ILCS 110/10)

REQUIREMENTS FOR A COURT ORDER

IF YOU RECEIVE A SUBPOENA FOR A DEPOSITION, OR TRIAL TESTIMONY, THE SAME RULES APPLY:

1. Say as little as possible.
2. Submit the subpoena to your insurance carrier.
3. Consult with your attorney and thoroughly prepare for the testimony.

AVOID THE LAZY LAWYER TRAP

- (a) Occurs almost always in divorce or custody matters;
- (b) Lawyer attempts to have you testify to matters beyond your license;
- (c) Lawyer attempts to have you testify to matters more appropriate for a court evaluator and you lack the privilege granted by the Court Evaluator Statute (750 ILCS 5/604.10) (*Heisterkamp v. Pacheco*, 47 N.E. 3d 1192, 400 Ill. Decisions 227 (2016 Ill.App.))

The Illinois
Department of
Financial and
Professional
Regulation
(IDFPR) Regulates
All Mental Health
Practitioner
Licenses

- ▶ It governs the procedures for the granting of any license, the requirements to maintain the license, and administers disciplinary proceedings.

The IDFPR Disciplinary Process

1. All actions are commenced by the filing of a complaint, which can be anonymous
2. An investigator for the Department will request all records relating to an individual, either by consent or subpoena. You must comply within 60 days.
3. A complaint can be dismissed at investigative stage, but rarely occurs.
4. The Department usually sends a notice for you to appear at an informal conference to discuss the complaint with a Department attorney and a volunteer mental health practitioner.

The IDFPR Disciplinary Process Cont'd...

4. Occasionally, a formal complaint is filed by the Department prior to the setting of the informal conference.
5. If the matter is not dismissed after the informal conference, the matter proceeds to a formal Administrative Trial-like hearing, where evidence is presented.
6. An Administrative Finding is administered and if rejected, an appeal process starts by having the matter referred to the Illinois Circuit Courts.

WHAT ARE THE MOST COMMON COMPLAINTS MADE TO THE IDFDR?

1. Therapists who counsel children involved in divorce/custody proceedings.
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4. Therapists who counsel children involved in divorce/custody proceedings.
5. Therapists who counsel children involved in divorce/custody proceedings.

WHAT ARE THE MOST COMMON COMPLAINTS MADE TO THE IDFDR? Cont'd...

6. Sexual relations with a client.
7. Use of the word “psychology” by professions other than clinical psychologists.
8. Failure to maintain professional distance with client
9. Not properly terminating relationship with BSC (client).
10. Extensive therapy without noticeable results
11. Failure to maintain confidentiality.
12. Getting trapped by lazy lawyer and rendering unauthorized opinions.

IN CONCLUSION:

- ▶ Refer any subpoena to your insurance carrier or attorney
- ▶ Do not acknowledge that you have records or information regarding any recipient
- ▶ Any communications with a recipient are only discoverable by proper consent or appropriate court order
- ▶ You can be sued for damages and be the subject of disciplinary action for a breach of confidentiality
- ▶ The IDFPR acts on all complaints, which you should immediately refer to your insurance carrier or attorney
- ▶ Review licensing statute and administrative rules for your profession for what is considered misconduct

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