I Just Got a Subpoena. What is it?

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If you have been required to either go to court to testify as a witness in an on-going professional negligence suit, or you have been hired as an expert witness to establish the standard of care in a professional negligence suit, you know what a subpoena is. For those of you who have not experienced either scenario, it is helpful to know what a subpoena is in the event you are ever served with one.

Generally, a subpoena is a directive requiring you to appear at a specific time and place and give testimony (under oath) about a certain matter. (1) The testimony under oath is given at a deposition, at trial or both.

The subpoena will include the name of the plaintiff and defendant, along with the case number, and the attorney who issued the subpoena (or asked that it be issued), along with the individual he or she represents. There are two types of subpoenas.

The first is a *subpoena ad testificandum*, which is Latin for the technical and descriptive term for the "ordinary" subpoena as defined above. A *subpoena duces tecum* requires you to appear at a specific time and place to testify and to bring with you specified documents (e.g., medical records, educational certificates) that are material and relevant to an issue or issues in a pending judicial proceeding and that are in your possession. (2)

Both types of subpoenas are issued according to your state's civil or criminal practice rules and your state's supreme court rules. As an example, the rules may grant a clerk of any court and/or an attorney licensed in the state in which you work to issue subpoenas. The rules may also state the subpoena can be served by certified mail, with a return receipt showing the date and to whom the subpoena was delivered, and within a certain time period *prior* to the date the appearance is required. (3)

A check for a fee for appearing as a subpoenaed witness and mileage is included with the served subpoena. Though the fee and mileage amount is hardly enough to truly pay for the subpoenaed individual's time and for the true cost of gas, parking or the cost of public transportation, it does provide some compensation for the requirement to appear at the time and place required in the subpoena.

Expert witnesses, including physicians and other health care providers, are able to charge for their time when giving a deposition or providing testimony at trial pursuant to a subpoena. If there is a conflict between the expert and the individual who subpoenaed the expert about the amount charged by the expert witness for his or her testimony, a court hearing is usually held to determine the reasonable fee to be paid to the expert. (4)

So, what should you do if you are served with, or receive, a subpoena? Some pointers to keep in mind are:

- Do not ignore a subpoena. If you have actual knowledge of the subpoena and witness and mileage fees have been included with the subpoena, you must respond. If the subpoena is not lawfully issued, is overly broad, or raises other legal questions, your attorney can handle that matter once you contact your attorney;
- Contact your insurance carrier when you receive the subpoena. If you do not have your own professional liability insurance that provides you with an attorney, you need to contact and retain an attorney to represent you in the matter that is the subject of the subpoena;
- Do not go to the deposition, or testify at trial, without legal representation;
- Do not talk with anyone about the subpoena or the case it is issued about except your attorney;
- Prepare for your testimony, with the help of your attorney;
- Testify truthfully and completely about the subject matter of the subpoena;
- Review any records in your possession you are asked to bring with you and go over them with your attorney, who will initially evaluate their relevance to the case and decide if any legal challenge to their production at the deposition or at trial is necessary;
- If you are subpoenaed as an expert witness, do not be concerned with answering a question about your fees as an expert. Payment is allowed, as was discussed above. Your attorney will tell you that you can, and should, state that the payment of your fees has nothing to do with your truthful and honest opinion in the case; and
- If you are asked if you would testify in any court case, you should ask that you be subpoenaed rather than being a voluntary witness. This approach protects you from being seen as biased or your opinion being seen as not truthful due to the voluntary nature of your appearance. Being subpoenaed rather than a voluntary appearance is some protection against these allegations.

Please note: *It is your duty as an insured to notify your professional liability insurance of any subpoenas, depositions or incidents that may result in a claim / suit against you. As a CPH & Associates policy holder, you may do so by logging into your CPH Customer Portal and selecting "Report a claim or incident" or "Report a subpoena or deposition" to fill out the appropriate form to notify CPH & Associates.*

FOOTNOTES

1. Henry Campbell Black (1991). Black's Law Dictionary. Abridged 6th Edition. St. Paul, MN: West Publishing Company, 995.
2. Id.
3. See, for example, Illinois Supreme Court Rule 237 (a) (2005).
4. See, for example, 735 Illinois Compiled Statutes 5/2-1101 (2009).

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