(Revised September 2010 to reflect amendments to statute)

MENTAL HEALTH SUBPOENAS: REQUIREMENTS FOR ATTORNEYS

Brooke R. Whitted and
(whittedlaw@aol.com)
Neal E. Takiff
(ntakiff@wct-law.com)
Whitted, Cleary & Takiff LLC
3000 Dundee Road, Suite 303
Northbrook, Illinois 60062
Phone: (847) 564-8662
Fax: (847) 564-8419
Website: www.wct-law.com

Subpoenas

The IMHHDDCA has been amended over the years to restrict service of subpoenas in certain circumstances, without an accompanying court order. The provision, located at ILCS 110/10(d), states:

> *(d) 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, authorizing the disclosure of the records or the issuance of the subpoena. No person shall comply with a subpoena for records or communications under this Act, unless the subpoena is accompanied by a written order authorizing the issuance of the subpoena or the disclosure of the records. (Source: P.A. 86-1417). (emphasis added)*

In order to become acquainted with the operation of this section, which serves as a statutory command to all "persons" not to comply with an improperly served subpoena, it is necessary to examine the sections referenced. On July 29, 2010, the IMHHDDCA was amended pursuant to Public Act 96-1399, which is effective now, and which placed additional requirements on the procedures to obtain the mandated court order:

> *(d) ….No such written order shall be issued without written notice of the motion to the recipient and the treatment provider. Prior to the issuance of the order, each party or other person entitled to notice shall be permitted an opportunity to be heard pursuant to subsection (b) of this Section. (Source: P.A. 96-1399).(emphasis added)*

Subsection (b) allows either a party or interested person to request an *in camera*[1] review by the court of the records or communications to be disclosed. If a therapist asserts a privilege on behalf and in the interest of a recipient (against the recipient's wishes), the court may require that the therapist establish that disclosure would not be in the recipient's best interests. Such a hearing would also be conducted *in camera*.

[1] *This means a preliminary review of the restricted file, by the judge, in his office and off the record.*

In addition, Public Act 96-1399 now requires that every subpoena seeking mental health records must now include the following language: **"No person shall comply with a subpoena for mental health records or communications pursuant to Section 10 of the Mental Health and Developmental Disabilities Confidential Act, 740 ILCS 110/10, unless the subpoena is accompanied by a written court order that authorizes the issuance of the subpoena and the disclosure of records or communications."** Under the new amendments, a subpoena is not valid without incorporating the above statutory language in the document itself. A sample subpoena is included in this memorandum on page 9.

A. In-Camera Inspection of File: Motion Required

Section 810(a)(1) concerns records and communications subpoenaed pursuant to a "civil, criminal or administrative proceeding in which the recipient introduces his mental condition or any aspect of his services received for such condition as an element of his claim or defense." Such disclosures are to be made only after the judge or hearing officer examines the documents *in camera*[2] and determines:

1. disclosure is relevant and probative;
2. disclosure will not be unduly prejudicial or inflammatory;
3. disclosure is otherwise clearly admissible;
4. other satisfactory evidence (other than that contained in the confidential record) is "demonstrably unsatisfactory";
5. 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 the disclosure is likely to harm.

B. What is 'Relevant?'

This section goes on to say that no record or communication between a therapist and patient is deemed "relevant" except the **fact of treatment, the cost of services, and the ultimate diagnosis** unless the party seeking disclosure of the communication clearly establishes in the trial court a "compelling need" for production of the document, or if the proceeding is a criminal trial in which insanity is claimed as a defense.[3]

In *Renzi v. Morrison,* an Appellate Court held that a therapist who voluntarily, and not in response to a direct question, disclosed a

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[2] *This means a preliminary review of the restricted file, by the judge, in his office and off the record.*

[3] *It is our position that subpoenas received in the course of proceedings pursuant to the Mental Health Code, such as, for example, Involuntary Admission, are included in this section. Thus, if a subpoena is received from a party to these proceedings, it must be accompanied by a court order.*

psychiatric patient's confidential communications while acting as a witness for a patient's spouse in divorce proceeding could be held liable for damages. *Renzi v. Morrison,* 249 Ill.App.3d 5 (Ill. 1993). Illinois law stipulates that a witness' testimony, when relevant, is still privileged information in judicial proceedings.

In *Renzi*, a therapist offered to testify for a patient's husband. However, the patient objected that such testimony was privileged information and was confidential. The trial judge overruled the objection and allowed the testimony. The therapist revealed the patient's conversations, test results and offered an opinion on the patient's emotional health. The testimony was significant enough to have "tipped the balance of the scale," in the case and the patient's husband was awarded temporary custody of the child. The Appellant Court reasoned that the lower court did not appoint, subpoena, or order the therapist to testify but instead the therapist appeared voluntarily and offered testimony. The court held that the therapist's function was to *treat the patient*, and not to advise the court.

C. Death of Patient

Section 810(a)(2) concerns civil proceedings in which a document is sought to be introduced after the death of the patient. The same procedure regarding an *in camera* examination by the judge or hearing officer is outlined. Post-death disclosures under this section must also involve the patient's physical or mental condition having been introduced in the procedures as an element of a claim or defense, by any party.

D. Actions Against Therapist

Section 810(a)(3) describes actions by a patient, or by a representative of a deceased patient, *against the therapist* alleging that the therapist or other practitioner caused the injury complained of in the course of providing services to the patient.

E. Court Ordered Examinations

Section 810(a)(4) concerns records and communications "made to or by a therapist in the course of examination ordered by a court." These communications may be disclosed in civil, criminal, or administrative proceedings or in appropriate pretrial proceedings *provided* the court has found that the patient has been adequately and "as effectively as possible" informed before submitting to such examination that such records would not be considered confidential or privileged. However, these records are only admissible as to issues involving the patient's physical or mental condition and only to the extent that they are germane to the proceedings.

F. Subpoenas for Mental Health Files - Case Study: ***Mandziara v. Canulli,*** 299 Ill.App.3d 593 (Ill. 1998).

A cause of action exists against attorneys who cause subpoenas to be served for mental health records without first obtaining the required court order. This case, decided in September 1998, holds that a mental health patient may sue an attorney for improperly serving a subpoena for mental health records without first obtaining a court order.

i. Facts

An ex-husband filed an emergency petition seeking modification of a court order awarding child custody to his ex-wife, Mary Mandziara ("Mandziara"). The petition alleged, among other things, that Mandziara attempted suicide and was hospitalized at Northwest Community Hospital. In connection with the petition, the husband's attorney, Michael Canulli ("Canulli"), served a subpoena on the Hospital's records custodian, Helen Langer ("Langer"), who appeared in court with the requested records. Langer did not give the records directly to Canulli. Instead, Canulli called Langer as a witness and she gave the records directly to the trial court. The judge immediately and improperly reviewed the records in open court and then questioned Mandziara about her hospitalization and about certain notes in the records. At the end of the hearing the court awarded custody to the ex-husband.

Mandziara sued Canulli for serving a subpoena on the Hospital without first obtaining a court order.[4] The trial court (a different court than the one that conducted the custody hearing) granted summary judgment to Canulli. Canulli filed a petition for sanctions under Illinois Supreme Court Rule 137 which the trial court denied. Canulli appealed the denial of

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[4] *Initially Mandziara sued the Hospital for releasing the confidential information without a court order. That case was dismissed on summary judgment after a finding that section 10(b) of the Act, cited supra, protected the Hospital from liability:*

> *While we do not condone the trial judge's action in commenting upon Mandziara's records in open court, this was beyond the control of [Langer]. We find the Hospital did nothing more than follow section 10(b) of the Act in that it provided the court with Mandziara's medical records pursuant to a request from an interested party for the sole purpose of an in camera inspection to determine their relevance in a child custody issue.*

Hospitals must be advised that Mandziara v. Canulli does not absolve them from liability under the Act.

sanctions and Mandziara cross-appealed the summary judgment for Canulli.

ii. The Holding of the Court

Canulli violated the Mental Health Confidentiality Act by failing to obtain a court order before serving a records subpoena on the hospital.

iii. Analysis

There are strong reasons for maintaining the confidentiality of mental health records. Presumably, the patient in psychotherapeutic treatment reveals the most private and secret aspects of his mind and soul. To casually allow public disclosure of such would desecrate any notion of an individual's right to privacy. At the same time, confidentiality is essential to the treatment process itself, which can be truly effective only when there is complete candor and revelation by the patient. Finally, confidentiality provides proper assurances and inducement for persons who need treatment to seek it.

Section 110/10 of The Mental Health Confidentiality Act, 740 ILCS 110/1 et seq., in pertinent part, provides as follows:

> *Except as provided herein, in any [court] or administrative... proceeding,... a recipient [of mental health services], and a therapist on behalf and in the interest of a recipient, has the privilege to refuse to disclose and to prevent the disclosure of the recipient's records or communications.*
>
> ***
>
> *Before a disclosure is made under subsection (a), any party to the proceeding or another interested person may request an in camera review of the record of communication to be disclosed. The court ... conducting the proceeding may hold an in camera review on its own motion ... the court ... may prevent disclosure or limit disclosure to the extent that other admissible evidence is sufficient to establish the facts in issue. The court ... may enter such order as may be necessary to protect the confidentiality, privacy, and safety of the recipient ...*
>
> ***

> *No party to any proceeding described under ... subsection (a) ..., 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, authorizing the disclosure of the records or the issuance of the subpoena. No person shall comply with a subpoena for records or communications under this Act, unless the subpoena is accompanied by a written order authorizing the issuance of the subpoena or the disclosure of the records.*

Section 110/15 of the Act also provides, "any person aggrieved by a violation of this Act may sue for damages, an injunction, or other appropriate relief."

The appellate court found that Canulli's actions constituted a violation of the Act. The court rejected Canulli's argument that he complied with the legislative intent of ensuring confidentiality by requesting that Langer produce the records to the court for an in camera review. Even assuming Canulli only intended that the documents be reviewed *in camera*;[5] the Act does not allow such disclosure without a court order.

> *The Act is carefully drawn to maintain the confidentiality of mental health records except in specific circumstances… The General Assembly has made a strong statement about the importance of keeping mental health records confidential. If we were to hold Canulli did not violate the Act merely because he did not look at Mandziara's records, we would be rewriting the statute, effectively eroding unmistakable legislative intent under the weight of the judicial fiat… Nothing in section 10(d) excuses a court order when the records are first examined by the trial judge.*

In reaching these conclusions, the court noted that Canulli supposedly had honorable intentions in wanting to protect his client's children, but that these intentions had no bearing on the determination of whether Canulli violated the Act. "**[M]otives have nothing to do with the legislative judgment that mental health records should not be surrendered as a matter of course."**

[5] *The court also held that this argument was contradicted by testimony in the record of the trial court hearing in which Canulli requested to be present when the judge reviewed the records.*

The court also indicated in some cases strict compliance with the statute can be excused, such as in cases where a patient placed her own mental health at issue. In the present case, however, "Mandziara did not bring this action. She did not ask to be brought into a courtroom to face a challenge to the custody of her children."

The court also concluded that an award of damages could be appropriate pursuant to section 110/15 of the Act, and remanded the case to the trial court to determine causation and damages.

iii. Conclusion

Now, the patient and the provider must be notified by motion well in advance of the court's entry of a properly worded order, that an order is being sought. Moreover, court orders MUST authorize issuance of the subpoena AND the disclosure of confidential records. Most importantly, the actual subpoena must contain very specific required language to be valid (see sample next page).

Subpoena in a Civil Matter (For Testimony and/or Documents) (This form

ALL SUBPOENAS FOR MENTAL HEALTH RECORDS MUST HAVE THE MAGIC LANGUAGE *(in red below)*

IN THE CIRCUIT COURT OF COOK COU

JANE DOE
Plaintiff/Petitioner

v.

JOHN DOE
Defendant/Respondent

No. *10 CH 1001-3456*

SUBPOENA IN A CIVIL MATTER
(For Testimony and/or Documents)

To: MENTAL HEALTH PROVIDER

☐ 1. YOU ARE COMMANDED to appear to give your testimony before the Honorable _____
in Room _____, _____, Illinois on _____, _____,
at _____ m.

☐ 2. YOU ARE COMMANDED to appear and give your deposition testimony before a Notary Public at: _____
in Room _____, _____, Illinois on _____, _____,
at _____ m.

☒ 3. YOU ARE COMMANDED to mail the following documents in your possession or control to _____
at _____, on or before _____, _____,
at _____ m.
(THIS IS FOR RECORDS ONLY. THERE WILL BE NO ORAL INTERROGATORIES.):

PLEASE INCLUDE ALL RECORDS IN YOUR POSSESSION INCLUDING BILLING RECORDS, RUNNING RECORDS, CHART ENTRIES AND PERSONAL NOTES

☐ Description continued on attached page(s).

YOUR FAILURE TO RESPOND TO THIS SUBPOENA WILL SUBJECT YOU TO PUNISHMENT FOR CONTEMPT OF THIS COURT.

Notice to Deponent:

No person shall comply with a subpoena for mental health records or communications pursuant to Section 10 of the Mental Health and Developmental Disabilities Confidential Act, 740 ILCS 110/10, unless the subpoena is accompanied by a written court order that authorizes the issuance of the subpoena and the disclosure of records or communications.

☐ Description continued on attached page(s).
(A nonparty organization has a duty to designate one or more officers, directors, or managing agents, or other persons to testify on its behalf, and may set forth, for each person designated, the matters on which that person will testify. Ill. Sup. Ct. Rule 206.)

☐ 2. The deponent's testimony will be recorded by use of an audio-visual recording device, operated by _____.
(Name of Recording Device Operator)

3. No discovery deposition of any party or witnesses shall exceed three hours regardless of the number of parties involved in the case, except by stipulation of the parties or by order upon showing that good cause warrants a lengthier examination. Ill. Sup. Ct. Rule 206(d).

Atty . No. _____ *Pro Se* 99500

Name: _____ *BROOKE R. WHITTED* _____ Issued by: _____
Signature

Atty. for: Whitted, Cleary & Takiff LLC

Address: 3000 Dundee Road Suite 303

City/State/Zip: Northbrook, Illinois 60062

Telephone: Phone: (847) 564-8662 Fax: (847) 564-8419

☐ Attorney

☐ Clerk of Court

Date: _____, _____.

☐ I served this subpoena by mailing a copy, as required by Ill. Sup. Ct. Rules 11, 12 and 204(a)(2), to _____
by certified mail, return receipt requested (Receipt # _____) on _____, _____.
I paid the witness $ _____ for witness and mileage fees.

☐ I served this subpoena by handing a copy to _____ on _____, _____.
I paid the witness $ _____ for witness and mileage fees.

_____ _____
(Signature of Server) (Print Name)

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

FORMS TO USE WHEN A SUBPOENA FOR A MENTAL HEALTH FILE IS RECEIVED

Whitted, Cleary & Takiff, LLC
3000 Dundee Rd, Suite 303
Ph. 847-564-8665
Fax 847-564-8419
www.wct-law.com
Whittedlaw@aol.com

FORM LETTER FOR SERVING ATTORNEY,
FROM MENTAL HEALTH PROVIDER

Date: _____

Dear Counsel:

I received a subpoena for records and/or for deposition (copy attached). The subject matter of the subpoena falls within the Mental Health and Developmental Disabilities Confidentiality Act, which unequivocally mandates that we not comply with the subpoena as served, unless it is also accompanied by a court order which authorizes you to have access to the confidential information and to issue the subpoena. I am advised by counsel that the subpoena itself also has to contain certain language specific to mental health records.

Once I receive an appropriate order authorizing your access to the materials and allowing issuance of the subpoena, accompanied by a properly worded subpoena, I will be happy to forward records, other than personal notes, directly to you. I enclose a sample petition and order, prepared by my attorney, which you might want to use as a template for obtaining your order on this issue. Please note the law has been amended to REQUIRE notice by motion of both the patient and the practitioner, in order that they may be timely afforded an opportunity to be heard.

Sincerely,

Enclosures

SAMPLE MOTION

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
_____ DEPARTMENT - _____ DIVISION

IN RE:	)	
	)	
_____,	)	
	)	
Petitioner,	)	
	)	
and	)	No. _____
	)	
_____,	)	
	)	
Respondent.	)	

MOTION FOR ORDER TO ISSUE SUBPOENA AND FOR ACCESS TO CONFIDENTIAL RECORDS

NOW COMES the Petitioner, _____, by and through his/her attorneys, _____, P.C., and pursuant to Section 10 of the Illinois Mental Health and Developmental Disabilities Confidentiality Act (740 ILCS 110/10 (1992)), moves this Court for the entry of an Order authorizing the issuance of a Subpoena for the Records and/or for the Deposition of _____, the Practitioner (hereafter "Practitioner") who has evaluated and/or counseled _____, in this cause. In support of said Motion, Petitioner, Respondent herein, states as follows:

1. The records, communications, notes and testimony of practitioner are relevant and material to this matter, and there is good cause for the court to find that these records are discoverable.

2. Movant is also seeking a deposition of the Practitioner in this matter in preparation and in anticipation of hearing, and desires the issuance of a Subpoena for same.

3. Section 10 of the Illinois Mental Health and Developmental Disabilities Confidentiality Act (740 ILCS 110/10(d) (1992)) provides:

> *[n]o party to any proceeding... nor his or her attorneys, 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, authorizing the disclosure of the records or the issuance of*

> *the subpoena. No person shall comply with a subpoena for records or communications under this Act, unless the subpoena is accompanied by a written order authorizing the issuance of the subpoena or the disclosure of the records.*

4. P.A. 96-1399, effective July 29, 2010, also requires that:

> *[d]… No such written order shall be issued without written notice of the motion to the recipient and the treatment provider. Prior to the issuance of the order, each party or other person entitled to notice shall be permitted an opportunity to be heard pursuant to subsection (b) of this Section. (Source: PA 96-1399) (emphasis added)*

5. This Motion has been timely served upon both the practitioner and the patient whose record is sought herein.

6. Practitioner and his/her records are covered by the Illinois Mental Health and Developmental Disabilities Confidentiality Act; accordingly, an order authorizing the issuance of a subpoena for deposition and access to the patient's records is required before Petitioner may further adequately prepare.

WHEREFORE, Movant respectfully requests that this Court enter an Order authorizing the issuance of a subpoena for the deposition and/or records of Practitioner, and corresponding access to the confidential records of the patient, pursuant to Section 10 of the Illinois Mental Health and Developmental Disabilities Confidentiality Act, and to grant Practitioner such further relief as this Court deems just and equitable.

Respectfully submitted,

_____

Attorney

SAMPLE ORDER

ORDER CCG-2

IN THE CIRCUIT COURT OF _____ COUNTY, ILLINOIS

_____, Petitioner,	)	
v.	)	NO. _____
_____ Respondent	)	

ORDER

THIS CAUSE coming on to be heard on the Petition for Order to Issue Subpoena and for Access to Confidential Records, the subject patient and mental health provider having been timely served and both having been afforded an opportunity to be heard, the parties being in Court and represented by counsel and the Court having jurisdiction over the Parties and subject matter herein, and the Court being fully advised in the premises, having duly considered all arguments of counsel,

IT IS HEREBY ORDERED:

1. Movant is found to have demonstrated there is good cause for discovery of the subject confidential records and/or for conducting a deposition of the Practitioner.

2. Petitioner's motion pursuant to Section 10 of the Illinois Mental Health and Developmental Disabilities Confidentiality Act at 740 ILCS 110/10 is granted, and a subpoena for confidential records may be issued by the moving party accordingly.

3. The moving party shall have full access to written files of the practitioner, _____, (other than personal notes), and the patient, _____, and said practitioner is hereby ordered to cooperate, either directly or through counsel, in the disclosure of said confidential files.

4. The moving party shall also have this Court's authority to conduct a deposition of the practitioner, provided that the said deposition shall be conducted at a time of convenience to the practitioner in light of the practitioner's schedule.

_____, 20____

ENTER:

Atty No.
Name
Attorney for
Address
City
Telephone

_____
Judge Judge's No.

Subpoena in a Civil Matter (For Testimony and/or Documents) (This form

ALL SUBPOENAS FOR MENTAL HEALTH RECORDS MUST HAVE THE MAGIC LANGUAGE *(in red below)*

IN THE CIRCUIT COURT OF COOK COU

JANE DOE
Plaintiff/Petitioner

v.

JOHN DOE
Defendant/Respondent

No. 10 CH 1001-3456

SUBPOENA IN A CIVIL MATTER
(For Testimony and/or Documents)

To: MENTAL HEALTH PROVIDER

☐ 1. YOU ARE COMMANDED to appear to give your testimony before the Honorable _____
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at _____ m.

☐ 2. YOU ARE COMMANDED to appear and give your deposition testimony before a Notary Public at: _____
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at _____, on or before _____, _____,
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(THIS IS FOR RECORDS ONLY. THERE WILL BE NO ORAL INTERROGATORIES.):

PLEASE INCLUDE ALL RECORDS IN YOUR POSSESSION INCLUDING BILLING RECORDS, RUNNING RECORDS, CHART ENTRIES AND PERSONAL NOTES

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(A nonparty organization has a duty to designate one or more officers, directors, or managing agents, or other persons to testify on its behalf, and may set forth, for each person designated, the matters on which that person will testify. Ill. Sup. Ct. Rule 206.)

☐ 2. The deponent's testimony will be recorded by use of an audio-visual recording device, operated by _____.
(Name of Recording Device Operator)

3. No discovery deposition of any party or witnesses shall exceed three hours regardless of the number of parties involved in the case, except by stipulation of the parties or by order upon showing that good cause warrants a lengthier examination. Ill. Sup. Ct. Rule 206(d).

Atty . No. _____ *Pro Se* 99500

Name: _____ BROOKE R. WHITTED _____ Issued by: _____
Signature

Atty. for: Whitted, Cleary & Takiff LLC

Address: 3000 Dundee Road Suite 303

City/State/Zip: Northbrook, Illinois 60062

Telephone: Phone: (847) 564-8662 Fax: (847) 564-8419

☐ Attorney

☐ Clerk of Court

Date: _____, _____.

☐ I served this subpoena by mailing a copy, as required by Ill. Sup. Ct. Rules 11, 12 and 204(a)(2), to _____
by certified mail, return receipt requested (Receipt # _____) on _____, _____.
I paid the witness $ _____ for witness and mileage fees.

☐ I served this subpoena by handing a copy to _____ on _____, _____.
I paid the witness $ _____ for witness and mileage fees.

_____ _____
(Signature of Server) (Print Name)

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

A SPECIAL NOTE ON SUBPOENAS AND DEPOSITIONS OF PHYSICIANS

Whitted, Cleary & Takiff, LLC
3000 Dundee Rd, Suite 303
Ph. 847-564-8665
Fax 847-564-8419
www.wct-law.com
Whittedlaw@aol.com

The Illinois Civil Practice Act requires a physician to cooperate with properly served subpoenas, however there are special considerations for medical doctors.

First, if there is any conflict between the Civil Practice Act and mental health confidentiality provisions, the latter controls.

Second, courts may quash subpoenas not properly authorized or served.

Third, the party seeking to depose a physician must pay the doctor a reasonable fee, separate and apart from the minimal witness fee. However, any fee may be paid only after the doctor has testified, and only for time spent testifying.

Finally, there must be "good cause" shown before a court can allow a physician to be deposed. See attached materials.

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Fax 847-564-8419
www.wct-law.com
Whittedlaw@aol.com

(735 ILCS 5/8-802) (from Ch. 110, par. 8-802)

Sec. 8-802. Physician and patient. No physician or surgeon shall be permitted to disclose any information he or she may have acquired in attending any patient in a professional character, necessary to enable him or her professionally to serve the patient, except only (1) in trials for homicide when the disclosure relates directly to the fact or immediate circumstances of the homicide, (2) in actions, civil or criminal, against the physician for malpractice, (3) with the expressed consent of the patient, or in case of his or her death or disability, of his or her personal representative or other person authorized to sue for personal injury or of the beneficiary of an insurance policy on his or her life, health, or physical condition, (4) in all actions brought by or against the patient, his or her personal representative, a beneficiary under a policy of insurance, or the executor or administrator of his or her estate wherein the patient's physical or mental condition is an issue, (5) upon an issue as to the validity of a document as a will of the patient, (6) in any criminal action where the charge is either first degree murder by abortion, attempted abortion or abortion, (7) in actions, civil or criminal, arising from the filing of a report in compliance with the Abused and Neglected Child Reporting Act, (8) to any department, agency, institution or facility which has custody of the patient pursuant to State statute or any court order of commitment, (9) in prosecutions where written results of blood alcohol tests are admissible pursuant to Section 11-501.4 of the Illinois Vehicle Code, (10) in prosecutions where written results of blood alcohol tests are admissible under Section 5-11a of the Boat Registration and Safety Act, (11) in criminal actions arising from the filing of a report of suspected terrorist offense in compliance with Section 29D-10(p)(7) of the Criminal Code of 1961, or (12) upon the issuance of a subpoena pursuant to Section 38 of the Medical Practice Act of 1987; the issuance of a subpoena pursuant to Section 25.1 of the Illinois Dental Practice Act; or the issuance of a subpoena pursuant to Section 22 of the Nursing Home Administrators Licensing and Disciplinary Act.

In the event of a conflict between the application of this Section and the Mental Health and Developmental Disabilities Confidentiality Act to a specific situation, the provisions of the Mental Health and Developmental Disabilities Confidentiality Act shall control.

(Source: P.A. 95-478, eff. 8-27-07.)

Whitted, Cleary & Takiff LLC
3000 Dundee Road
Suite 303
Northbrook, Illinois 60062
Phone: (847) 564-8662
Fax: (847) 564-8419

(735 ILCS 5/2-1101) (from Ch. 110, par. 2-1101)

Sec. 2-1101. Subpoenas. The clerk of any court in which an action is pending shall, from time to time, issue subpoenas for those witnesses and to those counties in the State as may be required by either party. Every clerk who shall refuse so to do shall be guilty of a petty offense and fined any sum not to exceed $100. An attorney admitted to practice in the State of Illinois, as an officer of the court, may also issue subpoenas on behalf of the court for witnesses and to counties in a pending action. An order of court is not required to obtain the issuance by the clerk or by an attorney of a subpoena duces tecum. For good cause shown, the court on motion may quash or modify any subpoena or, in the case of a subpoena duces tecum, condition the denial of the motion upon payment in advance by the person in whose behalf the subpoena is issued of the reasonable expense of producing any item therein specified.

In the event that a party has subpoenaed an expert witness including, but not limited to physicians or medical providers, and the expert witness appears in court, and a conflict arises between the party subpoenaing the expert witness and the expert witness over the fees charged by the expert witness, the trial court shall be advised of the conflict. The trial court shall conduct a hearing subsequent to the testimony of the expert witness and shall determine the reasonable fee to be paid to the expert witness.

(Source: P.A. 95-1033, eff. 6-1-09.)

Whitted, Cleary & Takiff LLC
3000 Dundee Road
Suite 303
Northbrook, Illinois 60062
Phone: (847) 564-8662
Fax: (847) 564-8419

Rule 204. Compelling Appearance of Deponent

(a) Action Pending in This State.
(1) *Subpoenas.* Except as provided in paragraph (c) hereof, the clerk of the court shall issue subpoenas on request. The subpoena may command the person to whom it is directed to produce documents or tangible things which constitute or contain evidence relating to any of the matters within the scope of the examination permitted under these rules.

(2) *Service of Subpoenas.* A deponent shall respond to any lawful subpoena of which the deponent has actual knowledge, if payment of the fee and mileage has been tendered. Service of a subpoena by mail may be proved prima facie by a return receipt showing delivery to the deponent or his authorized agent by certified or registered mail at least seven days before the date on which appearance is required and an affidavit showing that the mailing was prepaid and was addressed to the deponent, restricted delivery, return receipt requested, showing to whom, date and address of delivery, with a check or money order for the fee and mileage enclosed.

(3) *Notice to Parties, et al.* Service of notice of the taking of the deposition of a party or person who is currently an officer, director, or employee of a party is sufficient to require the appearance of the deponent and the production of any documents or tangible things listed in the notice.

(4) *Production of Documents in Lieu of Appearance of Deponent.* The notice, order or stipulation to take a deposition may specify that the appearance of the deponent is excused, and that no deposition will be taken, if copies of specified documents or tangible things are served on the party or attorney requesting the same by a date certain. That party or attorney shall serve all requesting parties of record at least three days prior to the scheduled deposition, with true and complete copies of all documents, and shall make available for inspection tangible things, or other materials furnished, and shall file a certificate of compliance with the court. Unless otherwise ordered or agreed, reasonable charges by the deponent for production in accordance with this procedure shall be paid by the party requesting the same, and all other parties shall pay reasonable copying and delivery charges for materials they receive. A copy of any subpoena issued in connection with such a deposition shall be attached to the notice and immediately filed with the court, not less than 14 days prior to the scheduled deposition. The use of this procedure shall not bar the taking of any person's deposition or limit the scope of same.

(b) Action Pending in Another State, Territory, or Country. Any officer or person authorized by the laws of another State, territory, or county to take any deposition in this State, with or without a commission, in any action pending in a court of that State, territory, or country may petition the circuit court in the county in which the deponent resides or is employed or transacts business in person or is found for a subpoena to compel the appearance of the deponent or for an order to compel the giving of testimony by the deponent. The court may hear and act upon the petition with or without notice as the court directs.

(c) Depositions of Physicians. The discovery depositions of nonparty physicians being deposed in their professional capacity may be taken only with the agreement of the parties and the subsequent consent of the deponent or under a subpoena issued upon order of court. A party shall pay a reasonable fee to a physician for the time he or she will spend testifying at any such deposition. Unless the physician was retained by a party for the purpose of rendering an opinion at trial, or unless otherwise ordered by the court, the fee shall be paid by the party at whose instance the deposition is taken.

(d) Noncompliance by Nonparties: Body Attachment.
(1) An order of body attachment upon a nonparty for noncompliance with a discovery order or subpoena shall not issue without proof of personal service of the rule to show cause or order of contempt upon the

nonparty.

(2) The service of the rule to show cause or order of contempt upon the nonparty, except when the rule or order is initiated by the court, shall include a copy of the petition for rule and the discovery order or subpoena which is the basis for the petition for rule.

(3) The service of the rule to show cause or order of contempt upon the nonparty shall be made in the same manner as service of summons provided for under sections 2–202, 2–203(a)(1) and 2–203.1 of the Code of Civil Procedure.

Amended June 23, 1967, and amended October 21, 1969, effective January 1, 1970; amended September 29, 1978, effective November 1, 1978; amended July 1, 1985, effective August 1, 1985; amended November 21, 1988, effective January 1, 1989; amended June 19, 1989, effective August 1, 1989; amended June 1, 1995, effective January 1, 1996; amended June 11, 2009, effective immediately.

Committee Comments

(Revised June 1, 1995)

Paragraph (a) of this rule was revised effective June 23, 1967, to divide it into three subparagraphs and add the material contained in subparagraph (a)(2), dealing with service of subpoenas.

The first sentence of the subparagraph (a)(2) states existing law. (*Chicago and Aurora R.R. Co. v. Dunning* (1857), 18 Ill. 494.) The second sentence simplifies proof of actual notice when service is made by certified or registered mail. It was amended in 1978 to conform its requirements to presently available postal delivery service. See Committee Comments to Rule 105.

Subparagraphs (a)(1) and (a)(3), without their present subtitles, appeared as paragraph (a) of Rule 204(a) as adopted effective January 1, 1967. New at that time was the provision now in subparagraph (a)(1) making an order of the court a prerequisite to the issuance of subpoena for the discovery deposition of a physician or surgeon. Also new in the 1967 rule was the use of the term "employee" instead of the former "managing agent" in what is now subparagraph (a)(3). The phrase "and no subpoena is necessary" which appeared in former Rule 19--8(1) (effective January 1, 1956), on which Rule 204(a) was based, was placed there to emphasize a change in practice to which the bar had been accustomed by 1967, and it was deleted in the 1967 revision as no longer needed.

Subparagraph (4) of paragraph (a) sets forth the procedures to be followed in those instances where the production of documents or tangible things by an individual may obviate the need for taking that person's deposition. The rule recognizes that subpoenas must be directed to individuals, not inanimate objects. Existing law regarding privilege and permissible discovery in a given case is unaffected by the rule. (See *Lewis v. Illinois Central R.R. Co.*, 234 Ill. App. 3d 669 (5th Dist. 1992).) The rule requires disclosure to all parties with prompt and complete production of all materials received, regardless of whether materials in addition to those specified are furnished by the deponent.

Paragraph (b) was not affected by the June 23, 1967, amendment. It was derived from former Rule 19--8(2) as it stood before 1967.

In 1985 paragraph (a) was amended and paragraph (c) was added to regulate the practice of compelling physicians and surgeons to appear to be deposed in their professional capacity and to set guidelines concerning professional fees which may, by agreement, be paid to physicians and surgeons for attending such depositions. Traditionally, expert witnesses are in the same position as other witnesses with respect to their fees. (*In re Estate of James* (1956), 10 Ill. App. 2d 232.) Physicians and other experts subpoenaed to testify may not refuse to do so on the ground that they are entitled to be paid some additional fee on the basis of being an expert. (*Dixon v. People* (1897), 168 Ill. 179.) Expert witnesses, like other witnesses, normally are entitled only to $20 per day and 20 cents per mile of necessary travel. (*Falkenthal v. Public Building Com.* (1983), 111 Ill. App. 3d 703.) As a practical matter, however, physicians and surgeons usually do request a professional fee, in addition to the statutory witness fee, to reimburse them for the time they spend testifying at depositions, and the party at whose instance the physician or surgeon is subpoenaed is normally loathe to refuse. This rule is intended to regulate this practice. A party may agree to pay a

reasonable professional fee to a physician or surgeon for the time he or she will spend testifying at any deposition. The fee should be paid only after the doctor has testified, and it should not exceed an amount which reasonably reimburses the doctor for the time he or she actually spent testifying at deposition. Unless the doctor was retained for the purpose of rendering an expert opinion at trial, or unless otherwise ordered by the court, the party at whose instance the deposition is being taken would be responsible for paying the professional fee, as well as other fees and expenses provided for in Rule 208.

Rule 204(c) implies that the trial court will exercise discretion in ordering the issuance of a subpoena upon a physician or surgeon and will refuse to do so unless there is some preliminary showing of good cause, regardless of whether there has been an objection by opposing counsel. At a minimum the moving party must be able to show that he has received the medical records available in the case and nevertheless has good reason to believe that a deposition is necessary. If appropriate, the court may require that such a showing of good cause be accomplished by an affidavit accompanying the motion.

Paragraph (c) was amended in 1989 to provide that a party "shall pay," rather than "may agree to pay," a reasonable fee to a physician or surgeon for the time the physician or surgeon will spend testifying at any such deposition. This change will clarify the responsibility of parties to not intrude on the time of physicians and surgeons without seeing to it that the physicians or surgeons receive reasonable compensation for the time they spend undergoing questioning on deposition.

The reference in paragraph (c) to "surgeons" has been stricken because it is redundant. Moreover, paragraph (c) is made applicable only to "nonparty" physicians. The protection afforded a physician by paragraph (c), including the payment of a fee for time spent, has no application to a physician who is a party to the suit. Such protection should likewise be unavailable to nonparty physicians who are closely associated with a party, such as physicians who are stockholders in or officers of a professional corporation named as a defendant, or a physician who is a respondent in discovery.

Whitted, Cleary & Takiff LLC
3000 Dundee Road
Suite 303
Northbrook, Illinois 60062
Phone: (847) 564-8662
Fax: (847) 564-8419