

# When Clinicians Are Summoned to Testify in Court: Orientation to the Process and Suggestions on Preparation

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## Abstract

There are occasions when clinicians are summoned to court to testify. The reasons for this are wide-ranging. It can be about the provision of patient care that is relevant to a criminal or civil legal matter, or to a malpractice complaint, concerns of safety for a child, child custody issue, allegation of sexual or physical abuse, or being called to testify as an expert witness in your field of expertise. The legal system is adversarial and litigation is the process used to determine the considered truth of the matter at hand. The adversarial nature of the courtroom stands in stark contrast to the collaborative mindset and approach used in health care. Most clinicians will never have to testify in a court setting. However, when a clinician does receive a subpoena, feelings of dread, anxiety, and panic can ensue. This can be especially harrowing if the subpoena is about a malpractice grievance. Understanding the legal arena, court proceedings and how to properly prepare, can assist the clinician to navigate the process and stay calm under pressure if subpoenaed to testify. This article will help clinicians know what to do and how to prepare in the event they are ordered to testify in court. An orientation to the courtroom, basic legal concepts, and definitions will be discussed. This article is structured in a question and answer format based on typical questions clinicians ask when anticipating going to court.

## Keywords

testify, court, pediatric nurse practitioner, subpoena, health care, clinician

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## What Is a Subpoena and Do I Have to Show Up to Court When I Receive One?

A subpoena is a court-ordered command to appear in court at a certain date, time, and place to provide verbal testimony, bring records, or provide both testimony and records, relevant to a certain court case. Most often a subpoena is issued by an attorney on behalf of a court in which the attorney is authorized to practice (FindLaw, 2018). This legal document is typically hand delivered to the person being subpoenaed. Subpoenas that request testimony or records for patients seen in a hospital or a larger health-care institution may need to be delivered directly to the legal office of that institution. The legal staff then distribute it to the designated clinician.

The term subpoena literally means “under penalty” and as such, there are possible penalties if you do not comply with this order, such as fines or jail (FindLaw,

2018). Therefore, do not ignore a subpoena. While you may need to testify in court, it also is possible that the order pertains to a pending trial or hearing that may not take place. Ideally, the attorney who sent the subpoena has already notified you about the upcoming court issue. The subpoena will identify the name of the attorney initiating the order, the attorney’s contact phone number, the type of hearing or trial, date and time, and the court where your presence is requested. Attorneys and paralegals at large health-care institutions

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are available to advise clinicians about what to do when a subpoena is served. If you are unsure about the purpose of the subpoena or this is your first experience with being subpoenaed, ask for help from legal counsel at your place of employment. Soon after you receive the summons, call the requesting attorney to find out exactly what is required and the likelihood you will need to testify. The attorney may want to interview you upon contact.

The legal forum you are being called to could be a hearing, a court trial, jury trial, or a deposition. A hearing is a legal proceeding that explores a special legal issue outside the presence of a jury. Some hearings have a judge presiding and others have a panel of legal professionals presiding over the legal matter. The goal of a hearing is to come to a legal determination for a court motion. A court trial is a legal proceeding that concludes with a verdict or outcome for the alleged criminal charges in a criminal case, and a verdict of liability and damages in a civil case. In a trial, the verdict is decided by a jury or a judge after the opposing attorneys present their case.

A deposition is a legal tool commonly used for civil lawsuits, such as malpractice claims. It is held prior to the trial in what lawyers refer to as “the discovery phase” of a lawsuit. It is a structured interview in which the person being interviewed (the deponent) is placed under oath and asked questions about issues of the lawsuit. Depositions are held for many reasons. They help to discover all available information about the allegations and circumstances surrounding the lawsuit, assist attorneys in assessing the strengths and weaknesses of their case and their opponents’ case, evaluate the demeanor and the credibility of the witness and parties to the lawsuit, preserve the testimony of a witness who may be unavailable at the time of trial, and refresh a witness’s memory or impeach a witness’s credibility during the trial (Peterson & Kopnishke, 2010). The attorneys for each side of the lawsuit are present and the interview questions and answers are recorded by a court reporter.

There are several types of courts that clinicians can be subpoenaed to regarding patient care they have provided. These include civil court, juvenile court, criminal court, and family court. Less often you may be called to probate court.

### **What Kind of Court Am I Going to and What Is the Purpose of My Testimony?**

The subpoena will identify the kind of court where you are requested to appear. The purpose of your testimony depends on the issue being decided and can be best answered by the attorney who has sent the subpoena. Each type of court has authority over a certain domain

of issues. The formality and the standard of proof to reach a decision varies for each type of court. The following are brief summations of the types of courts a clinician may be summoned to and the area of law it governs.

Juvenile court governs cases regarding young persons who are considered “juvenile” under state law, usually those under the age of 18. The types of cases heard in juvenile court include minors who have committed crimes; minors who are abused and neglected by their parents or guardians; termination of parental rights; and cases involving a status offense such as truancy, curfew violations, running away, and underage drinking (Michon, 2017).

Juvenile court is where child protection agencies seek legal judgment regarding concerns of child abuse and what is in the best interest of the child. A judge makes the decision and attorneys represent the child, parent(s), and the state child protection agency. Matters heard in juvenile court are typically closed and confidential.

Family court oversees issues regarding divorce, child custody, child visitation, and domestic abuse. Family courts are governed by state and local law (Family Court, n.d.). A judge is the decision maker.

Criminal courts are designed to determine whether a person has violated a criminal law. The state, represented by a prosecutor, brings charges against the accused (defendant) for breaking the law (Mince-Didier, 2017). The defendant has the choice to have the trial judgment decided by a judge (“court trial”) or a jury (“jury trial”). The standard is proof beyond a reasonable doubt. The question being decided is whether the accused (defendant) did what he or she is accused of doing. There is an attorney representing the defendant (Defense Attorney) and an attorney representing the state (Assistant State’s/District Attorney, or Prosecutor).

Civil courts handle disputes between individuals and businesses. In civil court, one party (plaintiff) sues another party (defendant) that they believe has harmed them (Hirby, 1995). The Civil court decisions are based on a preponderance of the evidence decided by a judge or jury. Medical malpractice claims allege negligence on the part of the Health Care Provider and these kinds of cases are tried in Civil Court. This type of liability requires four elements be proved. The four elements are Duty, Breach of Duty, Damages, and Causation (Peterson & Kopnishke, 2010). If you have been served regarding a medical malpractice grievance, it would be wise to seek legal counsel.

Probate court primarily handles matters such as wills, estates, conservatorships, and guardianships as well as the commitment of mentally ill persons to institutions designed to help them (Investopedia, 2017). A judge is the decision maker.

## **What Is the Difference Between a Fact Witness and an Expert Witness and What Will be Expected of Me?**

When a clinician is called to testify about care provided to a patient they saw, they are most often being called as a fact witness. A fact witness is an individual who has personal knowledge of details pertaining to a case and can testify on what was personally observed, without an opinion. A simple example of a fact witness is someone who testifies that the traffic light was red at the time of a motor vehicle accident. The clinician's testimony consists of speaking to the facts known to the clinician. The information presented by a fact witness is typically gleaned from the clinician's documentation and medical chart notes that reflect the clinician's knowledge about the case. Once again, a fact witness does not offer an opinion.

An expert witness is an individual with specialized knowledge about a subject matter and is called to help educate the judge or jury about that topic. Ordinarily, it is regarding a topic outside a layperson's knowledge. Expert testimony consists of the presentation of an opinion. For example, a medical examiner testifies to the cause of death based on his or her autopsy.

The judge or jury makes a subjective determination on whether an expert is credible (Brodsky, Griffin, & Cramer, 2010; Frasier & Makaroff, 2006). The definition of "expert" is generally accepted as someone who is qualified by evidence of his or her expertise, training, experience, and special knowledge (Frasier & Makaroff, 2006). The expert witness should have training and experience in the area in which the court is being advised and should be regarded by one's peers as having expertise in the area as well. To be qualified in the court as an expert witness, the attorney who has subpoenaed the witness needs to "lay a foundation" through questions to the witness that would highlight the witness's training, education, experience, knowledge, and skill. The judge will make the ruling if the witness may testify as an expert. Expert witnesses are compensated for their time and effort for preparation and testimony.

Most often clinicians are summoned to court as fact witnesses. In this role, clinicians are queried about their personal knowledge about the case. The goals of testimony for any witness are to present information accurately, clearly, objectively, and credibly. These are best accomplished with thorough preparation.

## **How Do I Prepare?**

Preparation is critical and a prepared witness will be more effective, whereas an unprepared witness, who may come across as reluctant, will not. There are a few things a clinician can do ahead of time to be prepared.

There is usually a significant lapse of time from when a patient is seen for care to when a case goes to court; therefore, clinicians must rely on their documentation to remember the accurate details of the case. Thus, for any case that may go to court, such as suspected child maltreatment, it is critical to carefully document at the time the case is seen. Statements made to you by the patient in response to questions asked or spontaneous statements that are relevant should be documented. Perform a thorough physical examination. Review and study your documentation of the history and physical examination in preparation for your testimony.

Witnesses may bring a copy of their chart documentation with them to the witness stand for reference when testifying. These are intended to only be used for reference to refresh the witness's memory and not to be relied on to read from. It is not recommended to bring any handwritten notes to the stand. Be aware that any notes brought to the witness stand can be called forth and admitted into evidence.

One goal of witness preparation is to strengthen witnesses' feelings of self-efficacy about testifying. Witness preparation is used to help witnesses feel they can testify effectively and reduce their anxiety about testifying (Boccaccini, Gordon, & Brodsky, 2008; Ng & Friedman, 2015). The best way to accomplish this is to arrange a meeting with the attorney who subpoenaed you to talk about your role in the trial, and what information they expect you to provide. Provide the attorney with your curriculum vitae as you will be asked questions on the witness stand about your education and experience to establish your credentials. Review questions you may be asked during direct examination and find out what you may be asked during cross examination. Ask the attorney what they consider to be the basic dispute in the case and how does your testimony address that issue. Visiting a courtroom ahead of time to become oriented to the surroundings may help you anticipate what to expect and be more prepared for the court experience.

Meet with or talk to other colleagues who have experience with testifying in court. Most often the clinicians who work in the field of child maltreatment have experience testifying in juvenile and criminal court. Providers from the Child Abuse Department at a local hospital will often be a great resource for this issue.

A few final preparation details include thoroughly reviewing your documentation for the case, know your curriculum vitae, and make sure you get your rest to be alert and focused. Your appearance and dress are important as they will convey an impression. The desired impression is one of professionalism and credibility. Dress in comfortable, conservative business clothes and avoid revealing clothing and flashy accessories.

## What Will Happen When I Go to Court?

Most often there will be other witnesses who have been called to testify for the same case. It is likely you will have to wait your turn. It is wise to tell the attorney ahead of time about your best availability and about any conflicts in your schedule. The attorney may have a specific plan for the testifying order of the witnesses. They will hopefully try to accommodate your needs if they know about them beforehand.

You will wait outside of the courtroom until it is your turn to testify. As you wait to testify, you are not permitted to talk about the case to any witness who has already testified. This “sequestration rule” eliminates the inference that your testimony has been influenced by your knowledge of anything that has previously transpired during the trial.

When it is your turn to testify, the Marshall will let you into the courtroom and you will be called to the witness stand. You will be sworn in by the clerk who will ask you for your name and business address and then you may be seated. A microphone is in front of your seat for you to speak into when responding to questions and water is available to drink. There will be several people all around the courtroom. The Judge will be sitting next to you and he or she will be wearing a black robe. The court reporter will be nearby with recording equipment. The attorneys and their clients will be seated facing you and the Judge. If there is a jury, there will be 6 to 12 people seated off to the side of the witness stand. A couple of the jurors will be alternates.

## Who Is the Decision Maker and Who Will Be Asking Me Questions?

The decision maker for the issue before the court is either the judge or the jury. Therefore, direct your answers toward the judge or jury. The attorneys will be asking the questions, but on occasion the judge may interject with questions. The attorney who subpoenaed you to court will be the first to ask questions and this is called “direct” examination. The major objectives of “direct” examination are to display the credentials of the witness, sometimes for “qualifying” him or her; to help the witness to “connect” with the jurors; and to provide testimony that supports the questioning attorney’s view of the case (Foucar & Wick, 2007).

The opposing attorney may object to questions being asked by the attorney. The judge will either rule about the objection as “sustained” or “overruled.” If it is “sustained,” the judge has decided that the question is not a valid question. If it is “overruled,” the judge has decided that the question is valid and can be answered. If the

opposing attorney objects to a question asked, you must not answer until the Judge makes a ruling.

Next, there is cross-examination conducted by the opposing attorney. The goals of cross-examination of a witness who provided damaging testimony are to make the witness appear unlikeable, to impugn his or her credentials, or to impeach his or her prior testimony (Foucar & Wick, 2007). Once cross-examination is complete, the attorney who called you to court may have more questions and this is called redirect. After redirect, the opposing attorney may have more questions and this is called recross. Once the attorneys are done with asking questions, you are finished. You will be excused from the witness stand by the Judge.

## How Do I Handle Myself and How Should I Answer the Questions Asked?

It is normal to feel anxious and nervous awaiting your turn to testify. Attending court well prepared and managing your anxiety are critical to being calm and composed on the witness stand.

The questioning attorney intends to control the pace and feel of cross-examination. Gentle questions evoke gentle answers. Fierce questions may evoke either fierce replies or submissive behaviors (Brodsky, 1991). Inflammatory questions are best answered with calm explanations that demonstrate a confident sense of professional competence (Brodsky & Gutheil, 2016).

Appearing confident helps one look credible to the jury. Witnesses are advised to look directly at the attorney who is asking the question and then pause to collect their thoughts. Answer the question after it has been completely asked and make eye contact with the jurors while answering (Foucar & Wick, 2007).

The witness should only answer the question that was asked. Do not include anything additional that was not asked. Make sure you have heard the entire question before answering. If you do not understand a question do not be afraid to ask for it to be repeated or restated. If you are asked to answer a question by giving a yes or no answer and you cannot without an explanation, say so. Remember a trial is a search for the truth. Keep your answers simple and avoid using complex medical terminology. Remain calm and collected and try not to react when the questioning attorney utilizes aggressive or argumentative tactics.

Keep the same “persona” when answering questions from both sides. If a witness is friendly and helpful with one attorney and hostile with the other, the jury will likely notice (Foucar & Wick, 2007). Testifying calls for direct focus, attention to questions, and answers that are honest and on task (Brodsky & Gutheil, 2016).

## Conclusion

The court system provides a forum where legal disputes can be resolved peacefully and fairly. Clinicians have a continued responsibility beyond patient care, to honestly represent the details of care provided if it becomes part of a lawsuit or legal dispute.

You can do this. If you follow these simple tips regarding how to prepare and how to handle yourself on the witness stand, you may find testifying in court to be a challenging, but rewarding experience.

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