

SUBPOENA RESPONSE TOOLKIT: **A GUIDE FOR MENTAL HEALTH SERVICES PROVIDERS ON HOW TO RESPOND TO SUBPOENAS AND OTHER DEMANDS FOR CLIENT INFORMATION OR RECORDS***

1. Introduction: Becoming a Domestic Violence-Informed Mental Health Provider

As a mental health provider, it is important to keep in mind that the people you are serving may be experiencing abuse by an intimate partner and/or other people in their lives. This includes being attentive to domestic violence issues when responding to a subpoena or other demand for client information or records. While you may already be familiar with state and federal laws regulating confidential mental health information, it is important to be aware of the domestic violence-specific risks related to the release of mental health records, particularly for survivors involved in court cases. For example, the information contained in mental health records may be used by an abusive partner to impugn a survivor's credibility during a court case. If custody is an issue in the case, the abuser may argue that the survivor's mental health symptoms or mental illness make her[†] an unfit parent.

On the other hand, mental health records can sometimes be helpful to a survivor who is involved in a court case. For example, good documentation of a survivor's abuse history and how it affected her mental health can help to bolster her credibility. Documentation by service providers can also provide evidence that a survivor is a good mother and that she is using the support services that are available to her, thereby counteracting assumptions that she is not a capable parent because of her mental health status.

This toolkit is intended to assist mental health providers in developing domestic violence-informed policies for responding to subpoenas and other demands for client records. However, this toolkit is not intended as a replacement for legal advice. You should always check with an attorney to ensure that your policies and procedures comply with all applicable laws.

2. Requests from the Client

The release of client information always poses some risks. Therefore, as a mental health provider, you should treat every request, demand, or subpoena for

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the release of mental health information or records with the utmost care. When you receive a request for records from a client, this means ensuring that the client is fully informed of the potential unintended consequences of releasing records and has an opportunity to consider whether it is desirable to narrow the scope of the release. You may want to take the following steps:

- Contact the client and let her know that you want to make sure that she is fully informed about the risks related to release of records.
- Offer to examine the client's mental health record with her in order to identify the records that will serve her purpose.
- Explore the potential unintended consequences of releasing the requested records, including how the records could be used against the client in a legal case.

The abuser may try to use information about the survivor's mental health symptoms, diagnosis, or treatment to impugn her credibility as a witness or to argue that she is an unfit parent. These arguments work because of mental health stigma. The survivor's record could also contain information that might trigger negative social biases, such as information about a substance abuse or sex work history. It might also contain references to "non-compliance" with a treatment plan, such as failure to follow up with referral services or take medication as prescribed, which can be harmful in court, especially when they are not accompanied by an explanation (e.g., referral services were inaccessible or the abuser interfered with medications).

- If the records will be sent to another provider (e.g., for continued care), the client should be aware that they will become part of the recipient's records and that the recipient may be able to re-release the records to a third provider in the future.
- Discuss whether narrowing the scope of the release would be appropriate and avoid unnecessary risks. In some cases, it may be possible to provide a summary of the pertinent records in lieu of releasing the records.
- If after considering the potential consequences, the client wants to release the records, you should check to make sure that the request for release of information is valid and then release the records. A valid release should...
 - Be in writing
 - Be time limited
 - Be current
 - Be signed by the client
 - Specifically identify the records to be released, indicating that they are mental health records
 - Specifically identify the recipient of the records

- Otherwise comply with federal and state law

3. Subpoenas and Other Demands from Third Parties

Mental health records are confidential and privileged in all states. This protection is not absolute, however. Under some circumstances, a judge can require mental health records to be released. As a mental health provider, it is important to understand when you must disclose mental health records and when you should not. Whenever possible, you should honor the client's wishes as to disclosure.

A subpoena is a demand to produce evidence for a legal proceeding. Although you must respond to a subpoena, you may resist complying with the subpoena by asserting that the requested mental health records are privileged. The client is the holder of this privilege. Therefore, if you receive a subpoena or other demand for mental health records, you should first contact the client to determine if they want the records to be released. If there is no way to contact the client without endangering them or if the client does not want the records to be released, you should resist the subpoena by asserting privilege on behalf of the client.

When you receive a subpoena or demand, you may want to take these steps:

Step 1: Write, Cite, Notify: If you are in solo practice, you should know how to respond if you are handed a subpoena or demand for records. Mental health agencies with more than one employee should make sure that those employees who are most likely to receive a subpoena or demand know how to respond.

- **Write:** If you are handed a subpoena or demand for records, make note of the date, time, and method of receipt.
- If possible, simply say nothing. If you are asked to give information on the spot, **cite the law:** "By law, we cannot confirm or deny that this person is a client until we process this request."
- **Notify:** If you work for a mental health agency, immediately notify a supervisor or designated person about the subpoena or demand. Immediate notice means the same day that the subpoena or demand is received.

Step 2: Contact the Client: After receiving a subpoena or demand for records, you should contact the client immediately. At a mental health agency, someone should be designated to respond to subpoenas or demands for records by contacting the client and, if appropriate, an attorney. When contacting a client, the following steps are recommended:

- Inform the client of the subpoena or demand and its origin.

- Review the mental health records with the client, identifying the information that is sought.
- Discuss all potential consequences of releasing the information (see above for examples of how mental health information can be used against a survivor in a civil legal case).
- If the client has an attorney, encourage the client to contact the attorney immediately. If the client does not have an attorney, encourage the client to retain an attorney or to contact the local legal services office or volunteer lawyers' organization. You can discuss the subpoena or demand and how best to protect the client's records with the client's attorney. As always, make sure to first obtain a release from the client.
- If after considering the potential consequences and speaking to an attorney (if possible), the client wants to comply with the subpoena or demand, you should obtain a valid release from the client (see above) before releasing the records. In addition the criteria above, the release should state that the records are being released in response to a subpoena or demand.

Step 3: Contact an Attorney: If the client does not want to comply with the subpoena or demand, cannot be contacted safely, or cannot be found, you should resist the subpoena or demand by asserting privilege on behalf of the client. The best course of action is to contact an attorney who will work with you determine the appropriate next step.

The client's attorney may successfully modify or quash the subpoena and you may not be required to disclose the records or the scope of the disclosure may be more limited. However, you are solely responsible for responding to a subpoena or demand that you have received. It is always best to contact your own attorney.

4. Additional Resources

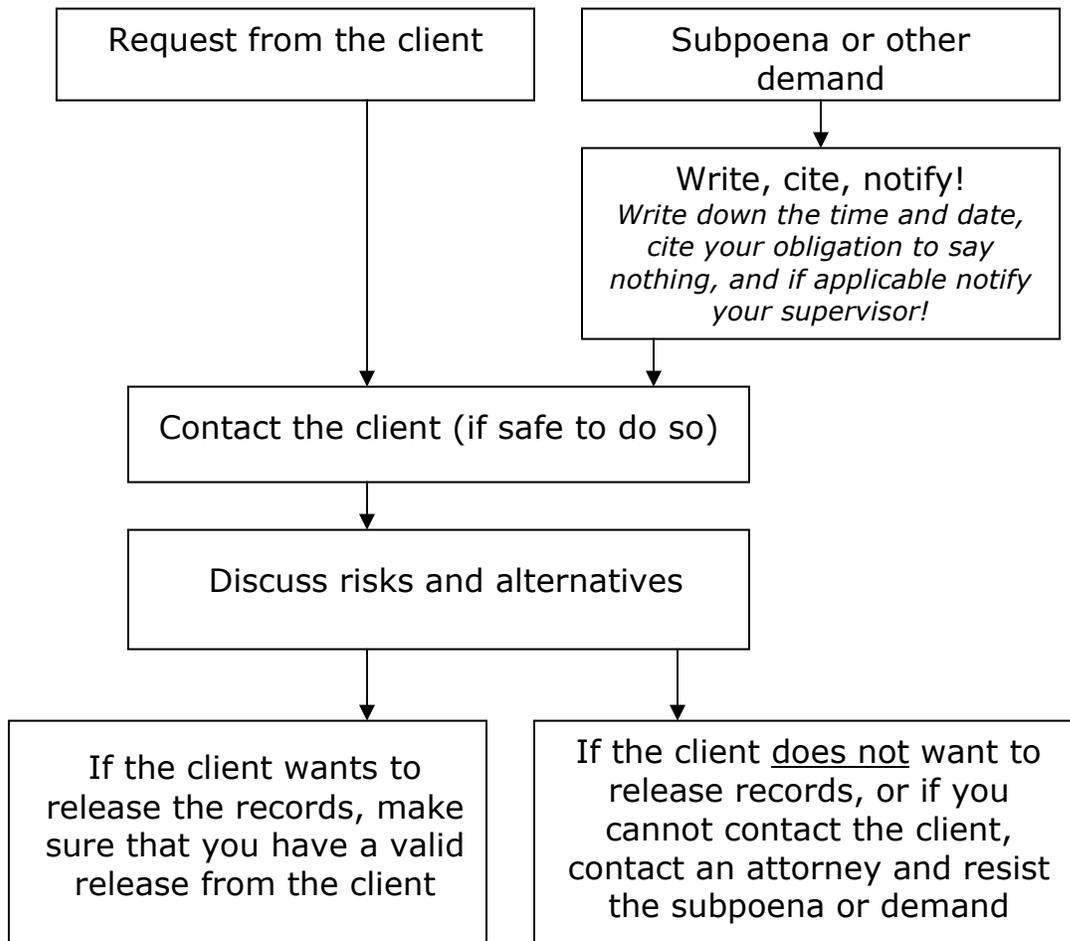
For more information on responding to subpoenas with and without the assistance of an attorney, see American Psychological Institute, *Strategies for Private Practitioners Coping with Subpoenas or Compelled Testimony for Client Records or Test Data*, 37 *Professional Psychology: Research and Practice* 2 (2006).

For information about how trauma or other mental health challenges can be factors in a domestic violence survivor's civil legal case, see Mary Malefyt Seighman, Erika Sussman, and Olga Trujillo, *Representing Domestic Violence Survivors Who Are Experiencing Trauma and Other Mental Health Challenges: A Handbook for Attorneys* (National Center on Domestic Violence, Trauma & Mental Health 2011) (available at the National Center web site or by calling or emailing the National Center). For information on responding to subpoenas and other legal

issues in the context of mental health treatment see: Warshaw, C., Brashler P. Mental Health Treatment for Survivors of Domestic Violence. In C. Mitchell and D. Anglin (Eds.), *Intimate partner violence: A health based perspective*. New York: Oxford University Press (2009).

If you have questions or comments on this tool, contact the National Center on Domestic Violence, Trauma & Mental Health at (312) 726-7020 (P), 312-726-4110 (TTY), or info@nationalcenterdvtraumamh.org.

QUICK REFERENCE CHART RESPONDING TO REQUESTS FOR RECORDS, DEMANDS, AND SUBPOENAS



FIRST RESPONSE SHEET **RESPONDING TO REQUESTS FOR RECORDS, DEMANDS, AND SUBPOENAS**

If you are in solo practice, you should know how to respond if you are handed a subpoena or other demand for mental health records. Mental health agencies with more than one employee should make sure that those employees who are most likely to receive a subpoena or demand for records know how to respond. This sheet will help you remember what to do: **Write, Cite, Notify!**

WRITE!

Make note of the date, time, and method of receipt of the subpoena or demand.

CITE!

If possible, simply say nothing. If you are asked to give information on the spot, cite the law: "By law, we cannot confirm or deny that this person is a client until we process this request."

NOTIFY!

If applicable, immediately notify a supervisor or other designated person.