

# Understanding Subpoenas

A GUIDE FOR TEXAS FAMILY CRISIS CENTERS

— 2011 Edition —





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# Foreward & Acknowledgments

This guide for Texas family crisis centers and shelters was created to provide information and to suggest a course of action on how to deal with subpoenas seeking to compel disclosure of information about a client or former client. The information provided is limited to instances where the crisis center or shelter is not a party to the underlying lawsuit, and where information sought is about a client, not the agency. Nothing in this guide should be considered a substitute for attorney advice.

This resource was developed by Texas RioGrande Legal Aid (TRLA) in collaboration with Texas Community Building with Attorney Resources (Texas C-BAR), the Texas Legal Alliance for Survivors of Abuse (LASA) and the Texas Council on Family Violence (TCFV).

Texas C-BAR and LASA are special projects of Texas RioGrande Legal Aid. Texas C-BAR assists nonprofits statewide in business matters through pro bono referrals, legal education manuals, and workshops. LASA provides legal assistance, education, and training to organizations serving individuals and families who have experienced family violence. TRLA is the nation's third largest legal aid provider, delivering services to 68 of Texas' 254 counties.

This guide is made possible by contributions to Texas C-BAR, including the Texas Council on Family Violence, The F.B. Herron Foundation, Bank of America Foundation, JPMorgan Chase, and Frost Bank.



This publication is intended to provide guidance to shelters and crisis centers when they are served with a civil subpoena that compels information about a client, former client, or shelter resident. It is assumed that the crisis center or shelter is not a party to the underlying lawsuit.

This guide does *not* address situations where the crisis center, shelter, management, staff, or board member(s) are parties to the lawsuit, nor does it address subpoenas in criminal matters, except where useful to distinguish civil from criminal law.

Finally, this guide is not a substitute for legal advice from an attorney. Only an attorney who is familiar with the specific facts of a given case can provide the most effective and responsive guidance to legal matters facing your agency.

## Introduction

For crisis centers serving victims of family violence or sexual assault, maintaining client confidentiality is fundamental. Clients have an expectation that sensitive information will not be disclosed to third parties; to do otherwise would compromise the client's safety as well as the agency's mission. Funders of family violence programs also require confidentiality as a condition of the receipt of funds from federal and state sources such as the Violence Against Women Act, the Family Violence Prevention Services Act, and the Texas Health and Human Services Commission.

Conversely, our legal system largely requires open disclosure of information that may be relevant to a lawsuit. Parties to litigation are expected to marshal facts sufficient to persuade a judge or jury to decide in their favor.

The tension between competing principles of disclosure and nondisclosure arise when a crisis center is served with a subpoena seeking confidential client information to support an underlying civil lawsuit.

There are exceptions in Texas civil law to the general requirement of disclosure in litigation, but these exceptions are relatively narrow and specific. Exceptions to disclosure, commonly referred to as legal privileges, can be asserted to protect communications between a client and attorney, a patient and physician, and a client and licensed mental health professional. Application of privilege is not automatic. Unless the privilege is asserted, disclosure is mandatory. Privileges and other objections to disclosure may be asserted in a motion to quash subpoena.

In order to protect client information under current Texas civil law, crisis centers under subpoena are burdened with raising the privilege *and* proving that it applies in each case. Moreover, complying with a subpoena could force a crisis center out of compliance with federal grant conditions that forbid disclosure of the same information.<sup>1</sup> To avoid unnecessary disclosure of client information, crisis centers can benefit from a basic understanding of subpoenas and methods uses to challenge them.

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<sup>1</sup> Federal Violence Against Women Act, or “VAWA”; Family Violence Prevention and Services Act, or “FVPSA;” Texas Health and Human Services Commission, or “HHSC.”

# I. Subpoena Basics

## A. Subpoenas – In General

### 1. Defined

A subpoena is a legal order commanding the person named in the subpoena to give sworn testimony at a specified time and place, to produce documents or other items designated in the subpoena, or both. It is one method used in lawsuits to discover information that might lead to admissible evidence.

Never ignore a subpoena. Subpoenas are mandatory - the person named in the subpoena must appear or documents must be produced as requested at the designated place and time. To do otherwise requires permission from the court or from the party requesting the subpoena.

Contact your agency lawyer. If notice of a subpoena arrives in the mail, if service has been attempted unsuccessfully, or if the center has been served with the subpoena, contact your attorney immediately. Your attorney may need to prepare a response or motion to quash well in advance of the deadline listed in the subpoena.

### 2. Identifying a subpoena

If you receive a paper, how do you know that it is a subpoena? A subpoena must meet certain formal legal requirements. It must:<sup>2</sup>

- Be issued in the name of “The State of Texas”
- Include the style and cause number of the lawsuit
- Identify the court where the suit is pending
- State the date the subpoena was issued
- Identify the person to whom the subpoena is directed

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<sup>2</sup> Texas Rules of Civil Procedure (hereinafter “Tex. R. Civ. P.”), Rules 176.1, 176.2

- State the time, place and action required of the person being subpoenaed
- Identify the party who secured the subpoena
- Include the text of Tex. R. Civ. P. Rule 176.8(a) regarding contempt<sup>3</sup>
- Include a \$10 witness fee for personal subpoena
- Be signed by the person issuing the subpoena
- Command the subject of the subpoena to
  - \* attend and give testimony, or
  - \* produce and permit inspection of the books, papers, documents or tangible materials designated in the subpoena, or
  - \* both testify and produce documents or other materials.

*If you are unsure* if the document is a subpoena, consider contacting your agency attorney for further guidance or calling the person who signed the document and ask what it is. The sender's name and address should follow the signature.

### 3. Identifying the type of subpoena

In civil cases, different types of subpoenas have different functions. The types can be identified as follows:

Personal subpoenas: There are several types of personal subpoenas. The Texas Rules of Civil Procedure make no distinction, but a kind of shorthand has evolved to describe the different types. Generally, a personal subpoena requires the person (witness) to appear in person at the time and place specified in the subpoena. The most common types of personal subpoenas include:

Trial subpoena: A trial subpoena one kind of personal subpoena. A trial subpoena compels the witness' appearance in a court of law and to remain day to day until discharged. A trial subpoena can be served with very little notice, even on the date the witness must appear in court. In a criminal cases, a personal subpoena

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<sup>3</sup> Tex. R. Civ. P. 176.8: "A fine may not be imposed, nor a person served with a subpoena attached, for failure to comply with a subpoena without proof by affidavit of the party requesting the subpoena or

that party's attorney of record that all fees due the witness by law were paid or tendered."

can compel the witness to appear and testify in a criminal trial, by an examining court, at a coroner's inquest, before a grand jury, at a habeas corpus proceeding or any other criminal proceeding.<sup>4</sup>

Deposition subpoena: A deposition subpoena is a personal subpoena that compels a person to appear for deposition at the time and place stated in the notice of deposition.<sup>5</sup> A nonparty may be subpoenaed to appear for a deposition without producing any documents.<sup>6</sup> Testimony provided in a deposition is given under oath. Videotaped depositions can be presented at trial in lieu a witness' personal appearance, or for other purposes, such as impeachment of a witness at trial.<sup>7</sup> A deposition subpoena usually compels the witness to appear at a law office or other location and remain day to day until the deposition is concluded.

Discovery subpoena (subpoena duces tecum):<sup>8</sup> A discovery subpoena is issued to compel a nonparty to produce documents. The person commanded to produce documents or other materials need not appear in person unless the subpoena commands the person to attend and give testimony.<sup>9</sup>

The subpoenaed person or entity is entitled to "reasonable" reimbursement for the cost of production, duplication, or copies.<sup>10</sup> Discovery subpoenas may include a form for acknowledgment or an affidavit to be completed by the custodian of records certifying that copies provided are true and correct copies of the originals.

## B. Subpoenas – Issuance, Notice and Service

### 1. Issuance of a subpoena

In civil cases, subpoenas may be issued by the following persons:

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<sup>4</sup> Tex. Code Crim. P. 24.01(a).

<sup>5</sup> Tex. R. Civ. P. 176.1 (e), 176.2.

<sup>6</sup> Tex. R. Civ. P. 205.1 (a), (b).

<sup>7</sup> Tex. R. Evid. 801(e)(3); Tex. Code Crim. P Ch. 39 et seq. "Depositions and Discovery."

<sup>8</sup> The Texas rules no longer use the term "subpoena duces tecum."

<sup>9</sup> Tex. R. Civ. P. 176.6(c).

<sup>10</sup> Tex. R. Civ. P. 205.3(f)

- the clerk of the court where the lawsuit has been filed
- a private lawyer representing one of the parties in the lawsuit<sup>11</sup>
- a “deposition officer” authorized to take depositions in Texas<sup>12</sup>

In criminal cases, a subpoena can be issued by the clerk at the request of a party to compel the appearance of a witness at trial or as part of an investigation. Discovery subpoenas may also be issued to compel the production of evidence in possession of the witness.<sup>13</sup>

## 2. Notice of a subpoena

A party may compel discovery from a nonparty and by serving a subpoena for:

- An oral deposition
- A deposition on written questions
- A request for production of documents served with a notice of oral or written deposition
- A request for production of documents

Before serving a subpoena on a nonparty, however, the party seeking discovery by subpoena from a nonparty must provide written notice on the nonparty and all other parties to the lawsuit. The time to serve notice depends on type form of discovery requested.<sup>14</sup>

Oral deposition with or without documents: A notice of intent to take an oral deposition must be served on the witness within a “reasonable time” before the deposition is taken.<sup>15</sup>

Deposition on written questions: A notice of intent to take deposition on written questions must be served at least 20 days before the deposition is taken.<sup>16</sup>

11 Texas rules permit a lawyer for the party to issue subpoenas. Tex. R. Civ. P. 176.4 (a), (b).

12 Tex. R. Civ. P. 176.4

13 Tex. Code Crim. P. 24.02. The subpoena “may specify such evidence and direct that the witness bring the same with him and produce it in court.”

14 Tex. R. Civ. P. 205.2

15 Tex. R. Civ. P. 199.2(a); 205.1

16 Tex. R. Civ. P. 200.1(a).

Documents only: A notice to produce documents or other materials must be sent to the nonparty at least 10 days before the subpoena compelling the production of documents is served. The notice must describe each item or category of items sought with reasonable particularity.<sup>17</sup>

*“Notice” rule for documents*: Since all nonparty subpoenas require personal service by a process server, a written notice of intent to serve a subpoena, while required under the rules, is not legally valid service.

*Notice alone does not require a response* - Failure to acknowledge receipt of the notice merely forces the issuer to make arrangements (and pay) to have the subpoena formally served. There is no penalty for failure to comply with the notice of intent to serve a subpoena. The minimum 10 days’ written notice before service of a discovery subpoena, and 20-day written notice before service of a deposition on written questions provides a valuable window of time for the custodian of records to locate the documents requested, inform the agency and the client, and decide what should or should not be disclosed once the subpoena is formally served.

If the scope of the request in a discovery subpoena is overbroad, involves expenses, or there is no information responsive to the request, the custodian can make good use of this 10-day window to notify the issuer and ask to modify, alter or otherwise limit the scope of the material requested.

### 3. Service of a subpoena

In civil cases, a subpoena may be served anywhere in Texas by a:

- Sheriff
- Constable
- Any person over 18 years of age who is not a party to the lawsuit (such as a

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<sup>17</sup> Tex. R. Civ. P. 205.3(b)(3); see 200.1 (b) (document request must comply with Rule 205).

private process server).<sup>18</sup> Private process servers are not required to wear a uniform or other identification to show legal authority to serve a subpoena.

In criminal cases, subpoenas may be served by any “peace officer.”<sup>19</sup>

#### 4. Methods of service

In civil cases, the rules for issuance and service depend upon whether the information or testimony sought is from a party to the lawsuit or from a nonparty who may have information relevant to the lawsuit.

Personal service required: All nonparty subpoenas require personal service. Texas law requires a nonparty subpoena to be served by “delivering a copy to the witness and tendering to that person any fees required by law.”<sup>20</sup>

*Delivery:* The person under subpoena does not have to “accept” hand delivery of the subpoena for delivery to be legally sufficient. If delivery is refused following identification of the person to be served, the process server can leave the papers for the subpoenaed person, even on the floor in front of her. It makes sense to educate your staff and collaborate with the constable or sheriff’s office on how and under what circumstances personal service should be accepted by your agency.

*Fees:* For a personal subpoena compelling the presence of a witness at a particular date and time, a witness fee of \$10 must be attached to the subpoena *at the time of service*. If no witness fee is attached, the personal subpoena is legally defective.

**Note:** If it is a discovery subpoena (documents only), the witness fee does not apply.

Proof of service: To show that a subpoena has been properly served, the issuing party must file with the court either:

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<sup>18</sup> Tex. R. Civ. P. Rule 176.5

<sup>19</sup> A criminal subpoena can be served by a “peace officer” or a private person without an interest in the underlying case. Tex. Code Crim. P. 24.01(b)

<sup>20</sup> Tex. R. Civ. P. 176.5

- An *acknowledgment of receipt* (memorandum of acceptance) that is attached to the subpoena and *signed by the person named in the subpoena* (the witness) showing that it was accepted, or
- A *return of service*, (statement by the process server) with the date, time, and manner of service, and the name of the person served.

To confirm that service was completed in a legally effective manner, call the clerk of the court in the county where the lawsuit is pending and ask if there is a “return of service” on file for the subpoenaed witness. If the answer is no,

- the server has not yet filed the “return” with the court (check back later), or
- the witness has not been served, or
- service is incomplete or incorrect.

Failure of the requesting party to provide proof of service means that the court cannot validly compel the proposed witness to comply with the subpoena. If the return of service is on file but is missing information (date, time, manner of service, person served) service is defective and therefore invalid.

## C. Legal Papers That Are Not Subpoenas

### 1. Citations

Citations may be delivered by a process server or by mail, usually by certified mail. A citation is the formal notice that a lawsuit has been filed. If it’s a citation, the word “Citation” will appear at the top of the paper and the document will contain the language “You have been sued...” If a hearing has been set, the deadline to respond can be much shorter than the answer date listed in the citation.<sup>21</sup> If the citation is directed to a client or former client, notify the client and provide it to them immediately. If it is for an agency employee in his or her official capacity, notify the employee and contact the agency lawyer.

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<sup>21</sup> In a typical civil lawsuit, such as a divorce, the answer will be due before 10:00 am on the “Monday next following the expiration of 20 days” after service. Tex. R. Civ. P. 99(b).

## 2. Open records requests

As a general rule, a shelter will not be considered a public agency for purposes of the Texas Public Information Act (“PIA” or “Open Records Act”) and will have no legal duty to release information pursuant to the Act. The Act specifically exempts Family Violence shelters from disclosing information about a shelter’s staff, volunteers, board members, clients, and services.<sup>22</sup> If the document is an open records request, a response is required even if exemptions apply. The time to reply is short, and the determination of whether your agency is subject to open records requirements can be complicated. Fax the request to your attorney to help you determine the best response.

## 3. Writs of Attachment

In Texas family law, a writ of attachment is a court order to a sheriff or constable in the state of Texas to physically remove a child from one person and deliver the child to another. They are used when one person is refusing to comply with a court order to return the child to another party, refusing possession of the child as governed by a previously issued court order, or when the party withholding the child is endangering the child. The party seeking the writ must submit a verified pleading or affidavit to the court setting forth the facts supporting issuance of the writ.<sup>23</sup>

If the child of a shelter client is subject of a writ of attachment, the shelter should neither confirm or deny the child’s presence in shelter. The client should be notified immediately about attempted service of the writ and advised to seek legal counsel immediately.

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<sup>22</sup> Tex. Gov’t. Code Sec. 552.138

<sup>23</sup> Tex. Fam. Code 105.001(c)

## II. Responding To A Subpoena

### A. When Personal Service Is Attempted

#### 1. Server requests for information

Process servers have no interest in the outcome of the case and are not “against” the person being subpoenaed. The process server may ask questions that help the server, but may not help your clients. When a process server attempts service on your organization, you are not required to volunteer any information about the person named in the subpoena, even if you know of the person. You do not have to answer any questions, including whether the server is at the correct location or address, if the person named in the subpoena is a client or a staff member, or whether the witness’ name is spelled properly in the subpoena. Do not advise the server of inaccuracies in the subpoena. “I have no information for you” is an acceptable response. Whether the server is a sheriff, constable, or private process server, you have no legal duty to offer information.

#### 2. Working with local law enforcement

It is important for a crisis center to cultivate a positive ongoing relationship with local law enforcement. The officer who serves a subpoena on a shelter client today may be the same officer to intervene in a family violence situation tomorrow. Good relations between local law enforcement and the shelter enhance the community standing of both. Part of a center’s goal to develop and maintain positive interactions with law enforcement could include collaboration on protocols on how to serve subpoenas and other legal process. Topics could include the crisis center’s current relationship with law enforcement, when and how often law enforcement attempts service, how the method of service may differ if the subpoena is to a shelter client or to the records custodian, the method of service attempted, and (for non-emergency matters), the time(s) and day(s) for service that might best accommodate both law enforcement and the shelter.

### 3. Subpoena for client, former client or shelter resident

We recommend the following procedures for clients or former clients:

- *Notify the client:* If service has been attempted on a client or former client, *notify the client immediately*. If the client is represented by an attorney, the attorney should be notified.
- *Notify the director:* The program director or CEO should be notified any time service is attempted.
- Avoid accepting a subpoena on behalf of a current or former client. Personal service on the client is required for service to be valid.
- You have no legal obligation to confirm or deny that the client is a current or former client or a shelter participant.
- A discovery subpoena directed to a client asking the client to produce records generated by your program is not valid for the client. The client is not the custodian of the program's records.

### 4. Subpoena for agency employee, volunteer or board member

We recommend the following procedures regarding these types of subpoenas:

- Avoid accepting service on behalf of another named staff member.
- *Notify the staff member:* If service has been attempted on a staff member, notify them immediately.
- *Notify the director:* The program director or CEO should be notified any time service is attempted.
- If service is attempted on a board member, contact the agency attorney immediately.
- Subpoenas directed to the “custodian of records” should be accepted by the person designated as the custodian. If the named staff member is not available, inform the process server that you are not authorized to accept the subpoena. Do not volunteer information about when the staff member is expected to return to the office.
- *Notify the client:* If the custodian of records is subpoenaed for records or documents pertaining to a specific client or former client, *notify the client immediately*.

## 5. Subpoena for “custodian of records”

As noted earlier in this guide<sup>24</sup>, subpoenas for deposition on written questions and discovery subpoenas cannot be validly served if the subpoenaed party has not received a written notice of intent to serve the subpoena.<sup>25</sup> More often than not, these types of subpoenas are directed to the custodian of records.

Absent the required notice, service of these types of subpoenas is grounds for an objection based on defective service based on the issuing party’s failure to comply with the notice requirement. Depending on the information requested and the extent to which you will challenge its disclosure, you can either:

- File a formal written objection with the court, or
- Contact the issuer and insist that they comply with the notice requirements of Rule 205 of the Texas Rules of Civil Procedure. The practical effect is to gain more time to gather and produce the information sought to be compelled.

## 6. Contacting your agency lawyer

Subpoenas are time-sensitive, and require legal attention well in advance of the deadline listed in the subpoena.

Notices: Upon receipt of the written notice of intent to serve a subpoena, notify the custodian of records and deliver a copy to her *immediately*. Depending on the kind and quantity of information requested in the notice, the custodian of records can request advice from your agency attorney on what to disclose if and when the subpoena is served.

Subpoenas: If a subpoena compels the appearance of an employee or volunteer, *fax the subpoena to the agency lawyer the day you receive it. Do not wait.* Any action to challenge the subpoena must be made well in advance of the subpoena deadline. The longer the

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24 Part I. Subpoena Basics, B. Subpoenas – Issuance, Notice and Service 2. – Notice of a Subpoena, *supra*.

25 Tex. R. Civ. P. 200.1(a); Tex. R. Civ. P. 205.3(b)(3); 200.1(b).

delay, the more the options for challenging the subpoena diminish.

Attempted service of subpoena: Notify your lawyer if service is attempted but not successful, because it is almost certain that service will be attempted again soon. Share a copy of the subpoena, if available, as well as a description of the events of the attempted delivery.

## B. Penalties for Noncompliance with a Subpoena

### 1. Contempt of court

Subpoena successfully served: The subpoenaed person must appear at the time and place specified in the subpoena. For a discovery subpoena, the custodian of records must produce the documents or materials requested. The penalty for failure to respond to any type of subpoena is contempt of court. A finding of contempt may expose the subpoenaed person or records custodian to a fine, jail time, or both.<sup>26</sup>

Requirements for contempt: Since enforcement by contempt may involve jail time, the party seeking contempt must show that all technical requirements have been met. The enforcing party must file a motion for contempt with the court and ask the court issue an order (“show cause” order) commanding the witness to appear in court to “show cause” for the noncompliance. Before doing so, the party seeking contempt must verify to the court that all witness fees have been paid or tendered.<sup>27</sup> If all requirements are met and the witness cannot show a valid legal reason for not complying with the subpoena (e.g., defective service, claim of privilege) the witness can be taken into custody.

**Note:** *No witness fee, no contempt.* If the issuer fails to attach the \$10 witness fee to a nonparty subpoena commanding the appearance of a person (personal subpoena), service is presumptively defective and no response is required until the fee has been

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<sup>26</sup> Tex. R. Civ. P. 176.8(a)

<sup>27</sup> Tex. R. Civ. P. 176.8(b)

tendered.<sup>28</sup> The witness fee must be affixed to the subpoena in the form of cash, money order or other certified funds.

## 2. Writ of attachment - witness under subpoena

If the witness under a trial subpoena does not appear as ordered, the court may order the issuance of a writ of attachment. The writ, issued by the clerk at the direction of the court, commands a peace officer to “attach” the witness (literally take the witness into custody, a type of civil arrest) and escort the witness to the issuing court to testify as ordered under the subpoena. The recalcitrant witness often will receive no other notice demanding appearance other than the subpoena. A writ of attachment is immediately executed by a peace officer, often without any other notice to the noncompliant witness.

## C. Accepting Service of a Subpoena

### 1. Right to challenge not waived

Accepting a subpoena does not waive the right to challenge it. Once served, a response to the subpoena is required, but the response can be in the form of an objection, claim of privilege, or both.

### 2. No information responsive to subpoena

Action still required: If the subpoena compels information about a client, former client, (or someone who has never been a client), you must still address the subpoena. Consider contacting the issuing party to inform them that the agency does not possess any information responsive to the request.

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<sup>28</sup> Tex. R. Civ. P. 176.8(a)

Affidavit of no information: The issuer may request written confirmation (usually in the form of an affidavit) that there are no documents or information contained in the agency files that are responsive to the subpoena. If confirmation is needed, the issuer should provide the form for the custodian of records to complete. The form should be carefully reviewed and changed, if needed, to accurately reflect that the information sought does not exist. Keep in mind that the issuing party does not represent the interests of the agency or your clients. If the form provided is unacceptable, you have the right to provide your own form or affidavit.

## D. Response to Subpoena Based on Objections

### 1. Objections distinguished from privileges

In response to a subpoena, an agency can object, invoke a legal privilege, or both. Objections typically address technical defects or equitable issues. Technical defects include the form of the subpoena or the manner in which it was served. Equitable issues deal with fairness, such as whether the action compelled is unduly burdensome or inconvenient.

As a means to resist a subpoena, objections should not be overlooked in favor of claims of privilege. The former admits nothing, while the latter confirms the existence of privileged information. Put another way, when an agency objects to a subpoena, it neither admits or denies that it has relevant information. When an agency claims a privilege, it is admitting that it has responsive information but that it will not disclose it. Objecting may therefore be a more appropriate response, depending on the information requested.

Objecting to technical defects in a subpoena may not seem worthwhile if the defects can be cured. If a subpoena request for documents is overbroad, it can be narrowed. If the \$10 witness fee is unpaid, it can be paid later. So what is the point of objecting?

Time. Since a response to a subpoena can be on such a short turnaround, any additional time gained by objecting means more time to contact the client or former client, time to review records on hand, time to review documents and time to review whether information requested might in fact be protected by a legal privilege.

## 2. Objections based on defective or improper service

Subpoenas must be delivered in a legally sufficient manner. In our system of jurisprudence, issues surrounding the adequacy of legal notice go to the heart of constitutional due process of law. For this reason, the legal rules governing subpoenas are very specific.

Once you object, the issuer can cure the defect and have you served again, this time correctly. Faulty or improper service might not defeat the subpoena, but might buy additional time to respond to the underlying request.

*Defective service – no witness fee:* If served with a personal subpoena, the witness is entitled to receive \$10 for each day of testimony. Texas law requires a witness fee of \$10 (for the first day) be attached to the subpoena at the time of service.<sup>29</sup> A subpoena without the witness fee is grounds for objection based on defective service. Since the witness fee is statutory, you do not need to comply until the witness fee is paid. Consider calling the issuer to inform them why the subpoena must be re-served.

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<sup>29</sup> Tex. R. Civ. P. 176.5(a)

*Defective service - Outside of subpoena range:* If a personal subpoena commands appearance in any county within 150 miles in any direction from the person's residence, the subpoenaed person is considered to be outside of subpoena range.<sup>30</sup> Note that the distance is measured from the witness' residence to within 150 miles of the county where the action is pending. If the witness lives in Austin and must appear in Houston, the 150<sup>th</sup> mile is from the Harris County line, not the Houston city limit.

A helpful tool to determine if the county in which you are ordered to appear is within the 150 mile radius may be found at [www.freemaptools.com/radius-around-point.htm](http://www.freemaptools.com/radius-around-point.htm)

### 3. Objections based on undue burden or expense

The issuing party must take "reasonable steps" to avoid imposing undue burden or expense on the person served.<sup>31</sup> If the subpoenaed person objects on this basis, the court "must provide the person served with ... and adequate time for compliance, protection from the disclosure of privileged material or information, and protection from undue burden and expense."<sup>32</sup>

*Undue burden – scope and specificity:* The scope of information requested in a discovery subpoena is grounds for objection if the request is overbroad or vague. A subpoena compelling production of "any and all records and documents pertaining to nonresident participants in supportive or group therapy for the years 2000-2005 inclusive" would clearly be both vague and overbroad.

If the scope is too broad, contact the issuer to see if the terms can be narrowed, or move to quash based on your objections. If you can come to agreement with the issuing party, this may be preferable, because courts tend to seek compromise on discovery

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<sup>30</sup> Tex. R. Civ. P. 176.3(a)

<sup>31</sup> Tex. R. Civ. P. 176.7.

<sup>32</sup> *Id.*

rather than complete denial. If you cannot agree and prevail on your objection, the court can either quash the subpoena or modify it to limit the scope of the request.

*Undue burden - unreasonable time to comply:* You are entitled to reasonable period of time in which to comply with the subpoena. “Reasonable” depends on the substance of the request. If the discovery subpoena requests documents that are archived, off-site or otherwise difficult to obtain, the issuer may agree to allow more time for compliance. If no agreement can be reached, you can negotiate different terms with the issuer or object in writing to the court.

*Undue burden - inconvenient date:* If a personal subpoena commands appearance of a witness at on a date that presents a serious scheduling conflict, the issuing party might agree to reschedule. This is not an unusual request, particularly for deposition subpoenas. If it is a trial subpoena, it is unlikely that the issuer can postpone your appearance.

*Undue burden - travel expenses:* Usually, costs and fees are set according to the rules of the court in which the lawsuit has been filed. If a personal subpoena requires travel, transportation costs (such as mileage) can be covered by the issuer. This is in addition to the daily witness fee of \$10. Alternatively, the issuer can travel to the witness’ location for deposition or to review records in response to a discovery subpoena.

*Undue burden - cost of production:* A party requiring production of documents by a nonparty must reimburse the nonparty’s reasonable costs of production.<sup>33</sup> If the cost is so burdensome that costs need to be covered up front, an objection can be made on this basis requesting that compliance wait until the estimated costs are paid.

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33 Tex. R. Civ. P. 205.3(f)

## E. Response to Subpoena Based on Privilege

Unlike an objection, a claim of privilege<sup>34</sup> alerts the issuer that you have confidential information about a client, but the law may shield it from disclosure. This includes discovery subpoenas that request sensitive client records, but can also include communications between the client and shelter staff. Records can be obtained through discovery subpoenas, while communication between the client and agency staff is compelled through a personal subpoena.

Whether a privilege applies is a judicial determination. When in doubt, err on the side of privilege. It is not an all or nothing proposition. Some client communications may be protected and others may not. An agency can release some documents as a partial response to a discovery subpoena and withhold others based on privilege.

### 1. Privilege - mental health professional and client

Unlike many states, Texas lacks a privilege law designed to protect communications between crisis center employees and their clients. Under some circumstances, employees who are licensed social workers may fall within the statutory definition of privilege in Texas civil law as it applies to “mental health professionals.”<sup>35</sup> Mental health professionals are persons whose professional activities include client evaluations, assessments, identification of mental or emotional disorders, and treatment through therapy.<sup>36</sup>

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34 A reminder that this Guide is limited to Texas civil law as it relates to disclosure of client information through a subpoena served on the shelter or crisis center. The rules of evidence and procedure are different for criminal cases. A client who is a defendant in a criminal matter has the right request to court-appointed counsel. A client who is called as a witness in a criminal matter must appear as ordered, or consult with counsel as to the consequences of non-appearance.

35 This privilege does not apply in criminal cases.

36 The communication was made by a person to a professional, or a person “reasonably believed” to be a professional who is “licensed or certified by the State of Texas in the diagnosis, evaluation, or treatment of any mental or emotional disorder

[.]” Tex. R. Evid. 510(a) (1) (B); (D); and the communication was made by a person to the professional “for purposes of diagnosis, evaluation, or treatment of [a] mental or emotional condition or disorder [.]” Tex. R. Evid. 510(a) (2) (A). See Tex. R. Evid. 510, et. seq., “Confidentiality of Mental Health Information in Civil Cases”.

*Licensed or certified:* For the mental health privilege to apply, the verbal or written communication by the client must be made to a person who is “*licensed or certified* by the State of Texas in the diagnosis, evaluation or treatment of any mental or emotional disorder” in the course of consultation, diagnosis, evaluation, or treatment.

*Social workers:* By legal definition, only licensed *clinical* social work involves “the practice of providing evaluation, diagnosis, and treatment to individuals, families, or groups with mental or emotional conditions or disorders or who are adversely affected by social or psychosocial stress or health impairment.”<sup>37</sup> Therefore, only licensed clinical social workers (LCSW) can invoke the “mental health” privilege.

Other classes of social workers (licensed master social worker, or LMSW, and licensed baccalaureate social worker, or LBSW) can claim the privilege they 1) work under the supervision of an LCSW and 2) the services rendered must be *directly related* to the *diagnosis and treatment* of the client’s *mental or emotional condition*.<sup>38</sup>

If your agency is served with a subpoena and doubt that a particular communication or document can be tied to the client’s diagnosis and treatment, *err on the side of claiming the privilege*. Disclosure may compromise the client’s confidence and safety, which in turn may undermine the crisis center’s goal to provide a safe haven for victims. In deciding whether privilege should attach, the court will ultimately decide whether the document or communication fit, but the court can do so *in camera*, or outside the view of the party seeking the information.

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<sup>37</sup> Tex. Occupations Code Ann. § 505.0025.

<sup>38</sup> 22 Tex. Admin. Code § 781.102.

## 2. Privilege - attorney and client

This exception to disclosure applies to confidential communications that are not intended to be disclosed to third persons and made in furtherance of the rendition of professional legal services to the client.<sup>39</sup>

**WARNING:** It is critically important to remember that the privilege protects only communications between a lawyer and client. The presence of a third party (such as a client advocate) to an attorney-client communication will destroy privilege, and the substance of the communication will be discoverable.

**Advocates as Paralegals:** Paralegals fall under the umbrella of attorney-client privilege only if they are working under the direct supervision of an attorney. Texas does not require special licensure for paralegals, so, under narrowly defined circumstances, a shelter advocate can act as a paralegal.

Communications between the advocate, client and attorney may be protected by the attorney-client privilege if:

- The advocate acts in behalf of a mutual client in furtherance of the rendition of legal services.
- The advocate acts under the direct supervision of an attorney.
- There is a contractual agreement, Memorandum of Understanding or other written agreement between the shelter and the lawyer, law firm, or Legal Aid.<sup>40</sup>

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<sup>39</sup> Tex. R. Evid. 503

<sup>40</sup> At the time of publication, only the LARS (Legal Assistance to Rural Shelters) program through

Texas RioGrande Legal Aid has incorporated this arrangement into its Memoranda of Understanding with shelters.

## III. Quashing The Subpoena

### A. Motion to Quash Subpoena

#### 1. Definition of a motion to quash

A motion to quash is a document filed with the court and sent to the issuing party that sets forth legal grounds to support why the subpoena should be voided, or “quashed.” A motion to quash can be based on objections, privileges, or any other relevant ground. A motion to quash or other challenge to a subpoena must be made well before the deadline to respond to the subpoena. If you do not contact an attorney immediately, your attorney will lack sufficient time to prepare or assist you with the motion. Once filed, the motion can be set for a hearing and the outcome decided by a judge well in advance of a decision on the underlying lawsuit.<sup>41</sup>

#### 2. Contents of a motion to quash

A motion to quash should:

- identify the parties to the underlying lawsuit,
- identify your agency as a nonparty,
- describe the purpose or mission of the agency,
- provide a short procedural history (when the subpoena was served, the information sought to be compelled),
- include a copy of the subpoena as an exhibit,
- raise any legal objections to the subpoena,
- raise applicable legal privileges (mental health professional- client; attorney-client),
- identify the professional capacity of the employee under subpoena (licensed professional counselor, caseworker),

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<sup>41</sup> Tex. R. Civ. P. 176.6(d) (objections) and 176.6(c) (privileges).

- note whether some or all of your agency's funding is conditioned upon maintaining client confidentiality, and
- in addition to and/or in the alternative, refer to other rules or laws that support confidentiality of information for other classes of victims (i.e. sexual assault).

### 3. Stay of proceedings

Once the written challenge is made, compliance with the subpoena is stayed (postponed) until the court rules on the motion, usually following a hearing on the motion.

### 4. Quashing the trial subpoena

A subpoena that commands the appearance of a witness in a court of law can be served on very short notice. If the person subpoenaed wishes to challenge the appearance, he should:

- contact the agency attorney,
- appear in court as ordered, and
- orally urge a motion to quash and the reasons for it.

The oral motion to quash and reasons for it (i.e. objections, privilege) should be made "on the record." Court proceedings are not always recorded, so it is incumbent upon the person urging the motion to make sure that all discussion taking place in the courtroom is recorded by a court reporter or other verifiable means. Without a record, the judge's denial of the motion cannot be subject to mandamus or otherwise appealed.

## B. Other Grounds to Support a Motion to Quash

### 1. Public interest and public policy

Courts have broad discretion in discovery matters. Even if it appears that there is no readily apparent basis to challenge a subpoena, the court can exercise its discretion to

quash the subpoena based on the broader considerations of public policy and as a function of its gate keeper function in determining what information should enter into the litigation.

Educate the court on why the agency cannot comply with the subpoena. Other laws protect victim communications from disclosure, such as Texas' law protecting information about victims of sexual assault.<sup>42</sup> Persuasive authority might include information about other nondisclosure provisions, the mission of the agency, the imperative of client safety, and an explanation of how both the agency and client would be compromised by the disclosure of sensitive information.

## 2. Texas' Public Information Act ("PIA") exception for shelters

The Texas Public Information Act permits certain public information to be released when a request is made pursuant to the Act. The act contains specific exceptions to disclosure for family crisis centers if the information relates to:

- The home address, home telephone number, or social security number of an employee or a volunteer worker;
- The location or physical layout of a family violence shelter center;
- The name, home address, home telephone number, or numeric identifier of a current or former client of a family violence shelter or sexual assault program;
- The provision of services, including counseling and sheltering, to a current or former client of family violence shelter center or sexual assault program;
- The name, home address, or home telephone number of a private donor to a family violence shelter center or sexual assault program; or
- The home address or home telephone number of a member of the board of directors or the board of trustees of a family violence shelter center or sexual assault program.<sup>43</sup>

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<sup>42</sup> Tex. Health and Safety Code § 44.071

<sup>43</sup> Tex. Gov't Code § 552.136 lists exceptions to disclosure.

An open records request for release of information is fundamentally different than a court order, such as a subpoena, compelling the turnover of personal information. The PIA exceptions do, however, provide some legislative recognition that some information should be exempted from disclosure.

### 3. Constitutional right to privacy

Federal constitutional law supports the proposition that shelter information should be protected from disclosure to third parties. To support a motion to quash, a shelter can rely upon an opinion by the Texas Attorney General's office that protected a shelter's disclosure of client information based on well-settled federal constitutional principles.<sup>44</sup>

A Texas shelter was asked, through an open records request, to produce its notary book. The book contained client contact information. Through legal counsel, the requested an Attorney General opinion as to whether the notary book fell within an exception to Texas' open records law, which exempts disclosure of "information considered to be confidential by law, either constitutional, statutory, or by judicial decision" or the doctrine of common-law privacy.<sup>45</sup> The opinion noted that federal constitutional interests protect privacy in matters such as marriage, contraception, family relationships, as well as sensitive personal matters. Federal constitutional interpretation requires that an individual's privacy interests be balanced against the public's need to know information of public concern. Since a shelter's notary book pertained to victims of family violence seeking protective orders, the privacy interests of the victims outweighed the public's right to information.<sup>46</sup>

While the Attorney General's opinion is limited to the facts presented, it provides support for the argument that the shelter client's privacy interests and safety outweigh a party litigant's need for the subpoenaed information.

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<sup>44</sup> Office of Attorney General of Texas, Open Records Decision 09229 (2009)

<sup>45</sup> Gov't Code § 552.101.

<sup>46</sup> Relying on *Ramie v. City of Hedwig Village*, 765

F.2d 490 (5th Cir. 1985); *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981).

#### 4. Texas' statutory protection for victims of sexual assault

In a motion to quash based on privilege, it may be helpful to inform the court that Texas law protects sexual assault victim information from disclosure. Currently, identifying information about victims of sexual assault is legally protected.<sup>47</sup> Victims of family violence should benefit from the same or similar protection.

Texas law protects communications between a certified sexual assault counselor and victim. The statute places the burden on the party seeking information to prove why the information should not be protected. No information can be disclosed without a waiver of confidentiality signed by the sexual assault survivor.<sup>48</sup> Conversely, victims of family violence must prove why their communications should be exempted (privileged) from disclosure. Of course, victims of sexual assault and of family violence do not fall neatly into categories. Statutory protection for victims of sexual assault can apply if in cases where there is a "co-occurrence" of family violence.

#### 5. VAWA, FVPSA and HHSC – mandatory confidentiality

The Violence Against Women Act (VAWA) and Family Violence Prevention and Services Act (FVPSA) authorize the distribution of federal funds to the states, which in turn distribute them to individual programs. In Texas, VAWA funds are distributed through the Office of the Governor, Criminal Justice Division (CJD) while FVPSA grants are distributed through the Criminal Justice Division (CJD) and the Texas Health and Human Services Commission (HHSC), respectively.

Family violence programs funded in whole or in part by federal grants are prohibited from disclosing any personally identifying information of victims of family violence, dating violence, sexual assault and stalking without the victim's "informed, written, reasonably time-limited consent[.]"<sup>49</sup> This includes any information likely to disclose the location of the victim, including name, address, social security number, email address or any other information that is likely to reveal the client's location.<sup>50</sup>

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<sup>47</sup> Tex. Health and Safety Code § 44.071

<sup>48</sup> Tex. Health and Safety Code § 44.071

<sup>49</sup> VAWA Reauthorization Act 2005, Sec. 4002 (B)(ii)

<sup>50</sup> Id. at (a)(18)

State confidentiality requirements under HHSC and CJD mirror those of VAWA and FVPSA. As a condition of receiving funds, each program must ensure that “all information will be kept confidential, including all personal information and all communications, observations, and information made by and between or about adult and child residents and nonresidents, employees, volunteers, student interns, and board members.”<sup>51</sup>

It is important to impress upon the court that disclosure of client information threatens the continued existence of the agency by forcing it into noncompliance with its funding rules.<sup>52</sup> Programs are also encouraged to work with the local judiciary in order to have them better understand the shelter's unique position, client safety issues and why certain information must be exempted from disclosure.

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51 Tex. Admin. Code Sec. 379.613(1)

52 See *State ex rel Hope House, Inc., Relator, v. Merrigan*, 133 S.W.3rd 44 (Mo. 2004) (order denying shelter's motion to quash subpoena

violated Missouri's family violence confidentiality statute)

## IV. Complying With The Subpoena

### A. Limited or Partial Compliance with Subpoena

If the court denies your motion to quash, other legal tools are available that may limit or restrict the documents or testimony compelled under the subpoena.

#### 1. Motion for a protective order

If the court denies the ground for objection or claim of privilege, a nonparty can file a motion for a protective order asking the court to enter an order to limit disclosure or testimony.<sup>53</sup> The court also has the authority to limit further disclosure to other parties of sensitive or confidential materials that have already been disclosed. Note that “protective orders” in discovery matters are completely unrelated to family violence protective orders.

#### 2. Modification of subpoena

If a challenge to a subpoena fails, ask the court to modify the scope of information requested. By narrowing the scope, the court can compel disclosure of some information while leaving more sensitive information undisclosed.

#### 3. *In camera* inspection

Another alternative to full disclosure is to ask the judge to review the documents privately (*in camera*, outside the presence of opposing counsel) to determine what documents might be protected. The judge can then make a more informed decision about what must be disclosed and what may be protected by privilege or public policy considerations. Confidential, identifying information may also be redacted (blackened out or omitted), allowing for inspection or production of documents not tied to a named individual.

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<sup>53</sup> Tex. R. Civ. P. 176(e)

## B. Full Compliance With Subpoena

If the information requested in the subpoena is not protected by privilege or objection, full compliance is mandatory.

### 1. Compliance with deposition or trial subpoena

Appearing as a witness at the designated time and place is essential. Non-appearance is cause to hold the witness in contempt of court. Under questioning by the adverse party, the witness should answer all questions as sparingly and directly as possible. If the question can be answered with a “yes” or “no”, the witness should answer and then not elaborate. If the question is unclear, or not understood, it is perfectly appropriate to ask the attorney to re-phrase the question. If the witness does not remember, “I don’t recall” is an appropriate answer.

### 2. Compliance with discovery subpoena

A discovery subpoena (or subpoena duces tecum) is probably the most common type of subpoena encountered by a crisis center or shelter. It is typically directed to the “custodian of records,” the sole person designated by the agency who is authorized to accept this type of subpoena. Often the subpoena is seeking information or records about a specific client that should remain confidential. If the custodian of records is not the same person as the executive director or CEO, the agency should have a policy in place to inform the executive director of any subpoena-related information, including the notice of intent to serve that precedes actual service by delivery of a discovery subpoena.<sup>54</sup>

*Custodian of records:* Each agency should designate a staff member as the custodian of the records. Most discovery subpoenas will be addressed to “the custodian of records,” and it is that person who will be responsible for responding to the subpoena.

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<sup>54</sup> Tex. R. Civ. P. 205

*Only existing documents:* When responding to a discovery subpoena, the custodian of records should never have to “develop” any responsive documents. The request is limited to existing material already on file or in the agency’s possession.



## V. Notifying The Client

### A. Client Confidentiality and Client Intent

Agencies serving those victimized by abuse subscribe to a universal rule: client information is confidential absent the client's written consent to disclose it. The client owns the privilege. This credo stems from the best practices and from federal legal requirements upon which state funding is conditioned. The ultimate beneficiaries of these funds are the crisis centers.

In the absence of a client's waiver or release, crisis centers have an affirmative duty not to disclose any client information because the services they provide are conditioned upon funding guidelines that mandate confidentiality.

A crisis center under subpoena has some difficult choices. It can disclose the information requested, in contravention of best practices and of federal law. Or, it can refuse disclosure and risk a finding of contempt of court if quashing the subpoena fails.

Ultimately, however, the decision to release the information belongs to the client. Each agency should have a procedure in place that addresses the specifics of how the client will be notified of the subpoena, who is responsible notification, and who will help the client weigh the consequences of disclosure. If a communication might be protected by a legal privilege, the client gets to decide whether it should be released, because the client owns the privilege.

To better understand client communications that might benefit from privilege laws, examine the communication from the client's point of view.

## 1. Client intent

For a communication to be protected the client must intend that it be confidential; that is, the client does not intend for its contents to be disclosed to third persons. Crisis centers and shelters should avoid any suggestion to a client that sensitive information will not be revealed under any circumstances.

If your client chooses to disclose potentially damaging information, your job is to make sure that she understands the potential consequences of her choice. No information should be turned over in response to a subpoena without reviewing the client's release (recall that a client's release may be subject to disclosure).

## 2. Client releases and waivers of confidentiality

Shelter releases: The only release you can honor with any certainty is the one that your agency has provided. In creating your agency's release, take this into account. Draft it to limit disclosure those to whom the client seeks to give access and make sure the release is limited in duration. Client releases are discoverable in litigation. Releases should allow the client to choose some optional limitations about what will be released and include an expiration date. VAWA, FVPSA, and HHSC all require programs to use time-limited, specific releases drafted by the program (not the requester).

Third party releases: When you receive a release executed by a client or former client in favor of a third party, consider the purpose to which the information released might be used.

A client release may be sent by fax with the expectation that the crisis center will honor it without question. A center is under no obligation to honor a release from a third party, even if it bears your client's signature. Before you provide any information pursuant to the release,

- Contact the client, then

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55 As, for example, when the client is a plaintiff in lawsuit against a physician or mental health professional.

- Examine the release with the following questions in mind:
  - \* When was the release executed?
  - \* Does your client still consent to the release?
  - \* Is the release limited or "global"?
  - \* Why might the sender need the release?

*Release in favor of client's attorney:* A client's attorney is presumed to be acting in the client's interests. It is nevertheless recommended that the client execute a written release in favor of her attorney before her personal information is released. The release of client information to the client's attorney is safe as long as the interests of the client, attorney, and agency are aligned.

*Release in favor of CPS:* A release signed by the client in favor of the Texas Department of Family and Protective Services ("CPS") does not mean that the client's interests are aligned with those of CPS. Agencies like the Texas Attorney General- Child Support Division and CPS represent the interests of children only. A release purportedly executed by a client in favor of an outside agency, whether received by fax or mail, should not be honored unless the client has had an opportunity to review and/or revoke it.

## B. Duty to Notify the Client

### 1. Rules requiring client notification

Shelter grantees receiving state and federal funds must "...make reasonable attempts to provide notice to victims affected by the disclosure" and "...take steps necessary to protect the privacy and safety of persons affected by the release."<sup>56</sup>

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<sup>56</sup> VAWA (C)(i), (ii)

If a subpoena requests information about a nonresident client or former client, protocols should include guidelines for client notification. Client agencies are thus required to notify a client of a subpoena that requests *any* information that might identify the client, including their name.

Shelters and crisis centers receiving federal funds through Texas HHSC are legally obligated to protect client privacy and safety. Every effort should be made to notify a client or former client that a subpoena is requesting information concerning the client. If the client cannot be reached, or if no efforts were made to reach the client, the burden is on the agency to protect the client's safety and privacy. If the client has not released the agency to disclose information through a subpoena, the agency must use every means available to challenge disclosure of client information.

## 2. Subpoena compelling client information

When the custodian of records receives notice of intent to serve a subpoena, or when the subpoena has been served, consider inviting the client to review the documents that may be subject to disclosure. If the client is willing to share some or all of the information, it is wise to have the client execute a written release that corresponds with the information to be released in response to the subpoena. If the client is unreachable, the agency must operate under the assumption that the client would *not agree* to disclosure of any information.

We recommend that agencies have a procedure in place to document attempts to notify the client or former client about the subpoena *provided that the client contact information is safe*:

Telephone: Document the times and dates the client was called about the subpoena.

Letter: Send a letter to the client to her last known address by certified mail *before* the

deadline to respond to the subpoena. The cover letter should inform her that:

- Your agency has received a subpoena requesting information or records about her,
- The court, cause number and nature of the proceeding, if known,
- The deadline to produce the information, and
- Whether subpoena compels testimony, documents, or both.

NOTE: A crisis center must weigh the consequences of failure to inform the client of the subpoena by every reasonable means against the need to keep her current address confidential. The client's address or other identifying information should be redacted from correspondence prior to disclosure.

### **3. Subpoena compelling client as witness**

If personal service is attempted on a client, former client, or shelter resident, she client should be informed right away, even if service is initially unsuccessful. We recommend that shelters and crisis centers decide in advance which staff member will be responsible for informing the resident or client that service is being attempted.



## VI. Subpoena Protocols

### A. Developing Protocols for Service and Notice of Subpoenas

Each agency should develop protocols for handling notice and service of subpoenas, and train its staff and volunteers in those protocols. If your agency has subpoena protocols in place, a periodic review of procedures will protect the agency and the clients it serves.

#### 1. Developing internal protocols

When developing an agency protocol on handling subpoenas, some considerations might include:

##### Who should be named custodian of records?

- Who should be designated as the custodian of records: This person is responsible for producing records or faces the possibility of contempt for failure or refusal to comply. In order to maintain a uniform and consistent response and to keep track of the kind and number of subpoenas, the custodian of records should be limited to one individual.
- Where the custodian should keep records and have an office: The custodian of the records should not have an office at the shelter. The custodian should work in the administrative office if there is one separate from the shelter.

##### What type of training is needed?

- Procedures setting forth who is authorized to accept subpoenas.
- Instructions on what to do when a process server appears to serve a subpoena or law enforcement arrives to execute a search warrant.

- Agency policies on responding to subpoenas and making the policies known to staff, board members and volunteers.
- Training receptionists or front desk people on what to do and who to inform when notice is received or service is attempted.
- Train agency staff on the importance of refusing to confirm or correct information requested by someone serving a subpoena or a warrant.

When do we need to contact an attorney?

- Decide who is responsible for attorney contact and follow-up.
- Contact your attorney for all subpoenas requiring testimony. For discovery subpoenas, the custodian of records can decide whether attorney assistance is needed.
- Have the attorney's contact information, including fax number, readily available.

## 2. Developing external protocols

How can we collaborate with local law enforcement?

- It makes sense to collaborate with the constable and sheriff's office on a well-defined procedure for service and acceptance of subpoenas as well as other legal documents requiring service (like citations and writs) on your agency.
- Set up a meeting with local law enforcement to collaborate on process-related issues.
- Determine mutually preferred days and times for service on shelter residents.
- Determine mutually preferred days and times for service on the custodian of records.
- Discuss how arrest and search warrants might be executed in the least threatening and intrusive manner possible.

## B. Developing Protocols for Challenging Subpoenas

How far should we go with a subpoena challenge?

Discuss how far the agency is willing to go to challenge a subpoena. Options include:

- Respond to the subpoena in whole or in part.
- Release nothing and risk contempt.
- Object to the subpoena on the basis of defective service, no witness fee or other objectionable grounds.
- Ask the issuer to modify the scope of the subpoena or cure the defect.
- Admit to responsive information but fight disclosure based on privilege.
- Ask the judge to review the documents privately (*in camera*) to determine what documents might be privileged.
- If the motion to quash is denied, take the case to a higher court or tribunal through mandamus or appeal.

What effect would it have on the agency and client if a legal challenge should fail?

Consider the potential impact if the legal challenge fails and client information is released. As a nonparty, the agency may not know in advance how the subpoenaed information might be used at trial. The outcome of the case could hinge on the very information supplied, or it might not be used at all.

- If the challenge expends considerable time and resources and nonetheless results in failure, consider what could have been done differently and what can be learned from the experience.
- If the court refuses to protect information despite the challenge, under what circumstances the judge should be subject to mandamus or appeal?
- Would there be any impact on the agency's standing in the community?
- How would the agency deal with the client following a loss?
- If the court orders release of documents or information, a program may need to re-assess its options, such as whether to risk contempt if the motion to quash fails.



# SAMPLE FORM: Subpoena Intake Checklist

\* This document is for internal use only. Do not list client name or contact information. Do not retain this form in client file.

\_\_\_\_\_ Name of person completing form

## SUBPOENA INTAKE CHECKLIST

\_\_\_\_\_ Deadline (date for witness' appearance or release of documents)

\_\_\_\_\_ Name of subpoenaed person

### Person Subpoenaed is:

\_\_\_\_\_ Custodian of Records

\_\_\_\_\_ Employee or volunteer

\_\_\_\_\_ Client or former client

### Notice and Service

\_\_\_\_\_ Date notice of intent to serve subpoena received in mail (for discovery subpoenas)

\_\_\_\_\_ Date subpoena served

\_\_\_\_\_ Date subpoena and/or notice faxed to agency attorney

### Type of Subpoena is: (check all that apply):

\_\_\_\_\_ discovery subpoena (production of documents)

\_\_\_\_\_ CPS

\_\_\_\_\_ deposition subpoena (on written questions or oral)

\_\_\_\_\_ trial subpoena (court testimony)

### Client Information:

\_\_\_\_\_ No record of client or former client (no information)

\_\_\_\_\_ Client's executed release or waiver of information is on file  
 \_\_\_\_\_ Date release signed by client  
 \_\_\_\_\_ Expiration date of release

**Client Documents:**

\_\_\_\_\_ Yes \_\_\_\_\_ No Responsive documents are in client file.

**Client Notification:**

\_\_\_\_\_ Date of first attempt to notify client  
 \_\_\_\_\_ personal meeting  
 \_\_\_\_\_ telephone  
 \_\_\_\_\_ letter (certified to last known safe address)  
 \_\_\_\_\_ date subpoena and/or notice (if client represented by attorney) faxed to client's attorney

Document additional attempts to notify client:

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**Client Response to Subpoena:**

\_\_\_\_\_ Client failed to respond (attempts documented above).  
 \_\_\_\_\_ Client responded  
 \_\_\_\_\_ Date of response

Subpoena was discussed with client:

\_\_\_\_\_ by telephone with staff or caseworker  
 \_\_\_\_\_ by meeting with staff or caseworker

Client wants to:

\_\_\_\_\_ challenge release of all requested information

\_\_\_\_\_ release all information (per release)

\_\_\_\_\_ disclose some information but not all

**Agency Response to Subpoena:**

\_\_\_\_\_ No responsive information about client on file

\_\_\_\_\_ Date issuing party was informed of no information

\_\_\_\_\_ by telephone

\_\_\_\_\_ by mail

\_\_\_\_\_ Responsive information about client exists

\_\_\_\_\_ modify/narrow scope of subpoena by agreement or court order

\_\_\_\_\_ move to quash subpoena

\_\_\_\_\_ comply with subpoena

\_\_\_\_\_ date documents produced

\_\_\_\_\_ copies mailed to issuer (certified)

\_\_\_\_\_ produced for inspection or copying at agency/shelter

\_\_\_\_\_ Date subpoenaed witness appeared (deposition or trial)

Expenses:

\_\_\_\_\_ Travel

\_\_\_\_\_ Copies

\_\_\_\_\_ Date subpoena matter closed/resolved



# SAMPLE FORM: Motion to Quash

NO. \_\_\_\_\_

	§	IN THE DISTRICT COURT
	§	
VS	§	_____TH JUDICIAL DISTRICT
	§	
	§	_____COUNTY, TEXAS

## MOTION TO QUASH SUBPOENA

Comes now \_\_\_\_\_ [person under subpoena], Movant, and files this Motion to Quash Subpoena. In support, Movant shows the following:

1. Movant was served with subpoena on \_\_\_\_\_ [date] at the request of \_\_\_\_\_ [attorney or party requesting information], ordering Movant to personally appear as stated in the subpoena on \_\_\_\_\_ [date] at \_\_\_\_\_ [location/place].  
A copy of the subpoena is attached to this Motion.
  
2. Movant is \_\_\_\_\_ [position] at \_\_\_\_\_ [agency], a [describe your agency or program, i.e. “nonprofit incorporated under section 501(c) (3) of the Internal Revenue Code”]
  
3. ***The subpoena is subject to objection.***

\_\_\_\_\_ Movant requests that the subpoena be quashed based on one or more of the

following objections:

\_\_\_\_\_ *No witness fee.* The subpoena was served without \$10 witness fee required by Tex. Civ. P. & Rem. Code §22.002.

\_\_\_\_\_ *Out of subpoena range.* Movant is out of the range of the subpoena. Tex. R. Civ. P. Rule 176.3; Tex. Civ. P. & Rem. Code §22.002.

\_\_\_\_\_ *Request is unduly burdensome, broad, or vague.* The subpoena for documents and other things is so overly broad in scope as to render compliance unduly burdensome.

\_\_\_\_\_ *Unreasonable time to comply.* The subpoena does not allow sufficient or reasonable time to gather the information compelled to be produced.

\_\_\_\_\_ *Inconvenient date.* The subpoena compels appearance of the witness on a date that the witness is unavailable to appear due to a scheduling conflict.

\_\_\_\_\_ *Undue burden – costs.* The subpoena compels production of documents, the volume of which places an undue burden for both copying and the time involved with copying. The issuing party has not promised Movant reimbursement or advance payment for anticipated costs pursuant to Tex. R. Civ. P. Rule 205(f).

\_\_\_\_\_ *Unreasonable travel expenses.* The subpoenaed witness will incur substantial travel costs in order to comply with the subpoena, and the issuing party has not offered Movant reimbursement or advance payment for anticipated costs over and above the \$10 witness fee.

Based on one or more of the foregoing objections, the subpoena should be quashed. Alternatively, the subpoena should be modified to address the grounds for objection.

4. *The subpoena should be quashed because it compels privileged information.*

\_\_\_\_\_As additional grounds, the subpoena should be quashed on the basis that the information compelled is protected from disclosure by privilege. In support, Movant shows the following:

a. \_\_\_\_\_ [agency]’s purpose is to provide services to individuals and families who have experienced family violence. Services may include individual or group therapy, temporary shelter, and referrals to other social services or community resources.

b. Movant has a duty to maintain the confidentiality of client communications sought to be compelled by the subpoena. The information sought to be compelled is protected by privilege in that:

\_\_\_\_\_the communication was made by a person to a professional, a person “reasonably believed” to be a professional who is “licensed or certified by the State of Texas in the diagnosis, evaluation, or treatment of any mental or emotional disorder [.]”<sup>57</sup>

\_\_\_\_\_ the communication was made by a person to the professional “for purposes of diagnosis, evaluation, or treatment of [a]mental or emotional condition or disorder [.]”<sup>58</sup>

5. *The subpoena should be quashed for other compelling reasons.*

\_\_\_\_\_ The subpoena should be quashed based on other considerations unique to victims of family violence and the agencies that serve those victims. In support, Movant asks the court to consider the following:

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57 Tex. R. Evid. 510(a) (1) (B); (D).

58 Tex. R. Evid. 510(a) (2) (A).

\_\_\_\_\_ a. *Federal and Texas laws recognize protection of victim information on privacy grounds.*

Federal constitutional law supports nondisclosure of victim information. A recent opinion by the Texas Attorney General relied on the federal constitutional right to individual privacy to protect a victim's personal information. A shelter was asked disclose its notary book, which included identifying information about clients served by the shelter. The information was sought through an open records request. The Attorney General decided that the notary book should be withheld because the privacy interests of victims of family violence outweighed the public's right to information about them.<sup>59</sup>

\_\_\_\_\_ b. *Texas law should protect victims of family violence from forced disclosure of confidential information in the same way it protects victims of sexual assault.*

Texas law currently shields information concerning victims of sexual assault from the public<sup>60</sup>, and victims of family violence should benefit from similar legal protections. Victims of family violence are similarly situated to victims of sexual assault, and revealing personally identifying information could result in further harm or retaliation to the victim. Movant urges that the subpoena be quashed because Texas law protects information about another class of victims but does not protect victims of family violence.

\_\_\_\_\_ c. \_\_\_\_\_ 's [name of agency] funding is conditioned upon laws that require confidentiality of all identifying client information.

\_\_\_\_\_ [name of agency]'s operating budget is supported by federal funds distributed to shelters and crisis centers by the Texas Health and Human Services Commission (HHSC) and the Criminal Justice Division (CJD). HHSC and

59 Office of Attorney General of Texas, Open Records Decision 09229 (2009), relying in part on *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985) and *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981).

60 Tex. Health and Safety Code § 44.071

CJD are required to monitor Texas’s compliance with federal laws authorizing the funds, namely the Family Violence Prevention Services Act (FVPSA) and federal Violence Against Women Act (VAWA). Grants to shelters and crisis centers from Texas HHSC are conditioned upon compliance with rules created by FVPSA, VAWA and HHSC. These *require* recipients such as \_\_\_\_\_ [name of shelter] to keep *all* client information confidential or risk losing funding due to legal noncompliance.<sup>61</sup>

Accordingly, If \_\_\_\_\_ [agency] is compelled to release confidential information under this subpoena, the agency’s funding – and its financial survival as a nonprofit – is put at risk.

Wherefore, premises considered, Movant respectfully requests that the court quash the subpoena based on objections to the subpoena, applicable legal privileges, and the remaining aforementioned considerations.

Respectfully submitted,

\_\_\_\_\_  
[Movant/Attorney for Movant]

\_\_\_\_\_  
[Address]

<sup>61</sup> HHSC confidentiality requirements mirror those of VAWA and FVPSA. As a condition of receiving funds through HHSC, each program must ensure that “all information will be kept confidential, including all personal information and all

communications, observations, and information made by and between or about adult and child residents and nonresidents, employees, volunteers, student interns, and board members.” Tex. Admin. Code § 379.613(1)

Tel.:

Fax:

**Certificate of Service**

I certify that a true copy of the above was served on \_\_\_\_\_  
[name of attorney and/or requesting party] in accordance with the Texas Rules of Civil  
Procedure on \_\_\_\_\_.

\_\_\_\_\_  
[Movant or Attorney signature]

## SAMPLE FORM: Order Granting Motion to Quash

NO. \_\_\_\_\_

	§	IN THE DISTRICT COURT
	§	
VS	§	_____TH JUDICIAL DISTRICT
	§	
	§	_____ COUNTY, TEXAS

### ORDER GRANTING MOTION TO QUASH SUBPOENA

On this day came to be heard \_\_\_\_\_'s Motion to Quash Subpoena.

The Court finds that the subpoena should be quashed based on the following:

\_\_\_\_\_ *No witness fee.* The subpoena failed to include the \$10 witness fee required by Tex. Civ. P. & Rem. Code §22.002.

\_\_\_\_\_ *Out of subpoena range.* Movant is outside of subpoena range. Tex. R. Civ. P. Rule 176.3; Tex. Civ. P. & Rem. Code §22.002.

\_\_\_\_\_ *Request is unduly burdensome and vague.* The subpoena duces tecum is too vague and/or overly broad in scope.

\_\_\_\_\_ *Unreasonable time to comply.* The time to comply is unreasonably short given the volume of documents requested and/or the difficulty in obtaining them.

\_\_\_\_\_ *Inconvenient date.* The subpoena compels appearance of the witness on a date that the witness is unavailable to appear due to a scheduling conflict.

\_\_\_\_\_ *Excessive cost to produce documents.* The cost of compliance with the subpoena duces tecum is unreasonably high and the issuing party has not provided Movant with advance payment nor promised reimbursement. Tex. R. Civ. P. Rule 205(f).

\_\_\_\_\_ *Excessive cost of travel.* Travel costs for the subpoenaed witness are unreasonably high, and the issuing party has not provided Movant either reimbursement or advance payment for the cost of travel.

\_\_\_\_\_ The Court further finds that the subpoena compels information that is protected from disclosure by the privilege protecting communications between mental health professionals and their clients. Tex. R. Ev. Rule 510 *et seq.*

\_\_\_\_\_ The Court further finds that victim information compelled by the subpoena is protected from disclosure by privacy rights recognized under federal constitutional law and specifically recognized in Texas.<sup>62</sup>

\_\_\_\_\_ The Court further finds that in the interest of public safety and public policy, Movant and other victims of family violence similarly situated are entitled to the same protections guaranteed to Texas victims of sexual assault currently afforded them under Tex. Health and Safety Code § 44.071.

\_\_\_\_\_ The Court further finds that \_\_\_\_\_ is a Texas agency serving victims of family violence; that \_\_\_\_\_ receives funds from both state and federal sources; that in order to maintain funding from these sources \_\_\_\_\_ is required to keep client information confidential, and that disclosure of information in response to the instant subpoena

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62 Office of Attorney General of Texas, Open Records Decision 09229 (2009), relying in part on *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985) *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981).

would violate the rules under which \_\_\_\_\_ 's continued operation depends.

IT IS THEREFORE ORDERED that Movant's Motion to Quash Subpoena is hereby GRANTED for the reasons stated.

\_\_\_\_\_ Date of Order

\_\_\_\_\_  
JUDGE PRESIDING





# Understanding Subpoenas

A GUIDE FOR TEXAS FAMILY CRISIS CENTERS

— 2011 Edition —



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