



## Responding To Subpoenas (2018)

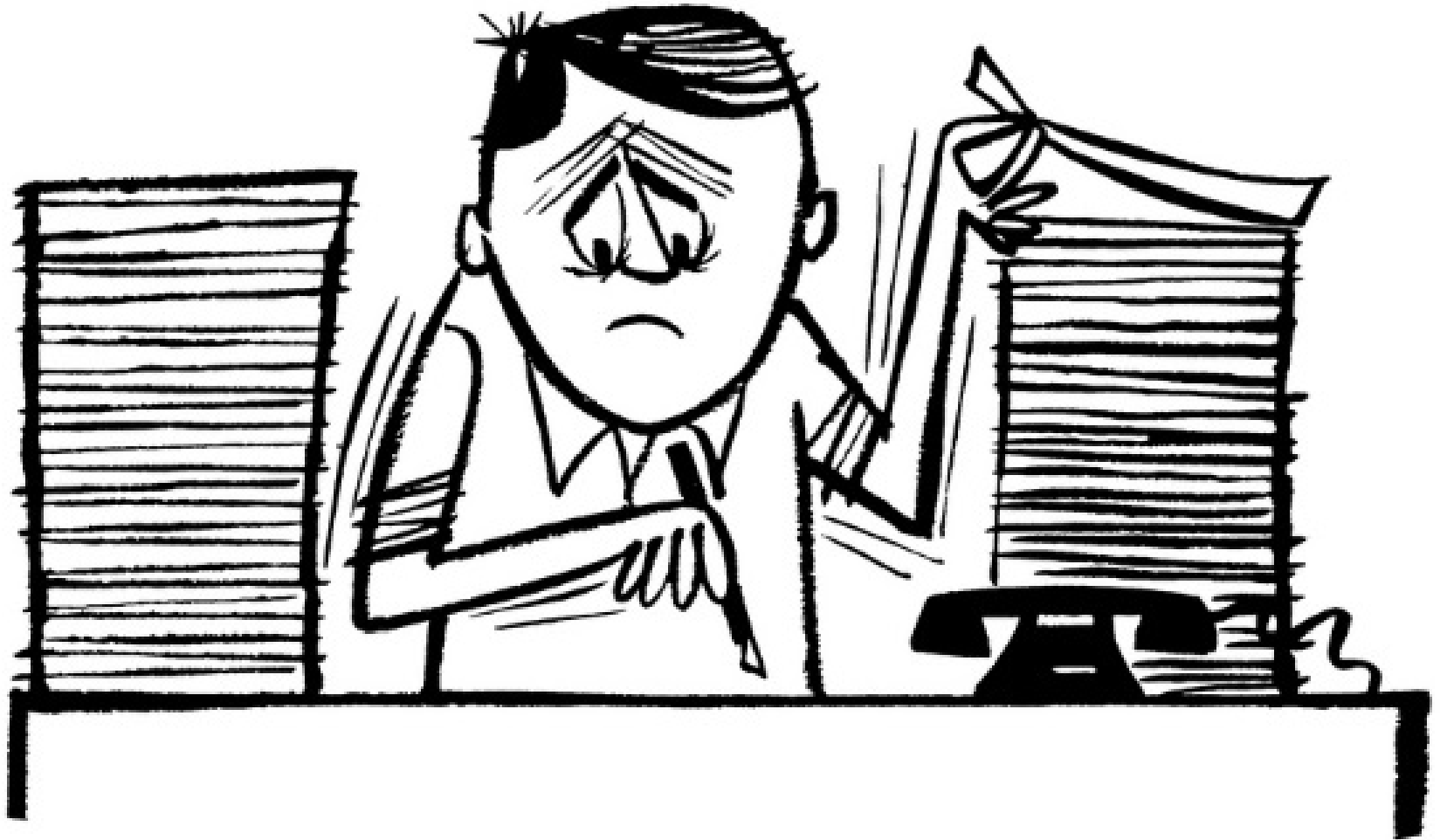
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Q: What do you think of when you hear the word Subpoena?

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# Overview

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- Today, we will answer:
  - ▣ Whether a subpoena is a court order?
  - ▣ What to do before your organization has been served with a subpoena?
  - ▣ What to do if you or your organization has been served with a subpoena?
    - Including a step-by-step guide on how to respond if you have been subpoenaed as a third-party witness

# What Is A Subpoena?

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- A written document that requests:
  - ▣ The attendance of a person to testify at a deposition, hearing, or trial.
    - (Deposition Subpoena for Personal Appearance or Subpoena for Personal Appearance.)
  - ▣ The production of documents, including business records.
    - (Deposition Subpoena for Production of Business Records or Subpoena for Production of Business Records.)
  - ▣ Both the production of records AND testimony.  
(Subpoena Duces Tecum.)

# What Is A Subpoena: General Terms

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- What does the “subpoenaing party” mean?
  - ▣ The person or entity that is requesting the testimony or the documents
- What does the “subpoenaed party” mean?
  - ▣ The person or entity that is asked to provide testimony or produce documents

# Why You Don't Want To Ignore A Subpoena

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- The subpoenaing party may file a motion with the court to compel compliance. As part of the court's order granting that motion, the court may issue **monetary sanctions** against the non-complying party.
- If you fail to respond to a subpoena **issued by a court (judge or commissioner)**, then the court can hold you in contempt of court.
- The subpoenaing party can bring a civil action against you to recover damages.

# But, Don't Panic

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- As we will discuss in the next section, “responding to a subpoena” does not necessarily mean you will automatically turn over the information requested; and
- If you have anxiety about responding to a subpoena, then call ABA Subpoena Defense Project or FVAP!

# Before Subpoenas

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- Let's discuss 3 tips you can do before receiving a subpoena!





# Before Subpoenas: Tip #1

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- Because DV and sexual assault organizations have an obligation to safeguard the survivor's data, these organizations should **develop written policies** regarding record keeping, data retention, and responding to subpoenas.
  - ▣ Data retention is the storage of the organization's data for compliance or business reasons.
  - ▣ You can use the step-by-step guide that we will discuss later to develop the written policy.

# Before Subpoenas Tip #2: Engaging An Attorney

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- Because you will have to provide the client with possible options for responding and possible consequences, it is prudent to establish a relationship with a local attorney who understands confidentiality restrictions imposed by state and federal law and the organization's grant agreements
- Some attorneys may do this pro bono, i.e., for free, or provide a discounted rate

# Before Subpoenas Tip #3: Establish Strong Relationships In The Community

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- DV and sexual assault organizations are often dealing with the same problems when it comes to subpoenas. Develop strong collaborative relationships with other organizations so that you can consult with them when in need.

# Responding to a Subpoena: Step-By-Step Guide

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# Step 1: Immediate Notification & Calendaring

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- The Executive Director or the employee of your organization who is designated to handle subpoenas, which could include your organization's legal counsel, should be immediately notified, and
- The subpoena will include a date and time to turn over documents or to appear in person. The designated employee should identify and calendar the deadline to respond to the subpoena.
- **The deadline to respond to a subpoena is typically short, so you will have to act quickly!**

# Step 2: Identify Who Issued The Subpoena

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## Civil Cases

**Clerk,  
Judge,  
Commissioner,  
Party or Party's  
Attorney**

## Criminal Cases

Clerk,  
Judge/Commissioner,  
Prosecutor or Public Defender  
and their Investigators,  
Defendant's Attorney

# Step 2: If Issued By Judge or Commissioner

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- If the subpoena is issued by a judge or commissioner, then it is a **court order**!
- However, you should still assert the privilege if confidential and privileged information is requested:
  - ▣ We will discuss more on how you can do that later, but generally you can do that through formal objections, motion to quash and/or protective order.
  - ▣ You can also ask that the information be reviewed in the judge's chambers.

# Step 3: Identify the Type of Case

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## Civil Cases

- It is typically the abuser who is requesting the survivor's information, e.g., custody dispute, restraining order, personal injury.
- Given the nature of the civil lawsuit, the information may be used against the survivor, so organizations should proceed with caution with respect to confidential and privileged information.



# Step 3: Juvenile Court, including Child Abuse and Neglect Cases:

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## Juvenile Cases

- ❑ Typically, the parties requesting information will be the parents, guardian *ad litem* for the child, and Department of Child and Family Services (DCFS).
- ❑ Juvenile court records and files are confidential, but that does not eliminate the organization's confidentiality duties.
- ❑ The information could be used against the survivor, so again proceed with caution. Don't just hand over the documents or testimony without analyzing whether confidential or privileged information is included!

# Step 3: Criminal Cases

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## Criminal Cases

- ▣ Typically, the subpoenaing party will be the defense counsel or the prosecutor.
- ▣ Do not assume that handing over information to the prosecutor will only stay with the prosecutor. Prosecutors are required to turn over certain information to the defense, so there is also a chance that the information will be used against the survivor.

# Step 4: Identify The Type of Subpoena

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- See “Types of Subpoenas Chart” (In-court and out-of-court subpoenas)
- Because there are different types of subpoenas, it is important that you correctly identify what type of subpoena because different rules may apply.
- For example, there are subtle differences in how much time must be provided to the witness in responding to civil and criminal subpoenas.

# Step 5: Identify The Parties Involved

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- Identify the subpoenaing party
- Identify the subpoenaed party
  - ▣ Your organization? An employee of the organization?
- Identify who is the person whose records are being requested?
- Does this person have a relationship with your organization?
  - ▣ Past or current client?
  - ▣ If so, is it safe to contact the client?

# Step 6: Method and Timing For Service

<b>Method/Timing To Serve</b>	<b>Civil Actions</b>	<b>Criminal Actions</b>
<b>Method to properly serve</b>	Personal service	Mail (only once acknowledged) or messenger, which likely means personal service
<b>When should a subpoena for personal appearance be served?</b>	“Reasonable time” in advance for witness to prepare and travel to the deposition, hearing or trial (typically 10 days)	“Reasonable time” in advance for witness to prepare and travel to the deposition, hearing or trial (typically 10 days)
<b>When should a subpoena requesting production of documents be served?</b>	At least 15 days before deadline to produce	At least 5 days before deadline to produce

# Step 6: Special Notice Requirements

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- If “personal records” of a consumer or employee are subpoenaed, then special notice and procedures are required to protect the person’s right to privacy
  - ▣ Note, this does not apply in criminal cases!
- Before service of the subpoena, a “notice of privacy rights” and a copy of the subpoena must be served on the person to whom the records pertain
- Personal Records Include:
  - ▣ Physician, Psychotherapist, Hospital/Medical Center, Clinic, Pharmacy, Public or Private School, Attorney, Bank, Telephone Company...See Cal. Code of Civil Procedure section 1985.3 for full list

# Step 7: Identify If It Requests Confidential and Privileged Information

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- Brief recap on confidentiality and privilege:
  - ▣ Who is the holder of the DV counselor-victim privilege?
    - Client? Employee? Organization?
  - ▣ When can the confidential/privileged information be disclosed?

# Step 7: Recap, Cont.

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When can DV counselor be ordered to disclose privileged information?

- After DV counselor asserts the privilege in court documents or in court, then the judge is required to assess the validity of the claim.
- The burden is on the person seeking the information to provide it is not confidential, that it has been waived, or that it is subject to disclosure to a statutory or other exception to the privilege.
- Before the judge makes a decision as to the validity of the privilege claim, the judge cannot require you to disclose the information.



# Step 7: Example From Subp. Duces Tecum Handout

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- You receive a civil subpoena for your business records related to a former client Sally Jones (see handout). The subpoena requests “all documents related to Sally Jones.”
- Would the documents be subject to the privilege?
- Tip: often times, subpoenas are vague or overbroad, and given the broad scope, privileged information will be included in the request.

# Step 7, Example

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- Can an organization disclose general information about whether a survivor did or did not receive services from the organization?
  - ▣ No, unless the survivor agrees!

# Step 8: Contact The Client Or Former Client

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- Because the client is the holder of the privilege, you should contact the client.
- What should you discuss with the client?
  - Confidentiality and privilege, i.e., what can and can't be disclosed without consent
  - Advise the client of possible outcomes of disclosure

# Step 8: What Can You Discuss With The Client?

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- Explain the client's options to challenge, including informal and formal resolution, what the court could do if a formal challenge is made, what the client's options are if the formal challenge is denied by the trial court.
  - Informal and Formal Resolution will be discussed later!
- The procedures if the client decides to disclose
- Answering these questions likely involves legal analysis, so you should consult with an attorney.

# Step 9: Client Does Not Want to Disclose All Or Part

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1. Informal Resolution (only applies when subpoena is not a court order)
2. Formal Resolution



# Step 9: Informal Resolution In Writing

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- Designated employee or organization's attorney should send **a letter** to the party who issued the subpoena or their attorney objecting on the grounds that the subpoena requests confidential information and information protected under the DV counselor-victim privilege.
  - ▣ See Interval House Handout example from the California Women's Law Center!
- Other grounds to challenge include improper service, vague or overbroad, non-payment of witness fees that were requested.

# Step 9: Oral Informal Resolution

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Designated employee or organization's attorney should call subpoenaing party to informally resolve. If you are able to resolve the defect verbally, then follow up with a written communication to document what was discussed and the agreement that was reached

- Need tips on what to say?
  - See Aiken, *Protecting Privacy To Enhance Safety Pro Bono Manual* (2014) on the ABA Subpoena Defense Project's website
  - [https://www.americanbar.org/content/dam/aba/administrative/domestic\\_violence1/Subpoena%20Defense%20Resources/Subpoena%20Defense%20Attorney%20Manual.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/domestic_violence1/Subpoena%20Defense%20Resources/Subpoena%20Defense%20Attorney%20Manual.authcheckdam.pdf)

# Step 9: Formal Resolution, Motion To Quash

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- If the subpoenaing party still demands appearance or production after informal resolution or they do not respond, then you can file a Motion to Quash.
- A Motion to Quash is a formal motion to the court asking for an order to modify the subpoena or for an order to render the subpoena null and void.
- The court may order that the party comply with the subpoena, but the court also has the authority to include a protective order.



# General Grounds To File A Motion To Quash

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- Subpoena seeks information protected by the DV counselor-victim privilege and/or information is confidential due to receiving federal funding from VAWA, FVSPA, VOCA
- Remember the other grounds too, i.e., improper service, too broad or vague!

# What Is Required To File A Motion To Quash?

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- Notice of Motion, Motion, Memorandum of Points and Authorities, Declaration
  - ▣ If you need an example, contact ABA Subpoena Defense Project or FVAP.
- Also consider requesting a protective order under Code of Civ. Proc. section 1987.1(a)
- For information on when you are required to serve the motion see “Subpoenas Cheat Sheet”

# Monetary Sanctions Associated With Formal Objections

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There should be grounds upon which to request a Motion to Quash, because a trial court may award reasonable expenses for seeking motions in bad faith or without substantial justification.

- ▣ See *Vasquez v California Sch. of Culinary Arts, Inc.* (2014) 230 CA4th 35, 41

# Step 9: What To Do If A Motion To Quash Is Denied

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- Seek relief in the appellate court through a writ of mandate. For help, contact FVAP!

# Step 9: Alternatives To A Motion To Quash

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- You can show up at the hearing or trial and object on the basis of the DV counselor-victim privilege.
- You can request that the information be disclosed in the judge's chambers, meaning it would be only before the judge, the client (as the holder of the privilege) and anyone the client authorizes to be there.

# Step 9, Cont.

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- If Formal Challenge Has Been Asserted, Then Does The Court Have Authority To Compel Disclosure?
  - ▣ Yes, a trial court may order you to turn over confidential or privileged information

# Step 10: Client Does Want To Disclose All Or Part Of The Confidential Information

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- Designated employee or organization's attorney should ensure that client understands the outcome of disclosure.
  - ▣ **Remember: informed, written, time-limited consent is required!**
- Designated employee or organization's attorney should have the client sign written consent to release information.
  - ▣ See Interval Handout Example from California Women's Law Center

# After Obtaining Informed, written, time-limited consent

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- Designated employee or organization's attorney must review the documents that will be produced in order to redact or remove any confidential or privileged information that client does not want disclosed (if only partial informed written consent to disclose) or confidential information the client does not have authority to release.
- What information do you think the client does not have authority to release?



# Information Client Does Not Have Authority To Release

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- Client does not have authority to release:
  - ▣ Shelter address
  - ▣ Information concerning other clients
  - ▣ Organization's business information
  - ▣ Information regarding children
    - Mandatory child abuse reports
    - Child abuse reports from Department of Child and Family Services
    - Seek advise from an attorney, as there may be other information regarding children that should remain confidential

# Step 10, Cont.

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- After obtaining written, informed, time-limited release of information and redacting other confidential information, then the organization can release the testimony or information.
- **Tip:** For redaction, consult with an attorney or have the attorney review the production before it is released to ensure the organization has complied with all applicable state and federal laws.

# HYPOTHESIS: Question

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- Client in shelter 30 days, returned 6 months later for more services after another DV incident.
- Client tells third party about communications she had with DV counselor re most recent incident.
- DV counselor receives subpoena from her abuser's attorney for all communications with client
- Q: What should the counselor do?

# HYPOTHESIS: Answer

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- Talk to your client.
- Counselor can file motion to quash, or appear and object orally on the basis of privilege.
- Counselor should object that subpoena should apply only to communications re most recent incident. Ultimately up to judge to determine scope of client's waiver, but *counselor must make every effort to limit amount of information to be disclosed*, even when faced with waiver by client.

# Step 11: What If Your Org Does Not Have The Information?

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- ❑ Contact the subpoenaing party or their attorney and explain that while privilege prevents you from disclosing whether a certain client received services at your organization
- ❑ Your organization has a general policy to destroy all documents after a three-year period, and that the subpoena requests information from 4-years ago.

# How To Respond To Subpoena Checklist

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- Step 1: Immediate Notification & Calendaring
- Step 2: Identify Who Issued The Subpoena
- Step 3: Identify the Type of Case
- Step 4: Identify The Type of Subpoena
- Step 5: Identify The Parties Involved
- Step 6: Identify Whether It Was Properly Served
- Step 7: Identify If It Requests Confidential Or Privileged Information
- Step 8: Contact The Client Or Former Client
- Step 9: Client does not want to disclose all or part: informal and formal resolution
  - ▣ Skip this step if your client **does** want to disclose
- Step 10: Client does want to disclose all or part
- Step 11: Organization no longer has client's information

# Thank You!

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The development of this product was supported in part by funding awarded by the United States Department of Justice, Victims of Crime Act, 2015-VA- GX-0058, through the California Governor's Office of Emergency Services. The opinions, findings, and conclusions in this publication are those of the author and not necessarily those of Cal OES. Cal OES reserves a royalty-free, nonexclusive, and irrevocable license to reproduce, publish, and use these materials and to authorize others to do so.