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Complying with Subpoenas and Court Orders While Minimizing Your Risk

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Dr. Amanda Zelechowski is a licensed clinical psychologist and attorney, specializing in the areas of trauma and forensic psychology. She is board certified in Clinical Child and Adolescent Psychology and has worked clinically with adults, children, and families in inpatient, outpatient, and forensic settings. She is a Risk Management Consultant for The Trust, as well as an Associate Professor of Psychology at Valparaiso University, where she directs the Psychology, Law, and Trauma lab.

Disclosures/Conflicts of Interest

The presenter does not have any conflicts of interest to disclose.

NOTE: The information presented in this webinar is not intended to provide legal advice or to substitute for the advice of an attorney, but rather to provide information about considerations when dealing with a legal request for information.

Learning Objectives

After viewing this webinar, participants will be able to:

1. Describe various types of subpoenas and discuss response options.
2. Explain requirement differences between court orders and subpoenas.
3. Apply actionable strategies for responding to subpoenas or records requests for legal purposes.

Why are we so afraid of subpoenas?

- Legal vs. ethical conflicts
- Intimidating language
 - “You are hereby ordered...”
 - “Failure to comply will result in...”
- Lack of control
- Risk no matter what



When does this typically come up?

- Client is involved in a legal matter:
 - Child custody/divorce
 - Personal injury
 - Workers' compensation
 - Criminal case
 - Child welfare investigation
- Other reasons for records requests:
 - Client's personal use
 - Education/employment accommodations

How did I get pulled into this legal matter?

- In legal, adversarial proceedings, it is necessary for all parties to have access to relevant, reliable, and truthful information
- The process of **discovery** allows each side to get information from the other side, prior to trial
 - If the information obtained during the discovery process meets evidentiary requirements, it is then presented to the parties, judge, jury, etc. to assist in deciding the case
- During the discovery process, parties can:
 - Get records from relevant providers
 - Interview people in depositions
 - Require witnesses to testify at a hearing
 - Send interrogatories (i.e., written questionnaires)
- Subpoenas are used to compel people to provide information that is deemed necessary to deciding issues before a court

Clarifications

- **Privacy**

- Legal right
- Applies to the person

- **Confidentiality**

- Ethical obligation
- Applies to the data/information
- An extension of privacy

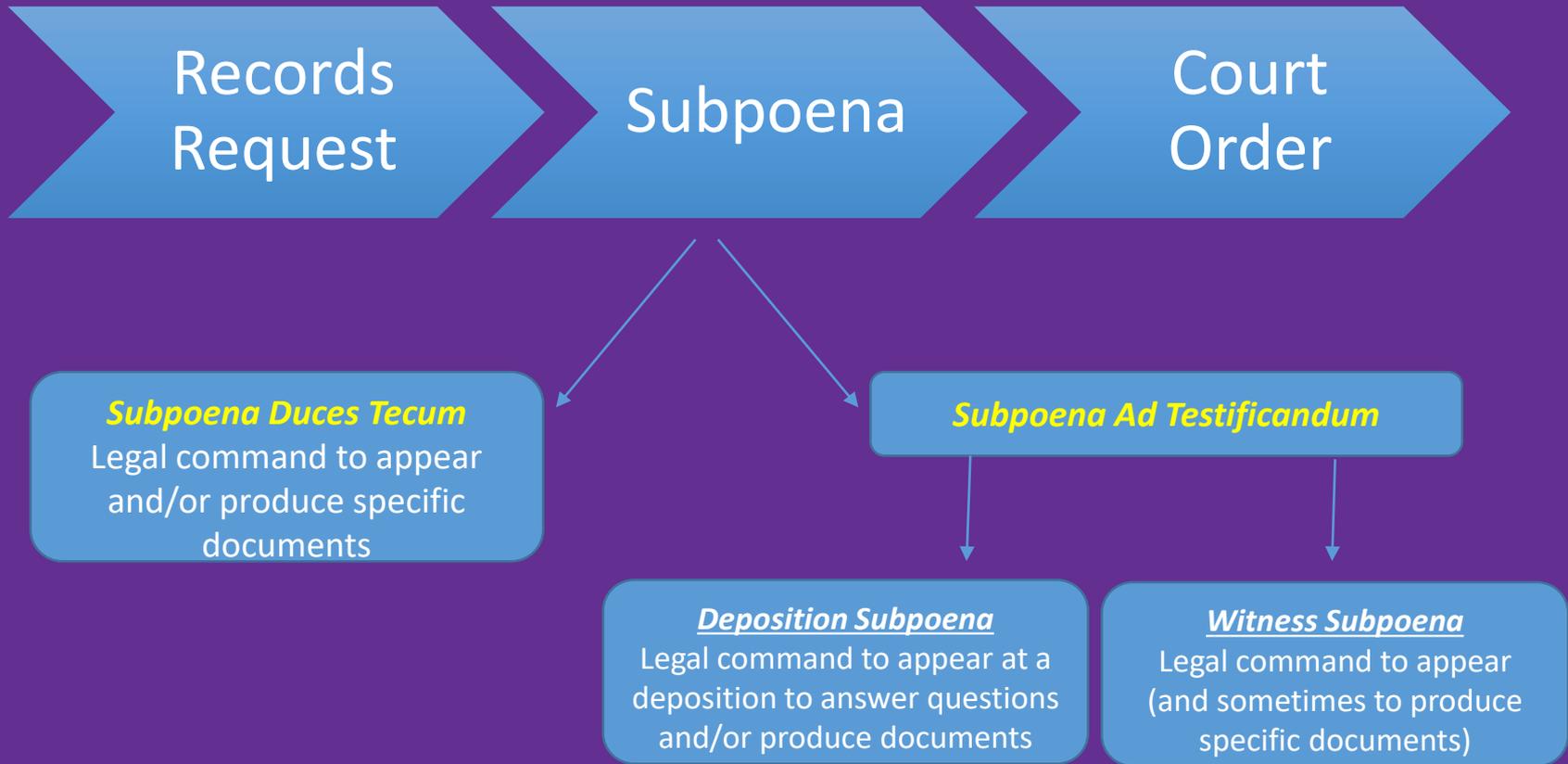
- **Privilege**

- Privileged communication is information that is disclosed in the context of a specific relationship (e.g., psychotherapist-client) and cannot simply be demanded by a third party for legal purposes

- Subpoena is NOT the same as a court order (*in most cases*)

- It is merely a formal legal request, but with some teeth behind it
- If there are no applicable exceptions (e.g., privilege), then the individual is likely required to provide the requested information

Types of Information Requests



Risk Management: *Prior* to Receiving a Subpoena

- Include specific policies in informed consent
 - Policies related to records requests
 - Policies related to legal involvement
 - Associated fees

<https://www.trustinsurance.com/Resources>

Risk Management: *Prior* to Receiving a Subpoena

Sample informed consent language:

Confidentiality Section:

- *“In most legal proceedings, you have the right to prevent me from providing any information about your treatment. In some legal proceedings, a judge may order my testimony if he/she determines that the issues demand it, and I must comply with that court order.”*

Child Treatment Agreement:

- *“You agree that in any child custody/visitation proceedings, neither of you will seek to subpoena my records or ask me to testify in court, whether in person or by affidavit, or to provide letters or documentation expressing my opinion about parental fitness or custody/visitation arrangements. Please note that your agreement may not prevent a judge from requiring my testimony, even though I will not do so unless legally compelled.”*

Billing and Payment:

- *“If you become involved in legal proceedings that require my participation, you will be expected to pay for any professional time I spend on your legal matter, even if the request comes from another party. [I charge \$XXX per hour for professional services I am asked or required to perform in relation to your legal matter. I also charge a copying fee of \$XXX per page for records requests.]”*

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Risk Management: *After* Receiving a Subpoena

1. Is the subpoena valid?
2. What is the subpoena requesting?
3. Contact the client
4. Contact the requesting attorney
5. Contact the court
6. Challenge the subpoena
7. Comply with the subpoena



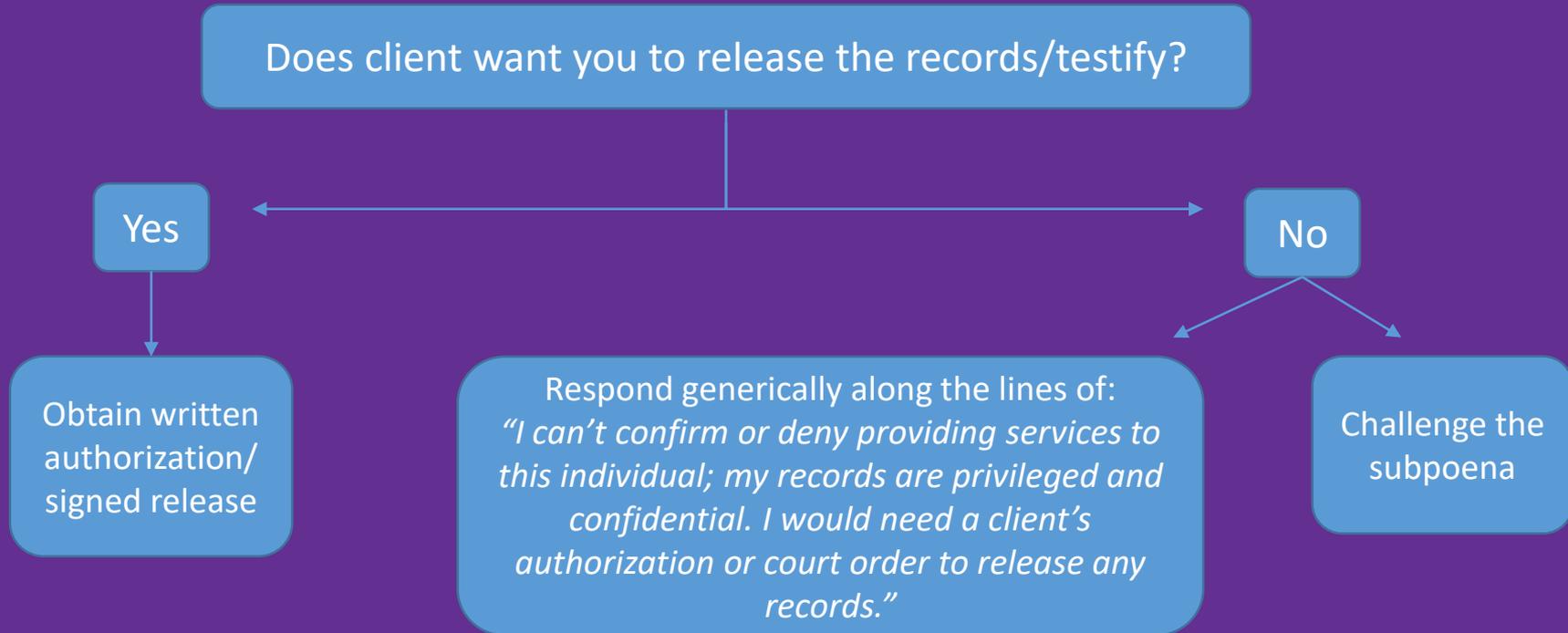
1. Is the Subpoena Valid?

- From outside of jurisdiction?
- Sufficient response time?
- Proper service?
- If subpoena is valid, then a formal response (although not necessarily compliance) IS required
 - Failure to respond can result in sanctions (e.g., accumulating fines, being held in contempt, having to pay attorney's fees, etc.)
- Remember, just because you have been subpoenaed does not mean that you must provide what is requested in the subpoena
 - But, you are legally required to respond

2. What is the Subpoena Requesting?

- Documents
- Testimony
 - At deposition
 - At hearing
- Both

3. Contact the Client



Other Considerations:

- Specific state requirements (e.g., Notice to Consumer forms in CA, minors)
- Can offer to have client review records before deciding
- Issues with providing partial or alternative records (e.g., treatment summary)
- Impact on therapeutic relationship

4. Contact the Requesting Attorney

- Which person or organization do you represent?
- How did you get my name?
- What is the nature of the concerns or proceedings?
- What information do you want?
- Why is this information needed?
- How do you want to receive this information (e.g., written report, telephone/in-person meeting)?
- What is the time frame for the request?

Barsky (2012)

5. Contact the Court

- Seek clarification
- Seek limitation
- If ultimately ordered to provide the records or testify, you should state something for the formal record along the lines of:
 - *“I would like to reiterate for the court my ethical obligation to maintain the confidentiality of the information that [client] has shared with me during the course of our professional relationship. Given my ethical duty, I have serious concerns and disagree with the court’s decision, but will comply with the court’s order.”*

6. Challenge the Subpoena

- Assert privilege
- File a motion to quash (in whole or in part)
 - Invalid subpoena
 - Lack of personal jurisdiction
 - Lack of custody/control of records
 - Potential harmful impact of disclosure
- File a motion for a protective order

7. Comply with the Subpoena

- Information requested
- Limitations
 - Psychotherapy notes
 - Raw test data
 - Test materials
- Deposition coverage

Specific Settings & Contexts with Varying Obligations

- Schools/Colleges/Universities
- Hospitals
- Employers
- Correctional facilities
- Substance abuse records
- Forensic contexts

Case Example

- Dr. Naïve receives a phone call from an attorney who tells her that he is going to be sending over a subpoena for all of her records on her client, Mr. Sad. He tells her that Mr. Sad has waived his privilege by introducing his mental health into litigation, that the subpoena is mandatory for Dr. Naïve, and that, if Dr. Naïve fails to comply, she will be in contempt of court and could be subject to fines or imprisonment.
- What should Dr. Naïve do?



Risk Management Steps

1. Is the subpoena valid?
2. What is the subpoena requesting?
3. Contact the client
4. Contact the requesting attorney
5. Contact the court
6. Challenge the subpoena
7. Comply with the subpoena



Summary

- Remember that subpoenas require a response, but not necessarily compliance
- Your role is usually to try and carry out the client's wishes
 - But, there may be situations where you have conflicting obligations or concerns
- When in doubt, consult:
 - With local attorney
 - With professional liability insurer
 - e.g., Trust RM Advocate Program: (800) 477-1200
 - With state psychological association representative

References & Resources

APA Committee on Legal Issues (COLI) (2016). Strategies for private practitioners coping with subpoenas or compelled testimony for client/patient records or test data or test materials. *Professional Psychology: Research and Practice, 47*, 1-11.

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Q&A

- Dr. Sammons will read select questions that were submitted via the Q&A feature throughout the presentation.
- Due to time constraints, we will not be able to address every question asked.



Thank You for Joining Us!

- If you have comments or feedback regarding this webinar, please email CESupport@nationalregister.org
- We hope you can attend the National Register's next webinar on July 18: Combined Treatments for Depression with Dr. Morgan T. Sammons, Executive Officer of the National Register.



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