

# How to Respond to a Subpoena

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This material is contained in the following source:

*Risk Management* (Doverspike, 2015, pp. 180-184)

# Disclaimer

This article is designed to be educational in nature. It does not provide legal advice nor is it intended to be or to substitute for the advice of an attorney. Because laws vary from state to state, the reader is encouraged to contact an attorney for legal advice regarding state laws governing professional conduct. Mental health professionals who receive a subpoena, or who are served with other legal process that requires or is likely to require revelation of client records, are encouraged to consult legal counsel, who can review the pertinent law and facts and provide appropriate legal assistance. The author's opinions do not reflect any official opinions or policies of the Georgia Board of Examiners of Psychologists ("licensing board") or the Georgia Psychological Association (GPA) Ethics Committee.

## Subpoena

- ✓ Determine which type of subpoena has been served.



### Witness subpoena

*Subpoena ad testificandum* (English: “give live, oral testimony as a witness”)

- ✓ This subpoena asks you to appear and give live, oral testimony as a witness.
- ✓ A *Subpoena to Take a Deposition* is used to order a person to testify at a deposition, at which the sworn testimony of a witness is taken outside of court.
- ✓ A *Subpoena to Appear* is used to order a witness to appear in court, but not necessarily to bring documents or records to court.
- ✓ A *Subpoena to Appear and Produce* is used to order a witness to bring along certain documents when the witness appears in court to testify.
- ✓ Contact your attorney to confirm that you are a non-party to the matter.



### Document subpoena

*Subpoena duces tecum* (English: “bring with you under penalty of punishment”)

- ✓ This subpoena asks you to produce records of documents as listed.
- ✓ Pursuant to OCGA § 9-11-34(c)(1), a party may issue a *Notice to Produce* documents to a non-party as part of discovery in a civil case. Within 30 days, the non-party may serve an objection to the notice, and the issuing party will thereafter have to move to compel in order to obtain the discovery.
- ✓ Pursuant to OCGA § 9-11-45(a)(2), a party may issue a *Subpoena to Produce* documents (i.e., not a subpoena for testimony) to a non-party as part of discovery in a civil case. An objection must be filed within 10 days.
- ✓ Contact your attorney to confirm that you are a non-party to the matter.

## Contact your client

- ✓ Determine whether your client consents to the testimony or production of records.



- ✓ If the client DOES NOT consent to any disclosure, obtain written consent from the client to confer with the client's attorney.

- ✓ If the client DOES consent to the testimony or production of records, obtain the client's written authorization, with the client's signature, for the disclosure of privileged treatment information.



## Document the Client's Chart

- ✓ Record all actions taken to obtain the client's consent to disclose information or to protect the privacy of privileged information.
- ✓ Document what information was disclosed.



1. Inform the client's attorney that the client DOES NOT consent to the disclosure.
2. Request that the client's attorney protect the client's privilege by raising legal arguments and objections with the Court.
  - a. If the Court rules in the client's favor, no disclosure will be required, OR
  - b. If the Court orders that the treatment information be disclosed, comply with the Court Order (unless the client appeals the Court's ruling).
3. Attend any court hearing or deposition to which you have been subpoenaed. If the client's refusal has not been raised by his or her attorney, protect the client's information by informing the judge that the records or testimony sought is privileged, and therefore cannot be disclosed with client consent or a Court Order.

## Contact your client

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- ✓ If the client DOES consent to the testimony or production of records, obtain the client's written authorization, with the client's signature, for the disclosure of privileged treatment information.

## Alternative Procedure

### Risk Management (Doverspike, 2015, pp. 180-184)

1. By certified mail requesting receipt, send a written objection to the issuing attorney.
  - a. Form 40 (Psychologists)
  - b. Form 41 (LPC)
  - c. Form 42 (LMFT)
2. The objection must be served "within ten days" after the service [of the subpoena] or on or before the time specified in the subpoena for compliance if such time is less than ten days after service."
3. File a motion with the court to quash the subpoena on the basis of privilege.
  - a. Form 43 (Licensed Psychologists)
  - b. Form 44 (Licensed MHPs)
4. The motion to quash must be accompanied by a memorandum in support.

## Document the Client's Chart

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## Contact your client

- ✓ Determine whether your client consents to the testimony or production of records.

- ✓ If the client DOES NOT consent to any disclosure, obtain written consent from the client to confer with the client's attorney.
- ✓ Filing a motion to quash a subpoena must be based on valid grounds

- ✓ If the client DOES consent to the testimony or production of records, obtain the client's written authorization, with the client's signature, for the disclosure of privileged treatment information.

## Document the Client's Chart

- ✓ Record all actions taken to obtain the client's consent to disclose information or to protect the privacy of privileged information.
- ✓ Document what information was disclosed.

## Valid Grounds for Filing a Motion to Quash

1. **Improper service:** The subpoena may not have been served properly.
2. **Lack of jurisdiction:** The court may lack jurisdiction over the subject matter of the lawsuit.
3. **Unreasonable response time:** There may not be a reasonable time to respond (depending on the jurisdiction, a minimum of 10-14 days)
4. **Distant location:** The subpoena may require production of documents at a location more than 100 miles away.
5. **Undue burden:** The subpoena may subject the recipient to excessive time, effort, or hardship.
6. **Evidentiary privilege:** The subpoena may request privileged information, although non-privileged information may be protected. In Georgia, "The mere fact of employment is not protected from disclosure" (*Cranford v. Cranford*, 1969).

## Determine Your Role

- ✓ Determine what type of witness you are expected to be.



### Fact Witness

- ✓ Fact witnesses do not have to be qualified as experts. Therefore, fact witnesses testify only to the facts that they have seen or heard. They do not give opinions. They are usually paid \$30.00 per day by the county.



### Expert Witness

- ✓ Expert witnesses have to be qualified as experts and can be cross examined regarding their credentials. If agreed upon in advance, they can be paid their usual, customary, reasonable fees for their time.



### Treating Professional

gives diagnostic and treatment opinions, but does not give opinions regarding ultimate issues or proximate cause.

### Forensic Expert

has broad latitude and gives opinions regarding diagnosis, treatment, ultimate issues, and proximate cause. 7

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### Treating Professional

can be considered a Fact Witness rather than Expert Witness (Bryant, 2022; Younggren et al., 2022)

### Forensic Expert

has broad latitude and gives opinions regarding diagnosis, treatment, ultimate issues, and proximate cause. 8

## **Forensic Expert**

- ✓ Determine in advance which entity is your organizational client.



### **The Attorney**

- ✓ If retained by an attorney, your work may be protected as a privileged attorney work product of that attorney.
- ✓ Your client (i.e., the attorney) will determine who, if anyone, can access your information.
- ✓ You will be expected to state your opinions and the basis of those opinions.
- ✓ You will be expected to state any limitations in your opinions if there is not adequate basis to support them.
- ✓ You will be cross-examined.
- ✓ You may not have any statutory immunity and you can be named in a civil liability complaint or lawsuit.



### **The Court**

- ✓ If retained by the court, then the information you obtain in an evaluation belongs to the court.
- ✓ The presiding judge or court will determine who, if anyone, can access your information.
- ✓ You will be expected to state your opinions and the basis of those opinions.
- ✓ You will be expected to state any limitations in your opinions if there is not adequate basis to support them.
- ✓ You will be cross-examined.
- ✓ You may have some statutory immunity from civil liability under OCGA 19-9-3(a)(7).

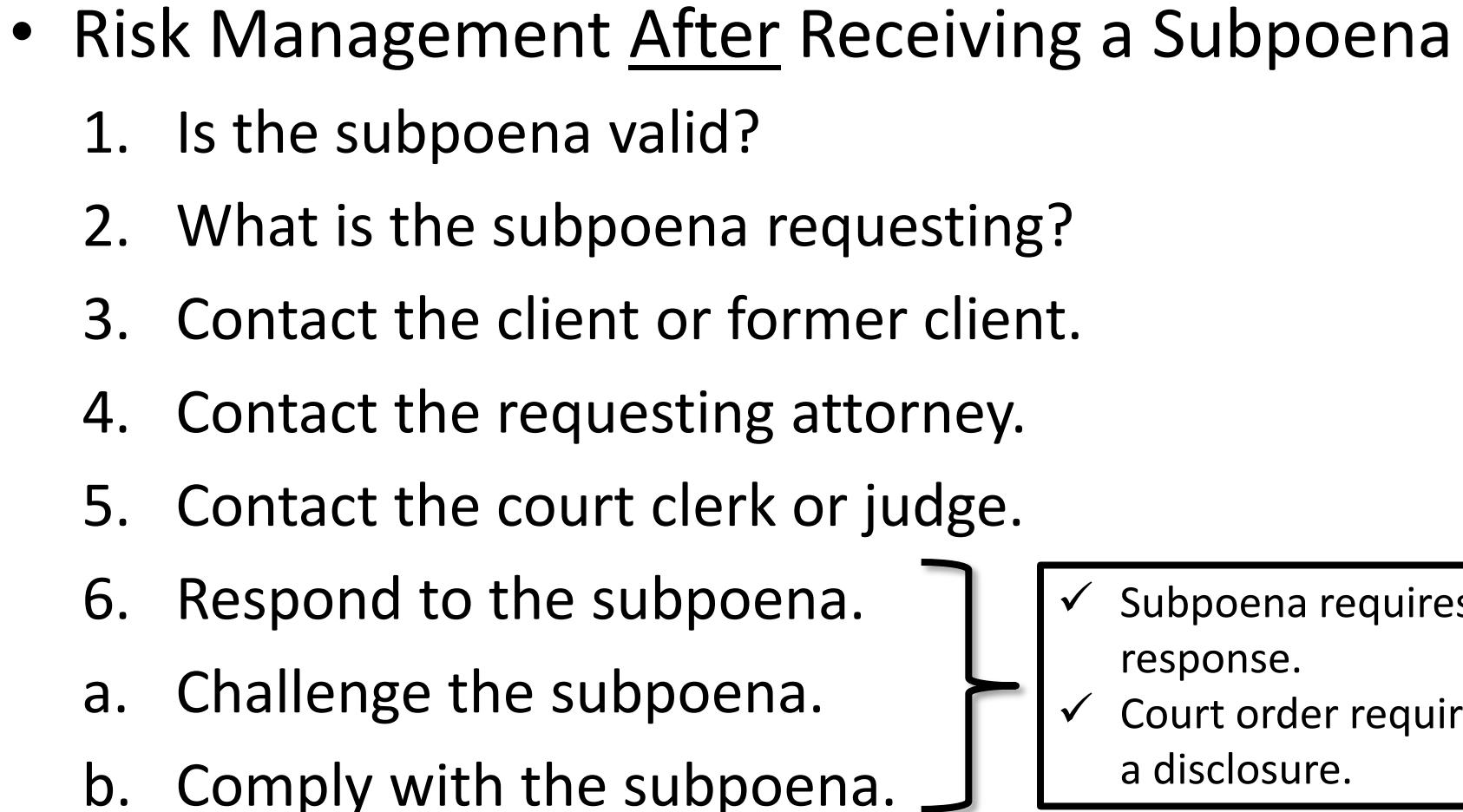
# Avoiding a Subpoena

- Risk Management Prior to Receiving a Subpoena
  - Sample informed consent language:
    - Professional Fees
    - *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.]*

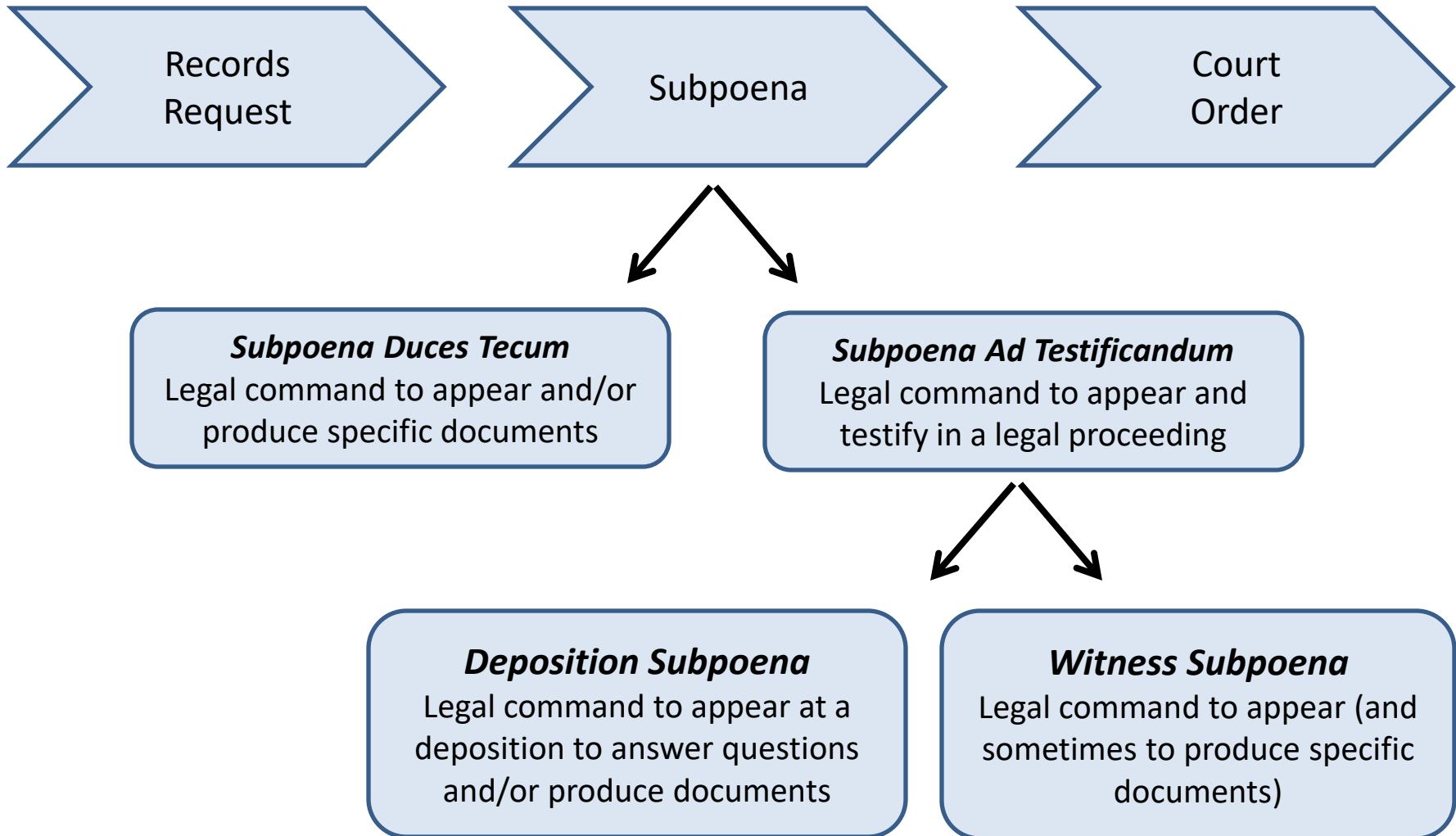
(Doverspike, 2015, p. xxi, Form 24 [Policy on Differences Between Therapeutic and Forensic Roles With Clients Undergoing Divorce and Custody Disputes])

(Scropp, Taub, & Zelechoski, 2022, pp. 3-4; Zelechoski, 2020, p. 79)  
<https://parma.trustinsurance.com/Portals/0/documents/Resources/>

# Responding to a Subpoena

- Risk Management After Receiving a Subpoena
    1. Is the subpoena valid?
    2. What is the subpoena requesting?
    3. Contact the client or former client.
    4. Contact the requesting attorney.
    5. Contact the court clerk or judge.
    6. Respond to the subpoena.
      - a. Challenge the subpoena.
      - b. Comply with the subpoena.
- 
- The diagram consists of a large brace on the right side of the page, spanning from step 6a down to step 6b. To the right of this brace is a rectangular callout box with a black border. Inside the callout box are two bullet points, each preceded by a checkmark.
- ✓ Subpoena requires a response.
  - ✓ Court order requires a disclosure.

# Types of Information Requests



# Contact the Client

Does the client want you to release records/testify?

Yes

Obtain written authorization to release/testify.

No

Respond generically along the lines of:  
*“I can’t confirm or deny providing services to this individual; my records are privileged and confidential. I would need a client’s authorization or court order to release any records.”*

Challenge the subpoena.

Motion to Quash

Protective Order

# Grounds for Challenging a Subpoena

Court lacks jurisdiction over subject matter.

Subpoena requires production of privileged information (although non-privileged information may be required).

Subpoena does not allow a reasonable time to respond (depending on jurisdiction, a minimum of 10-14 days).

Subpoena subjects the recipient to undue burden (i.e., excessive time, effort, or hardship required to respond).

Subpoena requires production of documents at a location more than 100 miles away.

# Testimony in Court Proceeding

## Examples of a Mental Health Professional's Role Testifying in Court Proceeding

Type of case	Role
Civil commitment	<ul style="list-style-type: none"><li><b>Fact witness (the treating therapist):</b> Provide your observations of the client.</li><li><b>Expert witness:</b> Give your opinion on whether the criteria for civil commitment are met.</li></ul>
Medical malpractice	<ul style="list-style-type: none"><li><b>Fact witness (defendant):</b> Explain how your actions were clinically appropriate.</li><li><b>Expert witness:</b> Give your opinion on whether the defendant therapist met (or did not meet) the professional standard of care.</li></ul>
Psychological damages	<ul style="list-style-type: none"><li><b>Fact witness:</b> Describe your treatment of the plaintiff (who is, or was, your patient) and describe their symptoms before the accident.</li><li><b>Expert witness:</b> Give your opinion on a plaintiff's psychological impairment, and whether it was caused by the accident.</li></ul>
Criminal	<ul style="list-style-type: none"><li><b>Fact witness:</b> Describe your past treatment of the defendant (who was previously your patient) and their symptoms before or after the crime.</li><li><b>Expert witness:</b> Give your opinion on competence to stand trial. Diminished capacity, or sanity at the time of the offense.</li></ul>

# Testimony in Court Proceeding

## Examples of a Mental Health Professional's Role Testifying in Court Proceeding

Type of case	Role
Parental fitness	<ul style="list-style-type: none"><li><b>Fact witness (the treating therapist):</b> Provide your observations of the client.</li><li><b>Expert witness:</b> Explain your opinion of the psychological fitness of the parent.</li></ul>
Visitation	<ul style="list-style-type: none"><li><b>Fact witness (the treating therapist):</b> Provide your observations of how the client described visits with child.</li><li><b>Expert witness:</b> Explain your opinion on whether or how visitation with the parent should be changed or modified.</li></ul>
Custody	<ul style="list-style-type: none"><li><b>Fact witness (the treating therapist):</b> Describe the symptoms and your treatment of the litigant (who is, or was, your client).</li><li><b>Expert witness:</b> Give your opinion of how the litigant's symptoms or parental fitness should affect custody.</li></ul>
Malpractice	<ul style="list-style-type: none"><li><b>Fact witness (defendant):</b> Explain how your actions were clinically appropriate.</li><li><b>Expert witness:</b> Give your opinion on whether the defendant therapist or forensic evaluator met (or did not meet) the professional standard of care.</li></ul>

# Testimony in Court Proceeding

<b>Dos and Don'ts for Courtroom Testimony</b>	
<b>Do</b>	<b>Don't</b>
Dress conservatively.	Wear distracting, bright clothing.
Allow opposing counsel to finish the question before you answer.	Wear heavy makeup or loud jewelry.
Prepare thoroughly.	Be late or unprepared.
Know where you will be testifying and arrive early.	Be late or unprepared.
Tell the truth.	Be cavalier or too casual.
Be respectful toward both the direct and cross examiner.	Be argumentative.
Keep it simple.	Use jargon.

# References

- American Psychological Association. (2013). Specialty guidelines for forensic psychology. *American Psychologist*, 68(1), 7–19.
- American Psychological Association Committee on Legal Issues. (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), 1–11.  
<http://dx.doi.org/10.1037/pro0000063>

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- Court appointed custody evaluator immunity from civil liability, Ga. Code Ann. Ch. 19, § 9, 3(a)(7) (2017).
- Doverspike, W. F. (2015). *Risk management: Clinical, ethical, and legal guidelines for successful practice* (2nd ed.). Sarasota, FL: Professional Resource Press. Pages 180-184.
- Doverspike, W. F. (2015). How to respond to a subpoena.  
<http://drwilliamdoverspike.com/>

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- Scroppe, J., Taub, D., Zelechoski, A. [Trust Risk Management Advocates]. (2022, March 17). Sample informed consent for psychotherapist-adult patient contract (with addendum for child/adolescent patient). Rockville, MD: Trust Risk Management Services.
- VanDercar, A., & Resnick, P. J. (2020, September 30). Tips for testifying in court. *Psychiatric Times*, 37(9), 26–27.  
<https://www.psychiatrictimes.com/view/tips-for-testifying-in-court>
- Younggren, J., Bryant, L., & Shapiro, D. (2022, March 17). *Forensic tips for the practicing psychologist roundtable*. Live webinar sponsored by The Trust.
- Zelechoski, A. D. (2020, April 30). *Perplexing problems in psychological practice: Decision science, ethics & risk management* [PowerPoint slides]. Rockville, MD: The Trust Risk Management Services.

# Resources

- For a list of attorneys and legal service plans, see the articles below:
- Doverspike, W. F. (2016). How to choose an attorney.  
[http://drwilliamdoverspike.com/files/how\\_to\\_choose\\_an\\_attorney.pdf](http://drwilliamdoverspike.com/files/how_to_choose_an_attorney.pdf)
- Doverspike, W. F. (2015). How to respond to a subpoena.  
[https://drwilliamdoverspike.com/files/how\\_to\\_respond\\_to\\_a\\_subpoena\\_\(doverspike,\\_2015\).pdf](https://drwilliamdoverspike.com/files/how_to_respond_to_a_subpoena_(doverspike,_2015).pdf)
- Wheeler, A. M. N. (2022, October). How to respond to subpoenas. *Counseling Today*, 65(4), 8-9.

# Citation

- The correct citation for this article is listed below:
- Doverspike, W. F. (2015). How to respond to a subpoena: Flowchart. <http://drwilliamdoverspike.com/>

# Appendix

- These forms are contained on the CD-ROM that accompanies the book Risk Management (Doverspike, 2015). The page number corresponds to the page on which the form is described in the book.
- |   | <u>Page</u> |
|---|-------------|
| <input type="checkbox"/> <b>Form 39:</b> Response to Request for Production of Documents        | xxiii       |
| <input type="checkbox"/> <b>Form 40:</b> Sample Letter for Response to Subpoena (Psychologist)  | xxiv        |
| <input type="checkbox"/> <b>Form 41:</b> Sample Letter for Response to Subpoena (for LPC)       | xxiv        |
| <input type="checkbox"/> <b>Form 42:</b> Sample Letter for Response to Subpoena (for LMFT)      | xxiv        |
| <input type="checkbox"/> <b>Form 43:</b> Motion to Quash [Psychologist]                         | xxiv        |
| <input type="checkbox"/> <b>Form 44:</b> Motion to Quash [Mental Health Professional]           | xxiv        |
| <input type="checkbox"/> <b>Form 45:</b> Waiver of the Psychologist-Patient Privilege           | xxv         |
| <input type="checkbox"/> <b>Form 46:</b> Waiver of the Psychotherapist-Patient Privilege [LPC]  | xxv         |
| <input type="checkbox"/> <b>Form 47:</b> Waiver of the Psychotherapist-Patient Privilege [LMFT] | xxv         |

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