

# **When the Sheriff Knocks on Your Door**

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## **OVERVIEW**

What do you do if a sheriff's deputy appears at your office or shelter with a subpoena *duces tecum* . . . or tries to execute an arrest warrant for a woman alleged to be a shelter resident . . . or has a writ of attachment for the children of one of your residents?

Certainly, most battered women's programs are concerned about keeping the confidentiality of women who use its services. Not only is this essential to the safety of the women, it is important to the viability of the program. If a program enthusiastically permitted its employees, its records, and its premises to be used to gain information about or access to a battered woman by persons potentially antagonistic to the woman, other women would understandably be reluctant to use its services. Also, of course, various funding sources require that shelters keep information regarding battered women confidential.

Basic to understanding what a program should do in response to an attempt to breach confidentiality is to have an understanding of what typical procedures are used to "invade" this confidentiality. This article will briefly describe those types of legal processes (other than being directly sued) which a battered women's program may encounter.

## **CITATION**

Upon the filing of a civil court petition, such as a divorce or a suit affecting the parent-child relationship, the clerk is required to issue a "citation" to be delivered as directed by the petitioner. Before a petitioning party can proceed with his case, the respondent must be given notice by citation or else specifically waive the service of the citation. Receiving a citation is probably the most routine kind of contact a battered women's program will have with peace officers. The citation is a piece of paper which constitutes the original notice to the defendant or respondent in a civil case that a suit has been filed against them. The citation notifies the defendant that she has a certain amount of time to answer the suit (typically on or before 10:00 a.m. on the Monday after the expiration of 20 days from the date of service), and gives her notice that if she does not file a written answer in the case, a default judgment may be taken against her. Citation may be served by any sheriff or constable, or any other person authorized by written order of the court who is not a party and who is over 18 years old, by delivering it in person or by sending it by registered or certified mail to the person. It can even be "served" by publication in a newspaper, if the whereabouts of the respondent is unknown. If it can be shown that the respondent is evading service, the court can order that the citation be delivered by leaving it with anyone over 16 years old at the location specified or in any other manner specified, such as posting in on the door of the residence.

The person serving the citation typically does not have the authority to “break down doors” or enter a home or private building without permission. When a person is avoiding service of citation, the law provides that the petitioner can obtain the kind of substitute process described above. Delaying the delivery of a service of process usually does not benefit the woman in the long run. What needs to be protected is the fact that the woman is in the shelter and especially the address of the shelter.

If the program has developed a good relationship with the local constables or deputies who serve citations, a system could be set up where the server notifies the program that a citation has been issued for a particular woman and that if the program has any contact with her they can inform her that the citation is waiting at the server’s office. She could then receive the citation without revealing her whereabouts or jeopardizing her safety. Be careful, however, if the service of process also includes a temporary restraining order or a notice of a temporary orders hearing. With both of these documents, the woman could be ordered to appear at a full-blown hearing in as short a time as three days. In those cases, the woman may not want to start the required notice-time running by picking up the citation. Thus she should consult with an attorney who can then counsel with her before she picks up the citation.

## **SUBPOENAS**

Subpoenas are another frequent kind of legal process that a battered women’s program will encounter. Generally, there are two kinds of subpoenas. A *subpoena of the person* requires a person to attend a court proceeding and give testimony, i.e., answer questions, while a *subpoena duces tecum* (also known as a subpoena for production of documentary evidence) requires a person to produce specified books, records, documents, or other physical evidence. Sometimes, a subpoena includes both a *subpoena of the person* and a *subpoena duces tecum*. All subpoenas are generally mandatory, that is, the witness must either appear or produce the documents at the required place and time, or get prior permission from the court or lawyer issuing the subpoena to do otherwise. **Accordingly, programs should not under any circumstances ignore a subpoena without first obtaining the advice of legal counsel, even where service of the subpoena is believed clearly to be defective.**

When a subpoena is served on a program or one of its employees, the first step is to identify which kind of subpoena has been issued (i.e., of the person, records, or both) and identify what type of proceeding it is for (i.e., criminal or civil proceeding, deposition, or a grand jury).

### **Subpoena of the Person**

This document requires the person to appear at the time and place specified in the subpoena. **If a program employee is subpoenaed, she even could be ordered to appear immediately, since Texas does not have a requirement that a witness be given a specific amount of prior notice.** Certainly, the shorter the notice, the

more likely the court will excuse noncompliance, but as discussed below, noncompliance without permission is a risky enterprise. Depending on the type of proceeding, the subpoena might be prepared by a clerk of a court, a justice of the peace, or even a court reporter.

### **Subpoena Duces Tecum**

The process for requesting a *subpoena duces tecum* is similar to that for requesting a *subpoena for the person* and, is often issued in conjunction with a *subpoena for the person*. **It should be personally served on the person having the possession, custody, or control of the records or evidence being requested. This person is generally called the “custodian of the records.” Each program should designate one staff member as the sole custodian of the records so that person is responsible for answering this kind of subpoena (typically, this is the program’s executive director).** If a board member, officer of the corporation, or an employee, other than the custodian of the records is subpoenaed to produce records, the program should have a plan for responding to that subpoena. Frequently, the response is to send the custodian of the records with the records at the time and place specified in the subpoena. **It is the actual custodian of the records who generally will be subject to the court’s direct order to produce records.**

Under the Texas Rules of Evidence, it is possible for the custodian of the records to forgo an actual court appearance by delivering the records to the party along with a business record affidavit. See Tex.R.Ev. 902(10). Upon receipt of a subpoena duces tecum, the custodian of the records should contact the party and inquire as to whether the party would be satisfied with the business records accompanied by an affidavit in lieu of testimony from a live person.

One of the most essential procedures a program must have in place is designating what kinds of records are kept about the women who are served. Since it is beyond the scope of this article to make detailed recommendations regarding those procedures, consider purchasing and reviewing, *Protecting Confidentiality: A Legal Manual for Battered Women’s Programs* (the address is listed at the end of this article). This manual thoroughly explores the issue of confidentiality and recommends procedures for limiting the amount of documentation retained by a program.

### **Subpoenas for Criminal Proceedings**

A battered woman could be involved in a criminal proceeding if she either brought criminal charges against the batterer, if she was a witness in a criminal case or if she herself was a criminal defendant. In any of these types of cases, the program’s records or counselors could be subpoenaed for information regarding the battered woman, the crime or the past relationship of the parties. The Code of Criminal Procedure provides that a subpoena in a criminal case can be served by reading the subpoena in the hearing of the witness, delivering a copy of the subpoena to the witness, electronically transmitting a copy of the subpoena to the last known

electronic address of the witness or mailing a copy of the subpoena by certified mail to the last known address of the witness. Thus anytime a program receives a subpoena by any of these means, an attorney should be contacted at once.

Criminal subpoenas could be used for a grand jury investigation, pretrial hearings or for a trial. As with any court proceeding, there could be many delays and the program might have to keep going back to court under new subpoenas.

### ***Grand Jury***

A battered woman may be involved in a grand jury investigation where program records or counselor(s) could be subpoenaed for grand jury proceedings. The grand jury, after hearing testimony and deliberating, decides whether felony indictments, or formal criminal accusations against a person, should be issued. All proceedings of the grand jury are secret and all witnesses are sworn to secrecy. The grand jury foreman or the attorney representing the State may issue a summons or even an "attachment" for an in-county witness to appear before them immediately or at a specified time. A written application to the district court can cause the same summons or attachment to be issued for an out-of-county witness.

Witnesses cannot take an attorney with them into the grand jury room and there is no opportunity to argue to the grand jury about the confidentiality of communications or the desire of a witness not to answer some specific questions. The way around this problem is to refuse to testify before the grand jury, in which case the program's executive director (or whoever the witness is) would be sent before a judge and could raise confidentiality issues there. If the judge determines that the questioning is proper, and the witness still refuses to testify, she can be fined up to \$500 and committed to jail until she complies. If the program receives a grand jury subpoena, an attorney should be consulted immediately.

### **Pretrial or Trial Settings**

Before a subpoena in a criminal case can be issued for a pretrial hearing or trial setting, the State's attorney or the defendant's attorney must make a written, sworn application to the clerk stating that the testimony of the witness is material to the State or to the defense. The court or clerk issuing the subpoena prepares the subpoena in a written form and indicates the date it was issued.

A failure to appear as required could subject the witness to a fine or even to an "attachment." If a witness is attached, a peace officer would actually take the witness into custody and bring her/him before the court at the ordered time. According to the Texas Code of Criminal Procedure, both parties (prosecution and defense) can rely on the issuance of one subpoena for a witness. In other words, even if the prosecutor subpoenas a witness but then tells the witness her presence is no longer required, the defense can still rely on the prosecutor's subpoena to compel the witness' appearance. Although in practice, a court may be unlikely to attach the witness under such circumstances, this is another situation where the program's attorney should be contacted for advice on local practice.

### **Subpoenas for Civil Proceedings**

The typical civil case involving a battered woman is a protective order hearing, a child custody case or some other family law case, such as a contested divorce. A battered woman could also be involved in a civil suit where she is either suing the batterer or a third party for monetary damages or is herself being sued.

### **Pretrial or Trial Settings**

A subpoena for a pretrial hearing or trial setting in a civil case must be issued by a clerk of the district court or county court or a justice of the peace, at the request of either side. The service of the subpoena can be made by the sheriff, constable, or by any other person who is not party to the suit and is 18 years or older, by delivering a copy of the subpoena to the witness. Unlike a criminal subpoena, the range of civil subpoena is generally limited to witnesses residing within 150 miles of the courthouse of the county in which the suit is pending. The witness is entitled to a fee of \$10 per day, but not travel expenses.

The witness must return to court every day until discharged by either the court *or* the party who requested the subpoena. Unlike a criminal subpoena, one party cannot rely on the other party's subpoenas: if the attorney who subpoenaed the witness discharges the witness, the witness is excused.

**If a *subpoena duces tecum* is issued, the court can quash or modify the subpoena if it is unreasonable, oppressive, or orders the payment of the reasonable cost of producing the documents or tangible things. Thus a court could choose to deny the subpoena of a program's records if the court found that producing the records was unreasonable.**

As in a criminal case, a failure to attend as summoned can subject the witness to a fine and to an attachment. If the witness refuses to testify, she may be jailed until she testifies.

### ***Depositions or Requests for Production of Documents***

A deposition is the procedure which permits attorneys in civil proceedings to obtain the sworn testimony of a witness prior to the actual trial. Oftentimes the attorney ordering the deposition will also include a request for production of documents. Typically, the certified shorthand reporter (who will be recording the testimony and reducing it to writing) will issue the subpoena directing the witness to appear at a specific time and place to give testimony. The subpoena may include a *subpoena duces tecum*, subject to the same restriction on unreasonable or oppressive requests. If the witness is a public or private corporation, the subpoena should direct the corporation to designate the person to testify (i.e., the custodian of the records) who has the most knowledge of the issues listed in the subpoena. In addition, the Rules of Civil Procedure specifically require that the time and place of the taking of the deposition be "reasonable." If the witness fails to appear, fails to answer questions

or fails to produce the requested documents, the deposing party can apply to the district court for sanctions which could eventually lead to the witness being held in contempt (a fine and/or jail sentence could be imposed) for failing to abide by the court's order to appear or answer.

### **Program's Response to Subpoena**

Just as in the situation where an officer is attempting to serve a citation on a battered woman who is a resident of the shelter, the program should not accept a subpoena for a battered woman or even confirm or deny that the woman is there or is a client of the program. **If a subpoena is served on a battered woman, whether she is a current or former resident, asking for her records at the program, the battered woman does not have to release them because she does not have custody over them. The program is not obligated to turn them over to her, although they may have an obligation not to destroy them. Under no circumstances should a program worker accept a subpoena on behalf of a battered woman.**

**If a subpoena is being served on the program's employees, only the person named on the subpoena or the custodian of the records should be authorized to accept a subpoena. If the named person or the custodian of the record is not there, the worker answering the door should politely tell the process server that no one else is authorized to accept subpoenas.** If the wrong name is listed as custodian, the program has no obligation to tell the correct name to the process server or the attorney issuing the subpoena, except as described in the section above on depositions.

**Whether the subpoena is served or not, the program's attorney should be contacted immediately and given a copy of the subpoena or information about its attempted delivery.** The attorney can decide what kind of formal response is required. Although funding sources may "require" confidentiality, battered women's programs in Texas do not have a specific privilege preventing them from responding to lawfully issued subpoenas as some other states provide.

## **WARRANTS**

### **Search Warrants**

A search warrant is a written order issued by a judge or magistrate in the name of the State, directed to a sheriff or police officer, commanding him to search a specified premise for contraband, illicit or stolen property; some evidence of guilt to be used in a legal proceeding; or to search for and photograph a child who is alleged to be the victim of a crime.

Some of the statutory and constitutional requirements which must be met are listed below.

1. The warrant must specifically describe the property or things to be seized. General exploratory searches are forbidden.

2. The warrant must specify the correct address and a description of the premises to be searched.
3. The warrant must be properly dated and signed by a judicial officer.
4. To secure a search warrant, a judge must be presented with an affidavit with sufficient facts to show the existence of probable cause. The affidavit must contain facts, which would enable the judge to make an independent determination that illegal activity was present and that a search would be reasonable and supported by probable cause. The affidavit is available to the public if executed.
5. The warrant must be executed within three days of its execution, exclusive of the day it is issued and the day it is executed.
6. The police officer shall give a copy of the warrant to the owner, or if the owner is not present, the person in possession of the place to be searched. If any property is seized, the officer must leave a written inventory of the property with the owner or person in possession. If neither of these persons are present, a copy of the warrant and the inventory are to be left at the place searched.
7. A search made pursuant to a search warrant may not go beyond the property described in the warrant and must be reasonably conducted to find the materials described. Any contraband, of course, may be properly seized.

It is unlikely that many search warrants will be served upon battered women's programs. When they are served, they would probably be for physical evidence, such as clothing or a weapon believed to be connected with a crime. The clearest example is a search warrant for a gun when a shelter resident is charged with killing her husband. Another example is the photographing of a child who has been abused.

The Texas Code of Criminal Procedure also permits, under very limited circumstances, a search for "property or items, except the personal writings by the accused, constituting evidence of an offense or constituting evidence tending to show that a particular person committed an offense." This could conceivably be used if there was reason to believe that a program was destroying records.

**If the police come to the door and have no warrant to search, the program has no obligation to let them search and they should not be allowed in. If there is a search warrant however, the program most likely will be able to argue the legality of the search warrant only *after* the search is conducted. Even with a search warrant, programs should make it clear verbally that they do not consent, but they *cannot physically obstruct* the officers from conducting the search. If a worker physically resists a search, she can be charged with interference with the duty of a public servant, a class B misdemeanor. Obviously, the program's attorney should be contacted immediately and the officers should be requested to wait to conduct the search until the arrival of**

**the attorney. If the search proceeds without the attorney, two workers should ask to accompany the officers during the search as witnesses and take notes or even photographs of the officers' actions, in order that a court can determine later whether the officers were exceeding the scope of the warrant.**

### **Arrest Warrants**

An officer could arrive at a program's door with a warrant to arrest a battered woman for any crime, including violation of a protective order, assault or the murder of her batterer. An arrest warrant, of course, authorizes the peace officer to take the person accused of an offense to jail. The warrant is issued pursuant to an affidavit which has been presented to the magistrate. The affidavit states the name of the accused, if known, or gives some reasonably definite description of the accused; it shows that the accused has committed an offense or that the person making the complaint has good reason to believe, and does believe that the accused has committed the offense; and states the time and place of the offense. **Once issued, the arrest warrant is generally valid throughout the State and the officer does not even have to actually have the warrant in his possession at the time of execution. In addition, if the charge is for a felony, the officer is permitted to "break down the door of any house for the purpose of making an arrest, if he be refused admittance after giving notice of his authority and purpose."** The officer is not permitted to enter if the charge is misdemeanor, unless "exigent circumstances" exist, e.g., they can hear someone being beaten in the house or they have reason to believe the accused is trying to escape..

### **Writs of Attachment**

Elsewhere in this article, the attachment of a witness who has failed to appear as subpoenaed was addressed. Another type of attachment is for a child who is the subject of a family code proceeding. Although this is not technically a "warrant," it does entail the taking of a child under a court order. The Texas Family Code permits the attachment of a child only if a verified pleading or affidavit has been filed justifying such a harsh and potentially terrifying remedy. One does not simply file a motion for a writ of attachment and ask a judge to order a peace officer to pick up the child. Instead, the writ is requested as part of another civil proceeding which is designed to determine what should happen to the child in the future, such as a divorce proceeding or a suit affecting the parent-child relationship. It is an order which is extremely temporary in nature: only until a court can have all parties brought before the court to determine who should have custody of the child. For example, in a divorce case, a spouse might allege that the other party's possession is creating a serious, immediate threat to the child's physical and emotional well-being or that the other party is planning on removing the child from the jurisdiction of the court. The writ of attachment could then be issued ordering a peace officer to either pick up and deliver the child to the petitioning party, some other person, or agency until a hearing can be held or to produce the child immediately before the court to determine what order, if any, should be made regarding the immediate welfare of the child. Judges generally closely examine these kinds of requests because of the

effect such an order may have on the child.

**Obviously, if a woman is a resident of a battered women's program when an attachment of her child is issued, the best remedy is to get an immediate hearing before the judge as to whether the child should be turned over to the other party or remain with the woman until a full temporary orders hearing can be held. Sometimes, even if the writ orders an officer to turn the child over to the petitioning party, an officer can be convinced to contact the judge prior to turning the child over in order that the judge can hear from the mother and/or the program's advocates first or even to take the child to an emergency shelter until such a hearing can be held.**

### **CONCLUSION**

Programs should discuss in advance, and without the strain of a pending subpoena or warrant, how they will respond to subpoenas and warrants. There are many policy considerations and decisions which should be thought through in advance. These decisions may be applied -- or revised and adapted -- to an individual case should a subpoena or warrant be served.

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