

# ***Parent Child Assistance Program (PCAP)***

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## **PCAP Legal Protocol: Subpoena and Testimony Guidelines**

PCAP staff are sometimes requested and/or subpoenaed to provide testimony and to produce documents in legal proceedings. The PCAP Legal Protocol provides guidance in responding to these requests. Commonly asked questions and answers are summarized below.

This Legal Protocol is specific to Washington State PCAP, but the information and recommendations can be generalized to PCAP sites elsewhere. PCAP sites are strongly encouraged to seek additional specific guidance and assistance from their own legal counsel with regard to state and local law and procedures.

### **RELEVANT LAWS**

PCAP is subject to the Health Insurance Portability and Accountability Act (HIPAA) as well as 42 CFR Part 2. HIPAA protects patient health information. 42 CFR Part 2 requires stronger protections for substance use disorder patient records. Confidentiality of clients' information is strengthened by these laws. In addition, for clients who have consented to be in research, there is a federal Certificate of Confidentiality that protects identifiable research records from disclosure.

### **PCAP POLICY**

Since PCAP is a program only for women who have used drugs or alcohol during pregnancy, just being in PCAP identifies a client as having used alcohol or drugs during pregnancy. This carries a stigma and awareness of this could harm a client's reputation. **Therefore, we must at all times guard the identities of our clients.**

In addition, information collected in PCAP often includes personal and sensitive information about clients and their families. We collect this information to help us better serve clients and families and to help us conduct evaluation that is beneficial to the community. Our clients and communities rely on PCAP to safeguard their privacy and confidentiality. Assurances of the confidentiality of clients' data and information are included in the PCAP Client Services Agreement and research consent process, including the exception that PCAP staff are required to report incidents of child abuse and risks of harm to self or others.

### **The Role of Releases of Information**

In general, PCAP case managers should make every reasonable effort to obtain signed Releases of Information (ROI) from clients as soon as possible after they enter the program. ROIs allow the case manager to disclose information to the clients' service providers (e.g., child welfare social workers, probation officers, treatment providers, attorneys). The PCAP case manager should be certain that the client understands that when the client signs a release, the case manager may share the information that is authorized to be released (positive and negative) with the service provider. While PCAP staff can always receive information without an ROI, **PCAP staff cannot confirm the identity of a client, nor can they confer with other service providers about a specific client without an ROI from that client.**

## HOW TO RESPOND TO A SUBPOENA

Every PCAP site should designate a **specific point person** for all subpoenas. This could be the PCAP agency's attorney, the clinical supervisor, the agency director, or another knowledgeable person. This would be a person:

- who is trained on the PCAP Legal Protocol;
- to whom all subpoenas, or notices of intent to subpoena, are sent as soon as they are received;
- who is responsible for overseeing the response to the subpoena;
- who is responsible for keeping documentation of all subpoenas handled.

**This designated person will often need information and assistance from other PCAP staff (e.g., the clinical supervisor, the case manager) to respond to the subpoena.**

Each case will be different, but the management approach should be consistent *for every subpoena received*. If isolated case managers or supervisors attempt to respond to subpoenas individually (and, for example, mistakenly release client data or files, or reveal protected information), *then a precedent is set that can put the entire PCAP program at risk*.

## WHAT IS A “SUBPOENA” AND A “SUBPOENA DUCES TECUMS”?

A *subpoena* is a formal notice requiring a named person (for example, the PCAP case manager) to appear at a particular date/time/location to give testimony as a witness. Sometimes that person is called the “custodian of the record,” meaning the PCAP clinical supervisor. Other times that person may be the PCAP case manager who was involved with the client.

A *subpoena duces tecum* is a formal notice requiring release of records to be either sent to a specified person or brought to a specific place by a specific date/time.

It is possible for a subpoena to require both release of records and personal testimony of a designated person. The subpoena itself will specify what type of information is required.

## WHAT SHOULD I DO WHEN I RECEIVE A SUBPOENA OR A SUBPOENA DUCES TECUM?

**Don't panic.** If a subpoena sits on a case manager's desk for days because she is afraid to show it to her supervisor, valuable time is lost.

**Immediately give subpoenas of any type to the designated person** who will oversee their handling. Subpoenas often require a response within days and may require many steps to manage. The more lead time the designated person has to respond, the better.

*In Washington State* case managers should give subpoenas to their clinical supervisor.

**NEW: Please do not fax subpoenas to UW PCAP unless the subpoena is specifically relevant to UW's role in the statewide program (oversight/training/evaluation). Call UW PCAP Research Coordinator Stacy Dimmich first to discuss.**

*The designated person will need information and assistance from other PCAP staff (e.g., the clinical supervisor, the case manager) to oversee the handling of the subpoena.*

**The PCAP site clinical supervisor** is responsible for taking the following steps.

- Identify if the document that has been received is a subpoena, or if it is a 14 day Notice of Intent to Subpoena under RCW 70.02.060.
- If the document is a 14 day Notice of Intent to Subpoena under RCW 70.02.060, immediately notify the client that a subpoena will be coming.
- If the Notice of Intent to Subpoena was not received a minimum of 14 days prior to receiving this subpoena, explain to the requestor that you cannot respond until you have a valid subpoena that has been preceded by the proper Notice of Intent to Subpoena.
- If the document is a subpoena, contact the requestor, i.e., the attorney whose name appears on the subpoena.
- Do not act defensive or confrontational. Explain that PCAP is covered by federal confidentiality law and regulations, specifically 42 CFR Part 2.<sup>1</sup> Therefore, you cannot confirm or deny whether the person in question is a client of PCAP without a judge-signed court order.
- Offer to explain the kind of work that PCAP does in general terms. You can explain that PCAP provides case management, not treatment, and connects clients to appropriate service providers, who would have their own records. You can point out that PCAP does not keep other providers' records (e.g. medical, mental health, or SUD treatment records) in our client files, and even if we did, we would be barred by 42 CFR Part 2 from disclosing them.
- If the requestor would still like testimony or records or files from PCAP, inform them that a judge-signed court order would be required and follow up with this assertion in writing. Refer to the attached template.
- Document all your steps in writing.

**IF THE REQUESTOR IS UNWILLING TO REVOKE THE SUBPOENA:**

- Inform the client. Discuss all foreseeable implications with the client. Ask the client whether they want their records to be released. If the client says yes, you **must** get a signed Release of Information from the client and release only what the client agrees to have released.
- If the client does not want their records released or the requestor wants more information than the client is willing to have released, **refer the matter to the attorney representing your agency.**

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<sup>1</sup> Why is PCAP covered by 42 CFR Part 2? PCAP meets these criteria: 1) Since our program is partially funded by Medicaid dollars, that means we are “federally assisted” and subject to federal regulations. 2) PCAP “holds itself out” as providing case management and does in fact provide referrals for treatment for substance use disorders.

If a PCAP staff member is subpoenaed to testify, and the client wants that staff member to testify (and signs a release), the staff member must appear as requested by the client's ROI. If the requested staff member (e.g., the case manager) cannot testify for any reason, ask the client and the requestor if another PCAP staff member (e.g., the supervisor) can testify instead. This request may or may not be granted. If only personal testimony is subpoenaed (and not records), PCAP staff member should not bring records, day planners, paperwork, or files to the proceedings.

## **WHAT ARE MY OBLIGATIONS TO GIVE TESTIMONY AS A "FACT WITNESS?"**

**If the client signs a release or you are court ordered to appear and give testimony, you will be testifying as a fact witness.** A fact witness is someone who has direct knowledge about information relevant to an issue that is being litigated. In our case, this usually means the witness has provided services and is being asked to answer questions about the care given to the individual by him/herself and possibly other providers.

**Sometimes fact witnesses are asked opinion questions.** Staff testifying as a fact witness may choose to formulate and answer an opinion question or not. The testifier should not formulate an opinion about matters that go beyond their direct involvement in providing care or services on the case. Only testify on matters within the scope of knowledge of one's practice.

**Sometimes witnesses are asked to meet informally with attorneys.** Ensure there is a signed Release of Information before agreeing to talk with attorneys. Staff may request a joint meeting with the prosecutor/plaintiff's attorney and defense/defendant's attorney to minimize the amount of time necessary to answer their questions. The attorneys are not obligated to agree to a joint meeting, but they may agree to it.

**Sometimes witnesses are subpoenaed to give a deposition or trial testimony at a time that is inconvenient or when the witness is unavailable.** When this occurs, contact the attorney and explain the situation and request an alternative time and date to provide testimony. While subpoenas should not impose an unreasonable burden on witnesses, an attorney is not obligated to change the subpoena to accommodate an individual's request, but most are usually willing to schedule the deposition at a mutually agreeable time. Witnesses who are subpoenaed to give testimony at trial are frequently summoned to appear at the court on the first day of trial. Always contact the attorney who has issued the subpoena for trial testimony to arrange for the appearance time and date. Because trials are unpredictable, scheduling testimony during trial is more difficult. If it is not possible to alter one's schedule, discuss alternatives with the requesting attorney such as a videotaped or telephonic deposition.

## **WHERE WILL I GIVE TESTIMONY?**

Testimony may occur in several different settings: at a deposition (usually held at a private office), at a hearing or in a courtroom. Testimony may be given only with attorneys present (at a deposition) or in the presence of a judge and/or a jury (at trial). In any of these testimony situations, the testimony is a formal statement given under oath or promise of telling the truth.

A deposition allows each party of a lawsuit to question any other party or anyone who may be a witness on the case. Depositions are generally conducted prior to trial, and the testimony given at a deposition is generally admissible at trial. If the deposition is taken solely for discovery purposes, the testimony generally may be used at trial only if the witness' trial testimony contradicts his/her deposition testimony, or if the witness is unavailable during the trial to testify

in person. However, any deposition of any party to the lawsuit may become part of the court record. One should assume that their testimony in a deposition may be put into a court record and be a public record.

## WHAT SHOULD I EXPECT TO OCCUR WHEN I TESTIFY?

- After being sworn in as a witness, the individual will be asked questions. These questions will usually be from the attorneys representing both persons or entities in the case. The attorneys for each side will take turns asking questions one at time.
- There might be strategic reasons why some issues are not explored during your testimony as a witness. It is not your responsibility to tell everything you know or believe to be important. It is best to just respond to the specific question that is being asked.
- Both the questions and answers provided by staff will be recorded, usually by a court reporter. If testimony is provided at a deposition, a written transcript of the testimony will be prepared. The individual who has testified will be asked whether they want to read it or not. They may choose to read it and either sign that it is accurate or identify corrections. Alternatively, one may choose not to read it. This is the staff member's decision.
- It should be assumed that one's testimony at a deposition may later be put into a court record and be a public record. Generally, all courtroom testimony is public record.

## HOW SHOULD I CONDUCT MYSELF AS A WITNESS?

### Guidelines for Testimony

- Tell the truth.** Those testifying will be under oath. Always give truthful answers; giving an intentionally false answer is a crime called perjury. Additionally, any falsehoods may be used to attack the individual's credibility on all matters. Be honest. Be accurate. Do not guess or hypothesize. If only approximate dates, times, or distances are known, then give only your best approximation and say it is an approximation. If a mistake is made during testimony, simply state that you were mistaken and correct your statement.
- Discuss matters of concern in advance with the PCAP clinical supervisor, and with the PCAP agency legal counsel.** If you are concerned about something that might prove embarrassing or something that you have done, discuss it candidly with the clinical supervisor and your attorney before giving testimony.
- Listen carefully to every question.** Do not let the person asking the questions put you in the position of accepting half-truths on which further questions might be based. Be sure that you agree with each aspect of the question before answering, or clearly state any qualifications you believe are needed for complete accuracy.
- Be alert for leading or hypothetical questions.** Some leading or hypothetical questions may result in a possible adverse conclusion. For example, an opposing counsel may ask, "Ordinarily, this result does not occur if the case manager uses reasonable care, right?" If you answer, "That is correct, this result does not ordinarily occur," then you might have testified against PCAP's position or against yourself by stating that normally this result does

not occur except when the case manager does not use reasonable care. As an alternative, it may be more accurate to acknowledge that an adverse outcome is one of the inherent risks in the process of PCAP.

- E. **Answer in your own words and answer only the questions asked.** Do not volunteer any additional information. Answer the questions with words that you normally use and feel comfortable using. Try to answer only one question at a time.
- F. **Pause before beginning each answer.** Take a moment before answering. This gives the individual testifying time to reflect on the question, it also gives that individual's attorney (if one is present), or another attorney an opportunity to make any necessary objections. If an objection is made to any question or answer, stop talking until you are directed by the judge, your attorney (if applicable), or the examining attorney to continue your testimony.
- G. **Listen carefully to objections.** Listen carefully, something can be learned about the question from the objection expressed. For example, an objection that a question is speculative: may mean that you would need more information to be able to answer the question. After the objection is made, answer the question unless your attorney advises against doing so. If you are testifying at a deposition and you do not have an attorney present, you may go ahead and answer the question if you are able. Alternatively, if you have serious concerns about answering, say that you need to consult with counsel and do not answer until you have done so. Do not explain the basis for your concerns to the other people present at the deposition. .
- H. **If you do not understand a question, say so.** Do not answer a question that you do not understand. Instead, ask for clarification or for the question to be repeated. If requested, the court reporter will repeat a question as it was recorded.
- I. **Do not guess or offer an opinion unless specifically requested to do so.** An individual will generally be allowed to testify only to what they personally saw, heard or did. If one does not have first hand knowledge, say so. Be willing to acknowledge the limits of your knowledge or expertise. Do not guess or offer an opinion unless it is specifically called for, and then answer only after waiting to hear if there is any objection.
- J. **Where appropriate, qualify your answers.** Testify accurately based on your memory. It may be necessary to estimate a date or fact if you are uncertain. If you are not sure, say so (e.g., "to the best of my recollection" or "as best as I can recall: or "I believe"). There is no need to apologize if you do not recall or if you do not know the requested information.
- K. **Avoid using absolutes unless you are certain they are accurate.** For example, saying "I never" or "I always" may be problematic if the circumstances show otherwise.
- L. **Avoid using the word "inadvertent."** One of the several definitions of "inadvertent" is "reckless, careless, negligent." Thus, the statement "I inadvertently missed the appointment" could suggest an admission of negligence. Instead, you should simply state what happened.
- M. **Indicate whether you are paraphrasing or quoting.** In testifying regarding conversations, make it clear whether you are paraphrasing or quoting directly.

- N. **Do not offer documents that have not been appropriately requested in advance.** Do not, for example, offer a social security card or other documentation that you think might answer or provide clarification for a question. If an attorney wants to obtain documents, other legal procedures may apply. This is especially true of medical or treatment records. Attorneys who seek medical or treatment records should be referred to the appropriate agencies.
- O. **If asked about a document, read it carefully before you begin to answer.** If you do not recall the document or do not know to an absolute certainty what the document says or what its author meant, then say you do not know. Do not guess at what might have been meant.
- P. **Speak slowly, clearly and audibly.** The court reporter must hear every word you say. Let the examiner complete the question before you begin to answer. Try to answer “yes” or “no” when appropriate; do not nod your head or say “uh huh”.
- Q. **If warranted, make an oral statement about inappropriate actions.** The transcript will reflect only what is said. It will not reflect, for example, that an attorney yells or hovers. If the individual testifying is confronted with inappropriate actions such as these, they may say what is happening at the time and the transcript will include the statement. You should not let yourself be provoked into an argument with the lawyers.
- R. **Be serious and polite at all times.** Do not give cute or clever answers, as they may be misinterpreted. Avoid all obscenities, ethnic slurs, and references that could be considered derogatory or offensive to others. Remember that your statement may be read to a judge or jury and thus become part of the public record.
- S. **If you need a break, say so.** A deposition or hearing is not an endurance contest.
- T. **Avoid casual conversation with opposing counsel.** Do not engage in casual conversation with the attorneys for the other side. This applies before, during and after the deposition.

#### **WHEN THERE IS NO SUBPOENA: WHAT IF A CLIENT REQUESTS PCAP ADVOCACY WITH THE LEGAL SYSTEM?**

A client may ask a PCAP staff member to accompany her to a court proceeding and provide statements of support without the PCAP staff member being subpoenaed or court ordered. PCAP staff members do not have the obligation to do so. In these cases, the case manager should:

- Discuss the situation with her clinical supervisor
- Understand that she is required to answer truthfully all questions asked of her during the proceedings; **therefore if the case manager has any information that could be detrimental to the client’s case, the case manager should not voluntarily attend court proceedings** (unless she is subpoenaed to do so).
- If a PCAP staff member does accompany a client to court or a hearing, the case manager must ask the client to first sign a ROI for that specific court hearing with the names, places, and dates involved. Before the release is signed, the case manager should review with the client specifically what the goal of PCAP’s involvement is. The case manager should make sure the client understands that she (the case manager) must answer all questions and *may* be asked to provide information that the client didn't intend to share or

may reflect negatively on the client. The client must understand that, under no circumstances, will the case manager lie or withhold information if asked a direct question by the provider or court.

- Review with the clinical supervisor all ROIs and testimony content in advance of court proceedings
- **Document all legal issue activities in case notes, and keep copies of correspondence in the client file.**

In lieu of attending court in person, a client may ask a case manager to write a letter to the court on the client's behalf. All of the above points apply (discuss with client, discuss with supervisor, obtain an ROI; make only statements that are completely truthful and can be documented, document in client file). In addition, any letter written on behalf of a client should be reviewed by the client and by the PCAP clinical supervisor before sending.

Note: Portions of the Legal Protocol were adapted from the Harborview Medical Center Administrative Policies and Operational Procedures Department Policy No. 5.35, revised 4/03.

**TEMPLATE RESPONSE LETTER TO SUBPOENA WITH NO JUDGE-SIGNED COURT ORDER OR RELEASE OF INFORMATION**

XYZ County Parent-Child Assistance Program (PCAP)

Address

Date:

Re: Request for Records in Case No: \_\_\_\_\_

Dear \_\_\_\_\_:

\_\_\_\_\_ County PCAP recently received a subpoena for substance use disorder records in relation to the above- referenced matter. As you may already know, \_\_\_\_\_ County PCAP is a Medicaid-funded program that provides intensive case management and advocacy for pregnant and parenting mothers and their families. The goal of the program is to provide support and to connect clients to necessary services. As a program that provides referrals to substance use disorder treatment, \_\_\_\_\_ County PCAP is governed by federal and state laws that address the privacy and confidentiality of our clients and their records. Therefore, \_\_\_\_\_ County PCAP cannot comply with your subpoena for records because it was not accompanied by a court order or by a written and signed authorization.

The federal confidentiality laws and regulations governing the release of substance use disorder information prohibit us from disclosing information in response to a subpoena unless a court also issues an order in compliance with the procedures and standards set forth in 42 C.F.R. Part 2. The requirements for any court order authorizing the disclosure of substance abuse records are set forth in 42 C.F.R. § 2.64 and 42 C.F.R. § 2.65. In the alternative, any subpoena would have to be accompanied by a written authorization from the client whose information is being requested. The requirements for written authorizations are found at 42 C.F.R. § 2.31.

While \_\_\_\_\_ County PCAP will comply with all valid requests for information, we must ensure we are acting in accordance with all federal and state confidentiality requirements. Without a valid release or court order, \_\_\_\_\_ County PCAP cannot confirm or deny whether the individual is or ever was a participant in our program. If you should have any further questions, please do not hesitate to contact \_\_\_\_\_.

Sincerely,

[NAME]

[Title]