

Subpoena information

The requirements and processes associated with a subpoena vary depending on the type of court i.e. Civil, Criminal, Children's or Family Court.

It is advisable to consult the issuing court to clarify your obligations when you're responding to a subpoena and it's important that you seek independent and specialist legal advice where appropriate.

1 What is a subpoena?

A subpoena is a court order to a person (the addressee) and there are three types:

- Subpoena for production (produce relevant requested documents pre-trial).
- Subpoena to give evidence (to attend and give evidence at court).
- Subpoena for production and to give evidence (to produce documents and give evidence at court).

A subpoena contains legalese, but the key information includes:

- Details of the court you need to send the records to.
- What date the records need to be received by the court.
- A schedule i.e. description of the documents which need to be sent to court.
- Different states have different courts and processes, but in most instances the principle is the same.

An individual or organisation may be subpoenaed to provide clients' clinical notes, referrals, records, reports or examination findings.

Unless a subpoena specifically requests an original document, a copy can be supplied. If you do supply originals, you should keep copies of all documents you produce.



As a legal document, it's worth noting that the subpoena overrides the individual's duty of confidentiality to their client. The individual does not need permission from their client to provide client records or documents.

2 What is the difference between a subpoena and a summons?

If you are called to be a witness you will receive a **summons or a subpoena**.

This depends on the type of court the case is heard in.

- A **summons** is used for cases in the Magistrates' Court.
- A **subpoena** is sent to witnesses where cases are held in County or Supreme Courts.

Both are directions from the court and the effect of a summons and subpoena is the same, regardless of the court or tribunal that has issued it. You need to read them carefully and seek advice if there is anything in it that you do not understand.

3 Is a solicitor's letter the same as a subpoena?

A solicitor may ask for documents and provide a release from the client, or they may ask for documents relating to a matter that your client is involved in.

Some solicitors' letters may quote legislation stating that you are compelled to provide the information. There are some laws, particularly regarding the administration of injury claims, that do require an individual to produce documents in response to a letter. However a subpoena comes from the court and not a solicitor.



You need to be clear about what the legislation compels you to do before responding.

If you are not clear why the solicitor is asking, and whether or not there is legislation compelling you to produce information, then ask the solicitor to clarify this.

4 If I am subpoenaed to produce records and appear in court, must I do both?

Yes. If you do not comply with the subpoena, you will be in contempt of court and may be at risk of imprisonment.

5 I've been issued with a subpoena to produce a client's documents. Must I inform them?

- No, but it's a good idea to inform your client about any request for production of their information. You should be clear that you are doing so as a professional courtesy.
- The person affected by the production of information has a right to lodge an objection against the production of his or her information to the court.
- You may provide them with a copy of the subpoena and suggest they seek legal advice.

6 Must I release a client file in total if it is against their wishes?

- If you are legally compelled to produce documents or information, your client's wishes cannot over-ride your legal obligations.
- However, a subpoena or summons may be limited to specific information, if that is the case, that is all you should be providing.
- You are protected by the relevant law from prosecution by the client or disciplinary body if you are subpoenaed to produce documents or information.



If you attempt to withhold information from the court you may be subject to a penalty.

7 Can I request to withhold client information from my file if I believe that it is irrelevant to the case?

- You can object to the production of any information you believe to be irrelevant to the case. It is up to the court to review the documents before they may be released.
- To do so, place the documents that you object to producing in a sealed envelope with a covering letter addressed to the Prothonotary/Registrar of the Court, entitled "Objection to Production".
- The Registrar should contact you with a date to attend court to make your objection – usually the date the documents are to be provided to the court.
- Limiting the objection to specific material may be more effective.



Each court has slightly different requirements for making an objection and the necessary information should be in a notice attached to a subpoena or available through the court website.

8 As a court witness, can I refuse to answer questions that I think will disadvantage my client?

- In court you're sworn or affirmed in and promise to tell the truth.
- If you refuse to answer questions in court the presiding judge may direct you to answer the question. If you refuse, you could be charged with contempt of court.
- Also, your credibility as a witness may be called into question if you are evasive in answering questions.

9 I no longer have the files the subpoena pertains to. What can I do about this?

- A subpoena can only compel a person to produce documents that are in his or her "possession, custody or control".
- Documents that have been destroyed in accordance with an established document retention policy are no longer within a person's "possession, custody or control".
- To avoid any repercussions for failing to respond to a subpoena, you can write to the court advising that documents were destroyed and when, in accordance with the established document retention policy of the business.

10 Do I get paid for appearing as a witness in court?

- If you are subpoenaed to give evidence in court the person serving the subpoena must give you 'conduct money' when subpoenaed i.e. sufficient money for return travel between your home or work, and the court.
- If a subpoena will result in a substantial loss or expense in properly complying with it, you can seek additional expenses from the party issuing the subpoena. **This must be done before you comply with the subpoena.**
- To do so apply to the court in writing for an order that the issuing party pay your expenses in addition to the conduct money. You should include an estimate of the loss or expense.

11 If it takes a significant time to respond to a subpoena, can I get paid for my time?

- There are different rules regarding the payment of expenses in different courts.
- Usually, if you will incur substantial loss or expense in properly complying with the subpoena, you may make a written application to the court for an order that the party who has issued the subpoena pay you an amount to cover that loss or expense. **This must be done before complying with the subpoena.**
- You will need to contact the court issuing the subpoena to find out what form of application you need to use, and provide proof of the loss or expenses incurred, usually in the form of an **affidavit**.
- To lodge an application you must, **before complying with the subpoena**, give notice to the **issuing party** that you will suffer substantial loss or expense in properly complying with the subpoena and include an estimate of the loss or expense.

Useful Links

<https://www.ag.gov.au/legal-system/courts>

<https://victimsandwitnesses.opp.vic.gov.au/witnesses/publications>

<http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/reports-and-publications/publications/corporate-publications/br-served-with-a-subpoena>

<https://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-subp>

<https://www.countycourt.vic.gov.au/going-court/subpoenas>

https://www.lawaccess.nsw.gov.au/Pages/representing/lawassist_readingwritinghome_wysk/Subpoenas.aspx

