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SUBPOENA – FREQUENTLY ASKED QUESTIONS

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WHAT IS A SUBPOENA?

A subpoena is a legal document and written order of the court that requires a person to provide documents to the court or act as a witness (or both); even though that person is not a party to the legal proceeding.

Generally speaking, there are two types of Subpoena which can be issued:

1. Subpoena to attend to give evidence in court as a witness
2. Subpoena to produce documents

A subpoena is the appropriate process to compel a person to attend a trial as a witness, or to produce documents to the court. The service of a subpoena may be an appropriate way to obtain information and documents which are not covered by other schemes such as the *Health Records Act 2001* (Vic) or standard authorities.

Is there a difference between a subpoena and a summons?

In effect there is little difference between a subpoena and a summons – the terminology depends largely on which court has issued the document (a 'summons' is issued in the Magistrates Court whereas a 'subpoena' is issued in the County and Supreme Courts).

While there are some differences regarding rules of service, both a subpoena and a summons is a compulsory order from the court requiring the person to whom it is directed to produce documents and/or attend court to give evidence. In this fact sheet, 'subpoena' will be used to refer to both a subpoena and a summons.

DO I HAVE TO COMPLY WITH A SUBPOENA?

Yes, so long as the subpoena is valid, it must be complied with. For a subpoena to produce documents, the patient's authority is not required prior to releasing health

information to the court. Complying with a valid subpoena is one of the exceptions to the requirement to obtain patient consent prior to the collection, use or disclosure of health information under the *Health Records Act 2001*.

WHAT IS A VALID SUBPOENA?

The form and particulars of a subpoena are governed by the specific Court Rules for each jurisdiction, but remain generally the same. For a subpoena to be valid it **must**:

- Adequately identify the person in possession of the documents or who is requested to attend court or the tribunal to give evidence;
- be stamped with the seal of the appropriate court or tribunal;
- be properly served within the time stated on the subpoena; and
- in most cases, be accompanied by **conduct money**. (rules regarding conduct money vary from court to court, see 'what is conduct money' below for further details).

A subpoena will generally need to include the following particulars to be valid:

- Identification of the person or company to which it is addressed through name, description, or position
- In the case of a subpoena to produce, identify the document or thing to be produced
- The date, time, and place for production or attendance

WHAT IF I HAVE BEEN SERVED WITH AN INVALID SUBPOENA/SUMMONS?

If the subpoena does not comply with all the conditions above, it is invalid and does not need to be complied with. If you are unsure about the validity of a subpoena and whether you need to comply with it, you should seek legal advice.

If you intend not to comply, you must provide notice (in writing) outlining the reasons for your non-compliance to the Registrar or Clerk of the Court and the solicitor who requested the issue of the subpoena. The relevant contact details can be found on the first page of the subpoena.

WHAT RECORDS DO I HAVE TO PROVIDE TO COMPLY WITH THE SUBPOENA?

The subpoena should be read carefully to ascertain the scope of the information requested. If you are served with a subpoena to produce documents, you are required

to provide only those documents specified by the description set out in the subpoena (usually under the heading 'Schedule of Documents').

In both the Supreme Court of Victoria and Magistrates Court of Victoria, you can comply with a subpoena to produce in one of two ways:

1. By attending the Court or other place at the date and time specified for production, and producing both the subpoena and a copy of the document(s) requested.
2. By delivering or sending the subpoena and the document or thing to the registrar (NOT the party requesting the documents) via registered post or courier. If you choose to have the records sent or delivered, you must ensure that the documents are received no less than 2 clear business days before the date specified for attendance and production.

In the County Court of Victoria, you can comply with a subpoena to produce by electronically lodging a copy of the subpoena and a copy of the document using the eCase system either before or at the time specified for production. You can find more information on the eCase system by [clicking here](#).

A photocopy of the documents should be sent, unless the subpoena specifically requests original documents. You should retain a copy for your records if originals are requested. The original or copied documents will be returned to you by the court or tribunal at the end of the hearing or after they have been inspected by the parties.

A 'Subpoena for Production before Registrar' (County Court) or 'Subpoena for Production before Prothonotary' (Supreme Court) enable parties to inspect documents before trial and must be complied with in the same manner as any other subpoena.

HOW DO I COMPLY WITH A SUBPOENA/SUMMONS TO GIVE EVIDENCE?

If you are served with a subpoena to give evidence, you should telephone the solicitors who issued the subpoena to organize the most convenient time for you to give evidence. Courts and tribunals are mindful that doctors must leave their practice to give evidence and will accommodate doctors as far as is practicable.

Courts may give priority to doctors giving evidence to minimize the inconvenience to other patients. The issuing party additionally has the power to alter the date for attendance or production to a later date, if it is justified in the circumstances. You should always communicate your individual circumstances with the solicitor who has requested your attendance and the court so that any inconvenience can be minimized.

Doctors must be aware that the court may not allow the doctor to give evidence out of order, despite inconvenience to the doctor and their practice. Furthermore, the scheduled time for a doctor to give evidence may be delayed once the trial begins due

to practical difficulties beyond the control of the solicitor of the court. The doctor's co-operation in these circumstances is appreciated.

In the event of unavoidable delays or inconvenience caused to a doctor or practice by virtue of complying with a subpoena, a court may exercise its power to order an issuing party to pay any reasonable loss or expense incurred by having to attend or give evidence out of order. Any amount to compensate for reasonable loss or expense will be in addition to any conduct money or witness expense payable to the addressee.

If you are subpoenaed interstate, you may also be able to give evidence via video link. To determine whether you might be eligible to give evidence via video link, you should contact the Court Registrar or Judges Associate.

In exceptional circumstances, you may apply to the court or tribunal to be excused from attendance. The courts are empowered to grant any relief in respect of a subpoena if an application is made by a person with sufficient interest. Such an application should be made in writing to the court/tribunal registry as soon as the subpoena has been issued.

WHAT IF THERE IS SENSITIVE INFORMATION IN THE MEDICAL RECORDS? CAN A SUBPOENA BE CHALLENGED?

The scope of a subpoena to produce documents should not go beyond what is necessary or relevant to the legal proceeding. Generally, a subpoena will request a patient's entire medical file and will not specify separate documents.

If you believe there is sensitive information in the records that is not relevant to the legal proceeding, you can contact the solicitor who issued the subpoena to request them to narrow the scope of the subpoena.

Prior to making an application to the court, it is preferable to try and reach agreement with the issuing party to either set aside or narrow the scope of the subpoena. Any agreement should be confirmed in writing.

In the event you believe that there is sensitive or irrelevant information in the records requested, and you have been unable to reach an agreement with the issuing party, you may apply to the Court to either:

- Set aside or narrow the scope of the subpoena
- Claim Privilege, Public Interest Immunity, or Confidentiality in relation to part or all of the sensitive information

Alternatively, you may wish to send any sensitive material in a separate sealed envelope to the other subpoenaed documents with a covering letter addressed to the Registrar or Prothonotary of the court, entitled 'Objection to Production'. The

Registrar/Prothonotary should then contact you with a date to attend the court and make your objection, which would normally be the date the documents are to be provided to the court. The rules for making an objection vary between different courts and the necessary information should be contained within a notice attached to the subpoena or otherwise available through the website of the relevant court.

In the event that you believe that a subpoena is too broad and would cover confidential communications, you may not be required to produce it. However, confidentiality or privacy are not bases themselves for objecting to a subpoena.

If you intend to either claim privilege or apply to the court to have a subpoena varied or set aside, you should always seek legal advice. The grounds for challenging a subpoena include the following:

- Abuse of process – the subpoena was issued for reasons other than the purpose of obtaining information relevant to the legal proceedings;
- Oppression – where the terms of the subpoena are so wide and insufficiently precise that compliance (including collation and production) would impose an onerous obligation on the medical practitioner, a subpoena may be set aside. This may also occur where it is evident that the issue of the subpoena is a ‘fishing expedition’ for information of possible relevance which may or may not exist.
- Public interest immunity – a subpoena may be set aside where the public interest served by withholding the information is greater than the public interest of following due process. This is usually limited to matters concerning national security or other extraordinary events.

WHAT TIME FOR SERVICE IS REQUIRED FOR A SUBPOENA/SUMMONS?

In both the Supreme Court and the County Court the last day for service of a subpoena is the date falling five (5) days before the earliest date on which an addressee is required to comply with the subpoena. In each case, however, the last date for service is the date specified in the subpoena; irrespective of the court.

In the event that the person a subpoena is addressed to resides interstate, the last day for service will be 14 days before the production date.

The general rule where a specific time is not given for service, is that a subpoena should be served at a *reasonable time* before the date for production of documents or attendance at court of the person served. With what is reasonable factoring things like:

- The occupation of the witness
- The location of the witness

- The degree of preparation required

A subpoena to produce documents may not be deemed reasonable where it is served the day before the documents are due to be produced to the court and where those files are not easily accessible, are voluminous or need to be copied.

Unfortunately, because of the unpredictability of civil proceedings, some doctors are subpoenaed to give evidence at very short notice, for example, only one day before the hearing. Despite the late service, you must comply with the subpoena (unless, for example, you are out of town, and compliance is impossible) in which case you should contact the solicitor who issued the subpoena immediately.

If, however, a subpoena is served after the day specified in the subpoena as the last day for service, you need not comply with it.

WHAT ARE THE METHODS OF SERVICE FOR A SUBPOENA AND A SUMMONS?

The main principle behind service is that you, as a named person on the subpoena or summons, have been put on notice as to the existence of the subpoena.

There are different methods of service depending on whether you have been served with a subpoena or a summons and different rules apply for each court and tribunal. Failure to comply with the procedure for service may invalidate the subpoena. For more details regarding service, please see the AMA Victoria fact sheet titled 'Service of Subpoena'.

WHAT IS CONDUCT MONEY?

Conduct money is served together with a subpoena (or within a reasonable amount of time before the day to attend court or the tribunal or produce documents). Conduct money must cover the reasonable costs incurred as a result of attending court as required by the subpoena, and returning after attending.

Conduct money must be tendered to a witness either at the time of service or alternatively at a reasonable time before the date that attendance is required. You will ordinarily not be required to comply with a subpoena unless conduct money has been provided.

For a subpoena to produce documents, the conduct money should cover the costs of getting the records to the court or tribunal (i.e. postal costs) but does NOT include professional fees. You may charge for the administrative and printing costs, and postage in complying with the subpoena and forward an account (after deducting the conduct money) to the solicitors who issued the subpoena.

Ordinarily, for a subpoena to give evidence, the conduct money should cover the costs of travelling to the Court using public transport. Conduct money is distinct from the

actual cost of coming to court and things like food and accommodation. However, it may be possible to claim these through either negotiating with the issuing party, or obtaining an order from the court that the issuing party pay any reasonable loss or expense incurred as a result of complying with the subpoena.

WHAT FEES MAY I CHARGE FOR MY TIME IN ATTENDING COURT?

You are entitled to fees as an expert witness when preparing for and attending a court or tribunal. This amount should reflect the time you are away from your practice but will not always compensate you for loss of earnings. Each court or tribunal has its set scales of witness expenses. They are not binding, and it is ultimately for you and the solicitor requesting your attendance to negotiate the fees, although the scales serve as a useful guide. Please refer to the AMA Victoria Fact sheet *Scales of Fees for Expert Witnesses* for further information.

WHAT HAPPENS IF A SUBPOENA/SUMMONS IS ADDRESSED TO A DOCTOR NO LONGER AT THE PRACTICE?

If a subpoena to produce documents is addressed to a doctor who is no longer at the practice and those records are NOT held by the practice, you should notify the solicitor who issued the subpoena. If a doctor is no longer at the practice but the patient records are still held by the practice, doctors should notify the solicitor and may have to comply with the subpoena as the practice is in possession of the records.

If a subpoena to give evidence is addressed to a doctor who is no longer at the practice, you should notify the court or tribunal and the solicitor immediately.

WHAT HAPPENS IF I DO NOT COMPLY WITH A SUBPOENA/SUMMONS?

Failure to comply with a subpoena/summons can have serious consequences such as being arrested and can constitute contempt of court. **Under no circumstances should a valid subpoena be ignored.**

If, however, you believe that there is a possibility that a subpoena to appear in court may not be able to be complied with, despite your best efforts (for example if you are on call and you receive an emergency call from the hospital on your way to court), we recommend that you advise the solicitor and the court of this possibility.

SHOULD I TELL MY PATIENT THAT THEIR MEDICAL RECORDS HAVE BEEN SUBPOENAED?

It is always good practice to inform your patient about any request for production of their medical records. You should make it clear that compliance with a subpoena is a legal requirement and you are informing your patient as a matter of courtesy and not for the purpose of seeking consent.

A person who is affected by the production of information pursuant to a subpoena has a right to lodge an objection against the production of his or her information to the court. If you think your patient may have concerns about production, you may provide a copy of the subpoena and suggest he or she seeks legal advice.

Sources:

- *Supreme Court (General Civil Procedure) Rules 2015* (Vic)
- *County Court Civil Procedure Rules 2018* (Vic)
- *Magistrates Court General Civil Procedure Rules 2020* (Vic)
- *Evidence (Miscellaneous Provisions) Act 1958* (Vic)