

# Dealing with subpoenas

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Case histories are based on actual medical negligence claims, however, certain facts have been omitted or changed by the author to ensure the anonymity of the parties involved.

General practitioners frequently receive subpoenas for the production of medical records relating to their patients. This article addresses some of the questions medical defence organisations receive from GPs about how to deal with subpoenas.



## Case history

Dr Price, a GP in a metropolitan general practice, received a subpoena to produce the medical records of one of her patients who was involved in a Worker's Compensation dispute. Dr Price's receptionist was the delegated person in the practice with the responsibility for dealing with subpoenas. The receptionist reviewed the patient's voluminous medical records and the over filled appointment book for that week. She wrote to the solicitor who issued the subpoena as follows:

'Dear Mr Stickler

I refer to the subpoena issued to Dr Price. I am normally fully occupied with other tasks and copying this patient's voluminous medical records might not be possible in the allocated five day time frame. This situation is no doubt different in a legal practice where staff regularly perform photocopying but I am constantly busy with patients and interruptions on the telephone.

I am not sure exactly what documents you require. If you need the whole file I will employ an extra staff member solely for the purpose as I anticipate it will require four hours of continuous work to complete. No doubt you will immediately see why the \$27.00 sent by you to cover costs is unreasonable.

However, we are interested in our patient's wellbeing and therefore we are interested in trying to comply with what is needed. I will instruct the staff member to copy and provide the medical records which relate to the patient's injury, but we will exclude personal medical information that has no relevance to the case. The medical records also include a number of specialists' letters which include the notation: 'Confidential: No reproduction of this letter without the permission of the author'. As I am not clear about the legality of copying these letters, I will not include them. Should you require these letters from me, I expect that you will obtain written authority from the specialists concerned.

Please let me know if this is not satisfactory.

Yours sincerely

Ms Jones'

## Medicolegal issues

By return facsimile, the receptionist received the following response from the solicitor:

'Dear Ms Jones

1. We note the contents of your letter dated 1/4/03.
2. We note that you have been served with more than five working days which is sufficient time for compliance with the subpoena for production of records, as per the Court rules.
3. We also refer you to the Workers Compensation Act 1998 and advise that failure to comply with a subpoena is an offence.
4. If we can be of any further assistance, please do not hesitate to contact our office.

Yours sincerely

Mr Stickler and Associates'

At this time, Dr Price phoned her medical defence organisation (MDO) for advice. In view of the fact that the schedule of documents in the subpoena did not clearly identify the documents to be produced, the MDO's medicolegal adviser contacted the solicitor on Dr Price's behalf. Further advice was then provided to Dr Price. Following receipt of this information, Dr

Price's receptionist sent a photocopy of the subpoena and the relevant documents to the Registrar of the Court.

## Discussion

A subpoena is an order of the court that compels the person to whom it is directed to produce to a court certain documents, and/or attend court and give evidence by a specified date. In some courts, subpoenas are called 'summons to produce documents'. Some of the questions that frequently arise when dealing with subpoenas include:

### ? Do I have to comply with a subpoena? What about patient confidentiality?

A subpoena is an order of the court and should not be ignored. The patient's authority to release the information is not required and compliance with a valid subpoena is one of the exceptions to a medical practitioner's duty of confidentiality.

### ? How should I deal with a subpoena for production of records? What records should I send?

For a subpoena to be valid:

- it must sufficiently identify the party in possession of the documents that have been subpoenaed
- it should be stamped with a court seal
- it should be served within the time noted on the subpoena, and
- in the majority of cases, the subpoena should be accompanied by conduct money. However, the rules about whether conduct money is payable and, if so, how much, vary between the different types of courts.

If the subpoena is not valid because of any of the reasons listed above, it need not be complied with. If the subpoena is not to be complied with, the Registrar or Clerk of the Court should be advised in writing. The reasons for not complying should be given. The solicitor who requested the issue of the subpoena should also be informed. General practitioners should seek legal advice or contact their MDO in this situation.

The subpoena should be read carefully to ascertain its breadth. The medical practitioner is obliged to produce only those documents specified by the description set out in the subpoena. This information is generally listed under the heading 'Schedule of Documents'. The documents should be sent to the court in a sealed envelope with a copy of the subpoena enclosed. Unless the subpoena specifies otherwise, a photocopy of the documents should be sent. If originals are required, the medical practitioner should retain a copy of the documents. The documents should NOT be sent directly to the party requesting the medical records.

### ? What if there is sensitive information in the medical records? Can a subpoena be challenged?

It is preferable to try and reach agreement with the issuing party to either set aside or narrow the scope of a subpoena. Any agreement should be confirmed in writing. If this is not possible, a person can apply to a court to seek to have a subpoena set aside or to have its scope narrowed. Legal advice should be sought in this situation. The grounds for challenging a subpoena include:

- abuse of process – the subpoena was issued for reasons other than the purpose of obtaining information relevant to the legal proceedings
- oppression – a subpoena may be set aside where its terms are so wide and insufficiently precise that compliance (including collation and production) would impose an onerous obligation on the practitioner, or where a subpoena is issued for the purpose of 'fishing' for information
- public interest immunity – if the public interest that would be served by withholding certain documents is so strong that it overrides the public interest in following due process, a subpoena may be set aside. This usually only applies to documents which may affect national security or some other extraordinary public interest.

- privilege – includes legal professional privilege which protects solicitor/client communications and certain professional confidential communications which have been made by patients to health professionals. These are called 'protected confidences'. In some states there is specific legislation that defines confidential communications, eg. in New South Wales 'sexual assault communications privilege'.

### ? Some letters from specialists state that the letter should not be released to a third party without the permission of the author. Should these letters be included when complying with a subpoena?

If the letters are included in the documents specified in the schedule of the subpoena, they should be sent to the court. The permission of the specialist is not required in these circumstances.

### ? Can I charge a fee for photocopying the documents when complying with a subpoena? If so, how much should I charge?

If the conduct money provided with the subpoena does not cover the costs of compliance, the solicitor who issued the subpoena should be advised. By law, medical practitioners should come to their own decision with respect to reasonable fees to charge for compliance with a subpoena. Guidance is available from various professional bodies. For example, guidelines produced by the Law Society of NSW and Australian Medical Association NSW Branch suggest photocopy charges where medical practitioners receive a subpoena. These are:

- charges in respect of documents up to 33 pages, a minimum of \$27.50
- additional charges, where more than 33 pages are provided, \$1.00 per page.<sup>1</sup>

## Risk management strategies

General practitioners frequently express concerns about releasing patients' medical records to third parties because the information included in medical records is of a

sensitive nature. They may be reluctant to release the entire medical record as required by a subpoena because much of the information contained in the record does not appear to be directly relevant to the proceedings. Nevertheless, in many cases a patient's pre-existing medical condition is relevant to the case and any determination of damages. Additionally, in some cases a patient may claim for psychological damage as a result of an injury and so any psychiatric history is also relevant. Unless GPs are familiar with the specific nature of the proceedings, they are not in a good position to assess the relevance of the documents to the matter. If a GP believes that a subpoena requires the production of documents which may be harmful to the patient or other person, or are demonstrably not relevant to the proceedings, they should seek advice. Under no circumstances should a subpoena be simply ignored.

#### SUMMARY OF IMPORTANT POINTS

- A subpoena is an order of the court which compels the person to whom it is directed to produce to a court certain documents, and/or attend court and give evidence.
- Failure to comply with a valid subpoena can have serious consequences. It can constitute contempt of court, the ultimate sanction for which is imprisonment.
- If in doubt about how to deal with a subpoena, seek advice from your medical defence organisation, other professional association or a solicitor.

Conflict of interest: none declared.

#### Reference

1. Medico Legal Relations: A Restatement. The Law Society of New South Wales and Australian Medical Association (NSW) Branch 2001.

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