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Family law matters

A guide for GPs

Background

General practitioners are regularly called upon to assist their patients in family law disputes. They are often served with a subpoena to produce their patient's file, or that of their children, and can be called upon to provide short reports regarding various health conditions of their patients. Doctors can also sometimes become witnesses in family law litigation and the time needed to participate is rarely compensated.

Objective

This article aims to provide GPs with key information in relation to responding to a subpoena and the preparation of reports in family law matters.

Discussion

Careful preparation of subpoenas and reports by GPs who find themselves embroiled in the family law disputes of their patients can save significant time and costs to all involved.

Keywords: medicolegal; jurisprudence; general practice; judicial role

General practitioners are regularly called upon to assist their patients in family law disputes. They are often served with a subpoena to produce their patient's files, or the files of their patients' children, and can be called upon to provide short reports regarding various health conditions of their patients. GPs can also sometimes become witnesses in family law litigation and the time needed to participate is rarely compensated.

Subpoena

The most common involvement of GPs in Family Court proceedings is through receiving a subpoena for the medical records of a patient and/or their children.

A subpoena is, in effect, a court order directing the addressee of the subpoena to either:

- attend court and give oral evidence
- produce documents to the court
- attend court to give oral evidence and produce documents to the court.

Service

The usual requirement of a subpoena is that it be served personally on the addressee. Practically, this means a process server attends the reception area of a practice in front of patients. As a courtesy, many lawyers will contact doctors and ask whether they are prepared to accept service of a subpoena by post or fax. Agreeing to accept service in this manner avoids having process servers attend the practice.

Conduct money

A subpoena must be accompanied by conduct money. Nonprovision of conduct money is a sufficient excuse not to comply with the subpoena, but in such circumstances it would be prudent to seek legal advice before electing not to respond.

The amount of conduct money must be sufficient to meet the reasonable expenses of complying with the subpoena. It is at least \$10 in the Family Court and \$25 in the Federal Magistrates Court. The cost of complying with a subpoena is usually not a professional's time, but their out-of-pocket expenses, including photocopying and travelling from their place of business to the court in order to deliver the documents.

There are additional fees payable where a subpoena is issued for a doctor to attend court and give evidence. A person listed in the subpoena may apply to be reimbursed if they suffer a substantial loss or expense that is greater than the amount of conduct money, or witness fees, payable under court rules.^{1,2}

Objecting to a subpoena

Any person named in the subpoena has the right to object to the subpoena. However, it will rarely be worth a GP's time and money to object. An objection would require that the addressee of the subpoena make an application to court – this usually involves engaging a lawyer and attendance

at court. Also, the grounds on which a doctor could object to a subpoena, including a lack of relevance, are often difficult to prove (as the doctor is not a party to family law proceedings). One of the only grounds available to GPs objecting to a subpoena is on the basis that the class of documents sought in the subpoena is so wide that they cannot be identified, or that significant time would be required to find them – which means that compliance is unreasonably onerous. Patient-doctor confidentiality is not a basis for a subpoena to be objected. Legal advice should be obtained before objecting to a subpoena.

If a person does not comply with the subpoena with which they were served and were given conduct money, a court may issue a warrant for the arrest of the person named in the subpoena. The court can also order the person to pay any costs associated with the noncompliance.

Reports from treating GPs

GPs are regularly asked to provide reports or letters about treatment for a party, or a child. Beran's article (*AFP* April 2011) provides general information about the content and structuring of legal reports.³ Often in family law, the report of a treating GP is in the form of a one or two page letter that answers questions about diagnosis, prognosis and treatment put to the doctor by their patient's lawyer. It is rarely a lengthy medicolegal report, which is usually prepared in family law matters by jointly appointed court experts or single experts.

Reports can only be put into evidence in the form of an Affidavit. This means that if the doctor elects to provide a letter or report outlining the matters above and the matter progresses to trial, they will likely be asked to swear an Affidavit. This will put their qualifications and report before the court, and evidence of a doctor's qualifications will be needed to establish the doctor as an expert and render their opinion admissible in court. The report itself would be annexed with the Affidavit.

General practitioners should be aware that provision of a report or letter, and then an Affidavit, in a family law court means they could be called for cross examination in court. At some point – possibly many months after an Affidavit is sworn – they could be given notice that they are required for cross examination.

The GP can request to attend court by telephone, and this is a question for the judge, not the lawyers in the case. It is usually not granted when the doctor's practice is a reasonable distance from the court as the best evidence is provided when a witness physically sits in court and gives evidence from the witness box.

If a GP wishes to appear in court by telephone, it is important to ask promptly as court rules specify time limits for applications to give evidence by telephone. If the request is made only a few days before a trial, usually lawyers will not be able to have the matter listed for determination before the trial and, as such, doctors will be required to attend personally.

It is worth noting that it is the GP's choice to provide a letter or report in support of a patient's family law case and, as a consequence, to undertake the obligations that follow such a choice. While GPs can be compelled to comply with a subpoena, they cannot be compelled to provide expert evidence in support of patients if they choose not to do this. An option is to decline a request to prepare a report or letter. If a GP does refuse to provide a report, the only remedy available to a patient, or their spouse, in family court proceedings is to subpoena the doctor to attend court and give evidence.

Single/court experts reports

It is important for GPs to understand that if they are providing a report, letter or Affidavit as a treating practitioner, then they are providing their opinion as an expert doctor. They are, therefore, a witness in the case of the person who they have been asked to provide the document for (usually their patient).

Another category of expert witnesses, often constituted by doctors, is the appointment of a specific doctor or specialist as a single or joint expert in the courts referred to as 'court experts' or 'single experts'.

There are strict rules about how experts are appointed as they are intended by the court to be independent experts whose first duty is to provide evidence to the court. There are also strict rules about communications with single experts.

It is worth noting that contact between treating professionals and court experts (instigated by the treating professional) could be viewed poorly by a patient's spouse. For example, this could occur

when the treating doctor is subpoenaed to attend court and is cross examined in an attempt to attack the credibility of the spouse.

Charging for out-of-pocket expenses

While it is usually not cost effective to challenge the quantum of conduct monies furnished under a subpoena, it is appropriate to write to the issuing party and indicate the amount needed for copying expenses so that the GP is not out-of-pocket in their efforts to comply with the subpoena.

A GP's professional time is valuable. Parties often pay their lawyers hourly rates for every attendance on the file. Doctors can become frustrated with the time required to comply with requests from lawyers in family law litigation, but they rarely appear to charge their patients for their time. Have a schedule of fees for the cost of preparing reports, signing affidavits and attending court for your practice. Be upfront with the lawyer, or your patient, about administrative costs and outline the fee you will charge for the work requested.

Many specialists who regularly prepare medicolegal reports in matters do not release their report until their fee has been paid in full. In all circumstances, other than a subpoena, the participation of the doctor is voluntary and they should be adequately compensated for their time.

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