

# Understanding Subpoenas in Healthcare

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A subpoena is a legal document issued by the court at the request of a party either before a hearing or when a case goes to trial. The parties are usually the people directly involved in the court case, so the person bringing the court action, or a party defending a court action. In certain cases, an interested third party can also apply for a subpoena to be issued to investigate a potential claim or action. The subpoena compels an individual to produce documents or give evidence and can be enforced by the courts.

There are three types of subpoenas; a subpoena to:

- produce documents
- give evidence, and
- produce and to give evidence.

## When would I be subpoenaed?

When an individual is subpoenaed, they are deemed to have access or be privy to information or documents that are crucial to the judicial outcome of a case. A party to a case can request a subpoena if a person refuses or is unable of their own free will to give evidence. However, the party requesting the subpoena can also make attempts at getting the required evidence and documents

by asking the person.

## What are the first steps I should take if I receive a subpoena?

Firstly, a subpoena should be read fully and carefully to establish its breadth. Understand whether the subpoena is for you to give evidence or for you to provide patient documents to the court. The person being served the subpoena is obliged to only produce or include information that is set out in the subpoena.

Once you have worked out that the subpoena is valid and that you need to comply with it call MIPS to clarify the first practical step is to contact the party that has issued the subpoena and asked to be kept updated through your best contact number.

So long as the subpoena is validly provided, you must comply regardless of patient consent. You must also comply regardless of your availability (most times) although you can often take steps to work through these issues with the party who issued the subpoena. Look at when and where you need to do the steps involved in the subpoena.

## What about my patient's confidentiality?

A valid subpoena is a legal document and is one of the only exceptions that requires a healthcare professional to override the duty of confidentiality and privacy. A healthcare practitioner does not need the patient's permission to send the required records to the court or to give evidence about their patient's treatment when subpoenaed.

Principal lawyer from Barry Nilsson, Rob Samut & Senior Associate Emma Harman suggest "keeping the subpoena on the patient file and advising the patient of what documents were provided in response to the subpoena. This is good practice and helps keep the patient informed of what is happening with their records and health information."

## How do I comply with the different types of subpoena?

The following actions are specific to the three types of subpoenas:

- Subpoena to produce requires you to produce the document/s or thing/s set out in the schedule to the subpoena
- Subpoena to give evidence requires you to attend court on the date specified on the subpoena to give evidence.
- Subpoena to produce and to give evidence will require you to give evidence in court on a specified date as well as producing the relevant documents set out in the subpoena schedule.

It's important to carefully read the information in the schedule and determine where the documents need to be sent. Usually this will be the court which is hearing the case. In a document produced by 'Federal Circuit Court of Australia' it's noted that one must "not send subpoenaed documents to the person who asked for the subpoena to be issued. The documents must be produced to the Court".

Failure to comply with a valid subpoena can have serious consequences and constitute contempt of court resulting in severe disciplinary actions. Failing to comply with a subpoena can also see a warrant issued for your arrest.

## What is conduct money?

Conduct money is the payment for loss or expense incurred in complying with subpoena and it must be met by the party serving the subpoena (Federal circuit court). The money must sufficiently cover return travel between the court and your place of residence or employment.

If you are not a party in the proceeding and you will incur substantial losses or expenses in complying with the subpoena, you may apply to the Court for an order that the party issuing the subpoena pay you an additional amount in respect to the expenses you incur. Call MIPS to verify as legislation varies between jurisdictions and courts.

## Are there situations where I can object to a subpoena?

If you are the person subpoenaed, you may wish to object to producing the documents. There are different ways to do this in each Court. Often if you wish to object to the subpoena you must complete the notice of objection form attached to the subpoena.

You can often object to the production of documents required by the subpoena under the following circumstances:

- the request is invalid;
- the documents are privileged;
- the terms of the subpoena are too broad.

It is important to note that if you are served with a subpoena that you should get in contact with MIPS in a timely manner before taking any action.

## Are there situations where I don't have to comply with a subpoena?

There are a few situations where you may not have to comply with a subpoena:

- the subpoena was not served on you in accordance with the Court's rules
- conduct money was not provided
- the party issuing the subpoena has no longer need you to comply with the subpoena, or
- the court has made an order.

## What should I do if I am required to give evidence in court because of a subpoena?

Despite being presented a subpoena to give evidence, it doesn't necessarily mean that you'll end up in court. Up to 95% of medical negligence litigation in Australia is resolved before it goes to trial (even cases that go to trial can be settled midway through a case).

Importantly, it is recommended to prepare for a case after receiving a subpoena even though you may not have to give evidence. Here are some tips for preparing to give evidence:

- Expected start times are notoriously inaccurate and can be very hard to predict. Keep updated so you can prepare and plan for if and when a date is set.
- During early discussion with the party issuing the subpoena it is a good opportunity to enquire about witness and conduct money. Payments vary between jurisdictions, but you're generally entitled to reasonable costs of responding to the subpoena and giving evidence (lunch money, transport fees, printing costs of documents etc.).
- In the lead up to court solicitors and barristers will want to help prepare and go through any questions you may have. You may also be able to work out arrangements to give evidence via video (it is important to note that there are different rules in different jurisdictions for this allowance).
- At the day of hearing dress code should be professional as you are in a formal environment and you want to portray yourself as a professional witness.
- Arrive early and review your reports and statements beforehand as well as organising where and who you will be meeting with before court.
- Be honest, tell the truth and speak facts that remain in the scope of your expertise.

## Summary

- Act in a timely manner once you receive a subpoena - it is an important document.
- Under no circumstances should a subpoena be simply ignored.
- Get in contact with MIPS if you receive a subpoena and need any further professional advice.

\*Thanks to the federal system there are different court rules in each court. These differ between state and federal courts, and then also between individual courts in each state or territory (Supreme, Magistrates/ County and District Courts) which often have different procedural rules which set out the requirements for subpoenas. This legislation which sets out the particular form, and basis upon which parties can issue subpoenas and can be quite different.

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