

When the subpoena comes: Managing legal requests for client files

APS Professional Practice



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Responding to requests for documents: Introduction

From time to time psychologists may receive requests from solicitors for copies of documents. A request in a simple letter from a solicitor may not be enforceable, so psychologists need to properly consider the circumstances before responding. Non-compliance with a request contained in a letter from a solicitor is unlikely to have any penalty attached.

Please note that a court summons or subpoena will **always** bear the name and address of the court, be authenticated by the court either with court seal or signature, and contain a last date for service of that document.

It is however, a professional courtesy to respond to a solicitor's letter and the most basic response should express your privacy concerns or objections and include a request for the solicitor to provide:

- an indication of the reason for, or purpose of, the request; and
- details of who will be accessing the information you provide.

A sample letter in response to a legal request for a psychological report can be found on page 9.

If a solicitor's request is stated as being supported by legislation, for example, workers' compensation legislation, then the psychologist should seek independent legal advice before responding.

If the request comes from the solicitor of a former client and is stated as being authorised by the client, then an original, contemporaneous written release signed by the client should accompany that letter, releasing the psychologist from their obligations of privacy and confidentiality to the client. In responding to such a request a psychologist should always discern what documents the client has agreed to release or not release, and should not automatically agree to provide a complete file.

A request from a solicitor is also unlikely to offer to cover the costs of compliance. Psychologists should seek payment for their reasonable costs of compliance with a request for documents and be paid before providing any documents or information in response to such a request.

A subpoena or witness summons is a court order to give evidence or produce documents or both and, if valid, has the endorsement of the court to seek this information. For a subpoena to be "valid" it must be dated, have the name of the court, and be authenticated by the court, either by displaying a court seal or having the signature of a court officer.

Despite the legal status of a subpoena, you are still entitled to express your concerns about release of the information and to ask for an indication of the reason for, or purpose of the subpoena; although asking these questions does not excuse you from complying with a subpoena. Once you have received satisfactory answers, you are still entitled to ask the court to review the material requested and judge whether the highlighted material (your highlighting) can be assessed as not relevant to the proceeding and excluded from the court documentation to protect the client's privacy and the privacy of any third parties whose information is documented in the file.

In some courts (eg., family court), only if the request to withhold information is presented on the court approved form will it be considered. Other letters are ignored. In some courts a request to withhold information must be argued in the presence of the judge. It is important to investigate what the appropriate means of making such a request is for the court settling.

A standard letter to use as the basis of your response to a subpoena can be found on pages 10-11 of this document. This is merely a guide and you will need to adjust it for your own circumstances.

The information provided by the Australian Psychological Society (APS) is general and does not replace the need to obtain independent legal advice specific to the notice received by you. You should seek independent legal advice if you have any concerns about the validity of the notice that you have received or how to comply with that notice.

For members with professional indemnity insurance through AON, you may contact the Legal Hotline service. You must quote your insurance certificate number to access that service.

Responding to a subpoena

The APS recommends that the following process be followed when a psychologist is served with a subpoena.

1. Check whether the subpoena is valid.
2. If valid, write a letter to the **court** or complete the appropriate form, outlining any concerns you may have regarding the negative consequences for the client of disclosure of the material in court and deliver the requested documentation in a separate sealed envelope/container to the court clearly identifying the documents or information you object to producing.
3. In writing to the **court**, incorporate any suggestion which may minimise adverse consequences of disclosure, such as limiting the use of client records or the persons permitted to review them.
4. When complying with a subpoena, make every reasonable effort to inform the client, whilst acknowledging that compliance with a subpoena is a legal requirement.
5. If you have malpractice insurance through AON, you may contact the free legal hotline service and quote your policy number. For contact details in your State or Territory see www.psychology.org.au/Content.aspx?ID=3858
6. If you still have concerns, seek independent legal advice.
7. Write to the solicitor who issued the subpoena requesting recovery of reasonable costs for complying with the subpoena, and if declined, then make application to the court.

Court rules regarding subpoenas

Jurisdiction	Court	Rules	Validity	Served - prior to last date for service*	Costs
<p><i>*Each Subpoena or Witness Summons should have stated on the face of the document the name of the court that has issued it and last date for service of that document. If the document is not served prior to that date, service is ineffectual and the person served is not required to comply with it.</i></p>					
Commonwealth	Federal Court	Federal Court Rules – (commencing 1 Aug 2011) Part 24 Forms 43A, 43B or 43C	Must have court seal or otherwise authenticated by the court	Served personally by giving to addressee or leaving with them	Conduct money (travel costs) for attendance must be paid to the addressee before attending court. Addressee may also make application for reasonable loss or expense incurred in complying with the subpoena (Rule 24.22)
	Federal Magistrates Court	Federal Magistrates Court Rules – Part 15A Forms – Subpoena & Notice of Objection - Subpoena	Dated and signed by the Registrar with court details (top right hand box on front page) completed	Subpoena to attend must be served personally by giving to addressee or leaving with them. Other subpoenas may be served by hand delivery, post or fax	Conduct money (travel costs) for attendance of at least \$25 must be paid to the addressee before attending court. Rule 15A.11 – If, before complying with a subpoena, you give notice to the issuing party of estimated loss and expense to be incurred in complying, and the court is satisfied that substantial loss or expense is incurred, it may make an order for that amount. Covers conduct money and costs of production
	Family Court	Family Law Rules 2004 – Rule 15.17 Form - Subpoena	Dated and signed by the Registrar with court details (top right hand box on front page) completed	Served personally by giving to addressee or leaving with them with a brochure called Subpoena (Information for Named Person) and by explaining nature of document	Conduct money (travel costs) for attendance of at least \$10 must be paid to the addressee before attending court. Rule 15.23 – if appearing in court entitled to witness fee of at least \$75 per day, also may apply to court for reimbursement if substantial loss or expense in complying with subpoena is greater than payment offered. Covers conduct money and costs of production
Australian Capital Territory	Supreme Court and Magistrates Court	Court Procedure Rules 2006 – Part 6.9 Form 6.10	Must have court seal or otherwise authenticated by the court	Served personally by giving to addressee or leaving with them after explaining nature of document	Conduct money (travel costs) for attendance must be paid to the addressee before attending court, also make application (Rule 6611) for reasonable loss or expense incurred in compliance

Jurisdiction	Court	Rules	Validity	Served - prior to last date for service*	Costs
<p><i>*Each Subpoena or Witness Summons should have stated on the face of the document the name of the court that has issued it and last date for service of that document. If the document is not served prior to that date, service is ineffectual and the person served is not required to comply with it.</i></p>					
Northern Territory	Supreme Court	Supreme Court Rules – Order 42 Form 42A	Must have court seal or otherwise authenticated by the court	Served personally by giving to addressee or leaving with them after explaining nature of the documents	Conduct money (travel costs) for attendance must be paid to the addressee before attending court, also make application (Rule 42.11) for loss or expense incurred in compliance
	Local Court	Local Court Rules – Part 23 Form 23B - Witness Summons	Must be signed and have court seal	Served personally by giving to addressee or leaving with them after explaining nature of the documents	No need to comply unless paid reasonable expenses for complying with subpoena (Sect 23.08) and may apply to court for expenses not covered
New South Wales	Supreme, District and Magistrates Courts	Uniform Civil Procedure Rules – Part 33 Form 25 – give evidence Form 26 – production Form 27 – both Form 28 – notice	Must have court seal or otherwise authenticated by the court	Personally; by leaving with an adult at the relevant address; or by ordinary post	Conduct money (travel costs) for attendance must be paid to the addressee before attending court, also make application (Rule 33.11) for loss or expense incurred in compliance
Queensland	Supreme, District and Magistrates Courts	Uniform Civil Procedure Rules – Ch 11, Part 4 Form 41 – production Form 42 – give evidence Form 43 – both	Must have the signature and description of the officer of the court and be dated	Personally; by leaving with an adult at the relevant address; leaving in a place where likely to come to attention; or by ordinary post	Conduct money (travel costs) for attendance must be paid to the addressee before attending court, also make application (Rule 418) for any loss or expense incurred in compliance
South Australia	Supreme and District Courts	Supreme Court Civil Rules - Ch 7, Div 4 District Court Civil Rules – Ch 7, Div 4 Form 26	Must have the court seal or some other form of authentication	Served personally by giving to addressee or leaving with them after explaining nature of the documents	Conduct money (travel costs) for attendance must be paid to the addressee before attending court, also make application (Rule 181) for reasonable loss or expense incurred in compliance
	Magistrates Court	(Civil) Rules 1992 – r 97 Form 1 – Witness summons	Must have court seal	Served personally by giving to addressee or leaving with them	Court may order payment of reasonable expenses on application (rule 97)

Court rules regarding subpoenas (*cont.*)

Jurisdiction	Court	Rules	Validity	Served - prior to last date for service*	Costs
<p><i>*Each Subpoena or Witness Summons should have stated on the face of the document the name of the court that has issued it and last date for service of that document. If the document is not served prior to that date, service is ineffectual and the person served is not required to comply with it.</i></p>					
Tasmania	Supreme Court	Supreme Court Rules 2005 – Part 19, Div 3 Form 37 & 37A	Must have court seal or otherwise authenticated by the court	Served personally by giving to addressee or leaving with them, or offering to deliver or leave with them	Conduct money (travel costs) for attendance must be paid to the addressee before attending court, also make application (Rule 500D) for reasonable loss or expense incurred in compliance
	Magistrates Court	(Civil Division) Rules 1998 - Rule 102 Form 18	Not stated – refer to Supreme Court Rules	Personal service	Not stated - refer to Supreme Court Rules
Victoria	Supreme Court	(General Civil Procedure) Rules 2005 - Rule 42 Form 42A, 42AA	Must have court seal or otherwise authenticated by the court	Served personally by giving to addressee or leaving with them	Conduct money (travel costs) for attendance must be paid to the addressee before attending court, also make application (Rule 42.11) for reasonable loss or expense incurred in compliance. No specific costs requirements for production to the prothonotary (Rule 42A.05)
	County Court	County Court Civil Procedure Rules 2008 Rule 42, 42A Form 42A, 42AA	Must have court seal or otherwise authenticated by the court	Served personally by giving to addressee or leaving with them	Conduct money (travel costs) for attendance must be paid to the addressee before attending court, also make application (Rule 42.11) for reasonable loss or expense incurred in compliance. No specific costs requirements for production to the prothonotary (Rule 42A.05)
	Magistrates Court	(General Civil Procedure) Rules 2010 – Rule 42 Forms 42A, 42AA	Must have court seal or otherwise authenticated by the court	Served personally by giving to addressee or leaving with them	Conduct money (travel costs) for attendance must be paid to the addressee before attending court, also make application (Rule 42.11) for reasonable loss or expense incurred in compliance
Western Australia	Supreme Court and District Court	Rules of the Supreme Court – Order 36B Form 21 Form 22	Must have court seal or be otherwise authenticated by the court	Served personally by leaving with the addressee and if requested, showing a copy of the original	Conduct money (travel costs), also court will usually order that issuing party pay reasonable loss or expenses to be assessed by the court if not agreed by the parties. Otherwise make application (O 36B r 11)
	Magistrates Court	(Civil Proceedings) Rules 2005 – Rule 71 Form 46 Form 47 Form 48	Must have court seal	Served personally by giving to addressee or leaving with them; or by leaving with an adult at the relevant address	Conduct money (travel costs) for attendance must be paid to the addressee before attending court, also make application for reasonable loss or expense incurred in compliance

A model letter for responding to a legal request for a psychological report

Sample letter in response to a legal request for a psychological report

Dear *(lawyer)*

Your request for a psychological report

Thank you for your request of *(insert date)* for the preparation of a report in respect of *(insert client name)* for the purpose of your preparation for court proceedings *(or other purpose for which report is requested)*.

In response to your request I confirm that I am not preparing an expert opinion, and am able to prepare a report addressing the following:

- My qualifications and experience.
- When I first saw the client and the number and frequency of consultations since.
- The nature of the work that I have completed with the client relevant to your request.
- My opinion regarding future treatment of the client.
- Any limitations or qualifications regarding the information reported.

Should you wish to clarify the nature of information that you seek to have included in the report, please provide that request in writing by way of return.

The cost for preparation of this report will be *(insert price)* and payment in full is required before the report will be prepared. An invoice will be prepared and addressed to *(insert name of lawyer/firm)* upon confirmation that you wish to proceed.

The report will be completed within 14 days of receipt of payment.

Yours sincerely,

[A Psychologist]

A model letter for responding to a subpoena

IMPORTANT NOTE – Psychologists should delete any paragraphs that they feel are not applicable to the request for documents set out in the subpoena. For example, delete bullet point 4 if no person other than the client is named or identifiable from the documents to be provided to the court.

Information provided inside square brackets [.....] is provided for your assistance and should be amended or deleted as applicable.

Documents should be provided only to the court. A copy of this letter of objection should be provided to all other parties without the documents being attached.

Please consider that the appropriate use of this template will have greater impact in the court system.

Draft Letter responding to a Subpoena

The Registrar
[### Court]
[Address]

[Date]

OBJECTION TO SUBPOENA

To the Registrar

RE: [RED v GREEN]

Court Ref No: [1234/2008]

OBJECTION TO SUBPOENA for production addressed to [A Psychologist]

Please find enclosed the documents named in the subpoena dated [####] addressed to [####]. These documents are provided to the court to comply with the subpoena.

I object to the inspection of these documents by any party on the following bases:

[Chose only those dot points which are relevant]

- The information contained in the documents has no relevance to the matters in dispute in the proceeding and I am concerned that they have been requested as part of a ‘fishing expedition’.
- The documents requested are sensitive personal health records, the disclosure of which could pose a serious threat to the life or health of the individual, which may include harm to physical or mental health.
- Even if the potential threat to the health of the individual is not such that it could be classified as ‘serious’, the effect on treatment caused by the undermining of the relationship of trust between myself and the client could cause long term or irreparable harm to the wellbeing of the client and the therapeutic relationship, possibly not just with myself as their treating psychologist but with psychologists in general.
- To disclose the information contained in these documents will conflict with my obligation under privacy legislation not to release information that would have an unreasonable impact on the privacy of a person other than the client.
- Psychology is a specialist profession. Reference to the information contained in these

A model letter for responding (cont.)

Draft Letter responding to a Subpoena

documents without explanation of the context in which they are written is unlikely to assist the court, and has the potential to cause a significant miscarriage of justice.

- The documentation requested contains confidential information regarding a sexual offence or offences and production may not be compellable by the party issuing the subpoena without the court's prior intervention. I request that the court have regard to any relevant provisions contained in the appropriate Evidence Act.

In addition, I have expended [##] hours of time reviewing, collating, copying and sending the documentation necessary to comply with the subpoena. The Australian Psychological Society Limited reviews the recommended fees for psychological services annually on 1 July. The recommended fee until XX XXX XXXX for a standard one-hour psychological consultation is \$XXX.XX + GST. As a sole practitioner [Amend if not appropriate], I have no alternative but to take time away from my practice to comply with the subpoena. I request the court make an order for my reasonable costs for compliance with the subpoena as follows:

\$XXX.XX x [##] hours + photocopying at \$0.50 per page = [\$....]

less monies received from the solicitors for the plaintiff/defendant of [\$20]

plus time necessary for attendance at court for the hearing of this objection.

Please notify me of the date, time and place for hearing of this objection.

Yours faithfully,

[A Psychologist]

cc. [The solicitor who prepared the subpoena and any other party for whom you have address details]

Understanding subpoenas and how to respond to them

(Reproduced from *InPsych*, October 2008)

By Jeanette Jifkins

In-house legal counsel, APS National Office

Many psychologists report feeling intimidated, if not overwhelmed, when they receive a letter from a solicitor or a subpoena from a court seeking a copy of their client's file or specific parts of their file. It is understandably daunting on the first occasion, and probably never ceases to feel intrusive and undermining of a practitioner's confidence in the principles of confidentiality and privacy.

The professional advisory and support staff at the APS National Office report that members frequently lack familiarity with legal processes and often express a general lack of confidence in gaining appropriate protection for their clients when legal issues arise.

A set of resources has been developed by the Professional Issues team and legal counsel at the National Office and is available from the APS website to assist psychologists to know how to respond when a subpoena notice is received. The full set of resources can be found on the APS website in the Practitioner resources section. A summary of the key information is presented below.

What is a subpoena?

A subpoena or witness summons is a court order to give evidence or produce documents or both and, if valid, has the endorsement of the court to seek this information. A subpoena is prepared and served/delivered by a solicitor and is done for the purpose of advancing the case of the solicitor's client. It must be endorsed by a court, but is not considered by the court until the hearing of an objection. Subpoenas may be delivered (served) by post, but are more often hand delivered to the person named.

When complying with a subpoena, documents should never be sent to the solicitor who served the subpoena – they should only ever be sent to the court which issued the subpoena.

How do I know if a subpoena is valid?

For a subpoena to be valid it must be dated, have the name and address of the court, and be authenticated by the court, either by displaying a court seal or bearing the signature of a court officer. A letter from a solicitor is not a subpoena or a court summons. If a letter from a solicitor states that documents must be provided in compliance with a particular piece of legislation, then the psychologist should seek further advice before responding.

The subpoena documents only need to be identified as court orders then left at a place of work or residence with a person over the age of 16 years in order to be validly served. Psychologists do not have to agree to accept or even touch the documents for them to be validly served. A subpoena must be served prior to the last date for service written on the subpoena to be valid. If not, the psychologist may not be obliged to comply.

How do I respond to a subpoena but still protect my client's confidentiality?

A valid subpoena must be complied with, but a psychologist is entitled to object to the production of some or all of the documents requested. The psychologist may identify specific documents or information in the client file and ask the court to judge whether the highlighted material can be assessed as not relevant to the proceeding and excluded from the court documentation to protect the client's privacy and the privacy of any third parties whose information is documented in the file.

Understanding subpoenas and how to respond to them (cont.)

Subpoenas are frequently served with only a short time for compliance, but if there is sufficient time and the psychologist feels confident, the psychologist may contact the solicitor who prepared the subpoena in order to understand the purpose of the subpoena and to outline the objection to producing any of the documents requested. The solicitor and the psychologist may negotiate an alteration to the terms of the subpoena, taking into account the psychologist's objections. However, if this is not able to be negotiated, the subpoena must be complied with and the documents must be produced for the court.

To comply with the subpoena and to make a formal objection to the production of the requested documents, the documents should be collated and copied for production, identifying those documents that the psychologist objects to producing. The documents should be placed in an envelope on their own. A separate letter should then be written to the Registrar of the court to accompany the documents, outlining the concerns about the negative consequences of disclosure of that information. That letter should be addressed to the Registrar of the court and be separate from, but prominently attached to, the documents being produced. The purpose of making an objection is to ensure that the court considers the material before it is released to the solicitor to look at. (An example of such a letter is available with the subpoena resources on the APS website.) A copy of the letter of objection, but not the requested documents, should also be sent to the solicitor who prepared the subpoena.

The objection process is instigated by the letter to the Registrar of the court and determined at a hearing in the court. After receipt of a letter of objection and the documents, the court will set a time and place to hear any objections. If the psychologist has not heard from the court or the solicitor who prepared the subpoena about the date for hearing of objections shortly before the date for compliance with the subpoena, the psychologist should contact the court and seek details of the time and date for the hearing. A psychologist does not necessarily need legal representation to appear for an objection hearing, but does need to be clear on the concerns and prepared to put those concerns logically and succinctly to the judge.

Should I tell my client about the subpoena?

Every reasonable effort should be made to inform the client that a subpoena notice has been received requesting the release of information about the client, and that compliance with a subpoena is a legal requirement. It may not always be possible to ensure that the client is informed prior to the return date of the subpoena; this does not excuse compliance with the subpoena.

Should I seek legal advice when a subpoena is received?

If the psychologist has malpractice insurance through Aon, they are entitled to contact the free legal hotline service – 1800 051 133 for advice. The insurance certificate number must be quoted to access the service. Independent legal advice can be sought if there are ongoing concerns.

Am I entitled to recover costs incurred in complying with the subpoena?

Yes. A request for recovery of reasonable costs for complying with the subpoena (e.g., time for preparing correspondence, attendance at court) should be made in writing to the solicitor who issued the subpoena. If the request is declined, an application for recovery of costs can be made to the relevant court. This application can be made at the time of the hearing of the objection. The psychologist should tell the judge at the time of speaking to their objection that they will also be seeking costs. This alerts the court to the matter of costs as soon as possible and may otherwise be overlooked.

The information provided in this article is general and does not replace the need to obtain independent legal advice specific to the subpoena notice received. Independent legal advice should be sought if there are any concerns about the validity of the subpoena notice or how to comply with the notice. Please note that the APS is unable to provide independent legal advice to psychologists.

How to respond to a subpoena - Frequently asked questions

(Reproduced from *InPsych*, June 2011)

By Jeanette Jifkins

In-house legal counsel, APS National Office

The APS National Office Professional Advisory Service receives a large number of enquiries from psychologists unsure about how to respond to a subpoena, indicating that this is a complex area that causes anxiety and uncertainty. Psychologists frequently lack familiarity with the legal processes and obligations associated with subpoenas, and how these intersect with professional obligations to maintain client confidentiality. Resources have been developed over the last few years to assist practitioners in this area, which have been consolidated into a document available on the website (www.psychology.org.au/Assets/Files/When-The-Subpoena-Comes.pdf).

In this article the APS in-house legal counsel, Jeanette Jifkins, revisits the subject of subpoenas to respond to frequently asked questions from members.

What is the difference between a subpoena and a summons?

Sometimes the difference is only in the terminology and not the effect. It does depend on the court and the applicable court rules. Sometimes a summons is issued to involve you as a party to a proceeding. Sometimes a summons is the same as a subpoena, requiring you to attend the court or provide documents. Either way, it is a direction from the court and you need to read it carefully and seek advice if there is anything in it that you do not understand. Many courts require explanatory notes to be included as part of the subpoena document.

How do I know I have received a subpoena?

A subpoena has a particular form approved by the court of issue, is stamped and dated by the court, will have specific notices attached and an 'expiry' date before which it must be provided to you. If the subpoena compels you to attend the court, it must also be accompanied by payment of a reasonable fee to cover your attendance. The website of the court issuing the subpoena will often include general information about subpoenas and sometimes include a copy of what it should look like.

A solicitor's letter is not the same as a subpoena. There are many ways solicitors seek information for the purpose of legal proceedings. A solicitor may ask for documents and provide a release from the client, or may ask for documents relating to a matter that your client is involved in. Some solicitors' letters may quote legislation and state that you are compelled to provide the information. There are some laws, particularly regarding the administration of injury claims, that do require a psychologist to produce documents in response to a letter. 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.

I've been issued with a subpoena and ordered to produce documents.

Do I need to inform my client about this?

It is always a good idea to inform your client about any request for production of his or her information. You should be clear that you are notifying your client by way of courtesy, and not for the purpose of seeking comment or permission. A person who is affected by the production of information pursuant to a subpoena also has a right to lodge an objection against the production of his or her information to the court. If you think your client may have concerns about production you may provide copy of the subpoena and suggest he or she seeks legal advice.

Am I required to release a client file in total if it is against my client's wishes?

Firstly, be sure that you are being requested to produce your 'file' rather than specific information. Many psychologists do not give sufficient thought to what is actually being requested. A subpoena or other request may be limited to specific information and if that is the case, that is all you should be providing.

Secondly, if you are legally compelled to produce documents or information, your client's wishes cannot over-ride your legal obligations. When required to produce documents or information under legislation or as a result of a court order, a psychologist will also be protected by the relevant law from prosecution by the client or disciplinary body.

How do I go about making a request to the court to withhold client information from my file if I believe that it is not relevant to the case?

If you believe that information or documents should not be released then you need to object to their production and it is then up to the court to review the documents before they may be released. You should put 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 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.

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. Your objection will have more credibility if you limit the objection to specific material rather than the whole of what you have been asked to produce.

Resources to assist in this process are available via the APS website from the link in the introduction to this article. A further useful resource is available through the Federal Magistrates Court of Australia and, although only applicable to that court, provides a useful template for writing an objection to production (www.fmc.gov.au/forms/html/subpoena.html).

Is there any general guidance about what I should withhold from the file if I am subpoenaed?

Again, careful consideration should be given to the specific request set out in the subpoena. If the request in the subpoena is too broad, making compliance with the terms too onerous, you can object to producing documents. Usually a request will be limited in scope to a specific date range and specific types of documents or information. If you have documents or information that do not fall within the scope of the request, they should not be produced. You are also not required to create a document in response to a subpoena, however, if you hold information electronically, you will be required to produce that, either in printed form or on CD. Many courts now prefer to receive copies of documents on CD as that reduces their storage issues.

I have been subpoenaed to provide a client file as part of a relationship dispute. I believe some of the information collected as part of treatment is not relevant to the court case. Can I withhold that information and do I need to advise the court that I am withholding part of the file?

Interesting question. This may sound reasonable from the perspective of a psychologist, but from the perspective of a lawyer it seems like the height of arrogance! A subpoena is an order from the court. If you receive an order from the court, you do not tell the court what parts of it you will or will not comply with. If you try, you could be charged with contempt of court.

If, after carefully considering the scope of the request made in the subpoena, you feel that there are documents or information that should not be disclosed, then you make an objection to the production in the way referred to above. If you attempt to withhold information from the court you may be subject to penalty.

I received a subpoena from the Family Court for copies of a child's file. Both parents separately attended sessions relating to the child and the content of the separate sessions has not been shared with the other parent as consent was not given to do so. Do I need to provide notes on the sessions I had with the parents or only those notes taken while working with the child?

The answer depends upon the specific request set out in the subpoena. If you determine that the request means that notes from sessions with both parents should be included and this raises concerns about the impact of disclosure upon the relationships between the parties, then the notes from sessions with either parent can be sealed in separate envelopes. An objection addressed to the Registrar of the court should state your concerns and ask to limit inspection of those documents to the court, or the legal advisors, or only the party who was involved in the session.

The Family Court publishes a brochure about compliance with subpoenas and making objections to production (www.fmc.gov.au/pubs/html/served_with_a_subpoena.html).

I have received a subpoena to produce client records and to appear at a tribunal hearing. I am prepared to provide notes but am I also obliged to appear at the hearing?

There are three types of subpoenas. The first is to appear in court, the second is to appear in court and produce documents, and the third is to produce documents. If you have been asked to attend as well, there is probably a reason why. If you do not comply with the subpoena, you may be subject to penalty.

I have been subpoenaed to appear in court. Can I refuse to answer questions that I think will disadvantage my client?

When you are sworn in as a witness in a court you promise to tell the truth. The truth should not be influenced by what you think may be in favour of, or disadvantage to, your client. 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 keep in mind that your credibility as a witness may be called into question if you are evasive in answering questions.

It is going to take me several hours to respond to the subpoena. How can I be sure that I will be paid for my time?

There are different rules regarding the payment of expenses in different courts. Generally speaking, 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. 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. You may choose to refer to the APS Schedule of Recommended Fees in outlining your expenses.

I have been subpoenaed to appear in court. When I asked about payment I was told that I am a witness as opposed to providing expert opinion, and hence no payment is provided. Is this correct?

'Conduct money', meaning sufficient money to cover the cost of your travel from your home to the court via public transport, must be paid at the time the subpoena is provided to you, otherwise the subpoena is not valid and you do not have to attend.

There are different rules regarding the payment of witness expenses in different courts. Most court websites have a section explaining what expenses a witness can claim. There are times when the lawyer who issues the subpoena may not be clear on what your full entitlements are as a lay witness instead of an expert. Any person who is not a party to a proceeding and is subpoenaed to attend is entitled to recover some witness expenses. Even a person who is a director of a company that is a party to a proceeding and in court everyday can sometimes claim expenses associated with attending the court.

I have received a subpoena for files older than seven years that have been destroyed as per the APS Code. 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, a psychologist can write to the court advising that documents were destroyed and when, in accordance with the established document retention policy of the business. Please note however, that even in line with a document retention policy, a psychologist should not destroy documents where the psychologist knows that those documents could be relevant to an existing or contemplated court proceeding.

The information provided in this article is general and does not replace the need to obtain independent legal advice in specific situations. Please note that the APS is unable to provide legal advice to psychologists, nor is the in-house legal counsel available to answer specific queries. Enquiries regarding professional matters should be directed to the APS Professional Advisory Service by telephoning or emailing the APS National Office.

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