

**When the subpoena comes:**

**Managing legal request for client files**

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# When the subpoena comes:

## Managing legal request for client files

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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.

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.

A standard letter to use as the basis of your response can be found with these website resources. This is merely a guide and you will need to adjust it for your own circumstances.

The information provided by the Australian Psychological Society 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.

## The Role of the Tribunal and the Public Advocate

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** 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 – 1800 051 133, and quote your policy number.
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>					
<b>Commonwealth</b>	Federal Court	Federal Court Rules – Order 27 Form 41	Must have court seal or otherwise authenticated by the court	Served personally by giving to addressee or leaving with them	Conduct money for attendance, or otherwise make application (Rule 27.11 Federal Court Rules) for loss or expense incurred in compliance
	Federal Magistrates Court	Federal Magistrates Court Rules – Part 15, Div 3 Form - Subpoena	Must have court seal	Subpoena to attend and give evidence must be served personally by giving to addressee or leaving with them. Other subpoenas may be served by hand delivery, post or fax.	Rule 15.20 – 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 will make an order for that amount. Covers conduct money and costs of production
	Family Court	Family Law Rules 2004 – Part 15, Div 3.1 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	Rule 15.23 – entitled to payment of reasonable expenses in complying with subpoena and may apply to court for reimbursement if substantial loss or expense in complying is greater than payment offered. Covers conduct money and costs of production
<b>ACT</b>	ACT 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 for attendance, or otherwise make application (Reg 66.11) for loss or expense incurred in compliance

## 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>					
<b>NT</b>	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 for attendance, or otherwise 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
<b>NSW</b>	Supreme, District and Magistrates Courts	Uniform Civil Procedure Rules – Part 33 Form 25 – give evidence Form 26 – production Form 27 – both	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 for attendance, or otherwise make application (Rule 33.11) for loss or expense incurred in compliance
<b>Queensland</b>	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 for attendance, or otherwise make application (Rule 414) for loss or expense incurred in compliance
<b>SA</b>	Supreme and District Courts	Supreme Court Civil Rules - Ch 7, Div 4 District Court Civil Rules – Ch 7, Div 4	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 for attendance, or otherwise make application (Rule 181) for 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>					
<b>Tas</b>	Supreme Court	Supreme Court Rules 2005 – Part 19, Div 3 Form 37	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 for attendance, or otherwise make application (Rule 500D) for loss or expense incurred in compliance
	Magistrates Court	(Civil Division) Rules 1998 - Rule 102	Not stated – refer to Supreme Court Rules	Personal service	Not stated - refer to Supreme Court Rules
<b>Victoria</b>	Supreme and County Court	(General Civil Procedure) Rules 2005 - Order 42 Form 42A	Must have court seal or otherwise authenticated by the court	Served personally by giving to addressee or leaving with them	Conduct money for attendance, or otherwise make application (Rule 42.11) for loss or expense incurred in compliance
	Magistrates Court	Civil Procedure Rules 1999 – Order 17 Forms 17A – 17D	Not stated, although court seal referred to elsewhere in the rules	Personally; by leaving with an adult at the relevant address	No need to comply unless paid reasonable expenses for complying with subpoena (Sect 17.04) and may apply to court for expenses not covered
<b>Western Australia</b>	Supreme and District Courts	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 for attendance, 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	Reasonable expenses for complying with subpoena must be tendered (Reg 71)

## A model letter for responding

**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 objecting to Subpoena #

The Registrar  
[### Court]  
[Address]

[30 June 2008]

#### 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.

## A model letter for responding *(cont.)*

### # Draft Letter objecting to Subpoena # *(cont.)*

- Psychology is a specialist profession. Reference to the information contained in these 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 30 June 2009 for a standard one-hour psychological consultation is \$200.00 + GST. As a sole practitioner [Amend if not appropriate], I have had 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:

\$200 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

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 ([www.psychology.org.au/practitioner/resources/subpoena](http://www.psychology.org.au/practitioner/resources/subpoena)). 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.

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.

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

(Excerpt from *InPsych*, October 2008)

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 a 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.

**By Jeanette Jifkins**

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*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.*



