



## **FACTSHEET: SUBPOENA**

### **What is a subpoena?**

A subpoena compels a witness to provide a court with information or documents on a specific date, time and location under a penalty for failure. It is issued by the court and is served by the sheriff of the court.

A subpoena can be issued in relation to Inquest proceedings (for example, where a practitioner treated a patient who subsequently died and is called upon to give factual evidence to assist the court in making a finding regarding the cause of death), Criminal proceedings (for example, in a case of rape or assault where a practitioner may have been involved in treating the victim), Civil proceedings (for example, where a practitioner may have treated a patient after a motor vehicle accident and the injury is the basis of a subsequent claim for damages) or Professional conduct hearings.

There are two types of subpoenas:

- a) A subpoena *duces tecum* is a type of subpoena that requires the witness to produce a document or documents pertinent to a proceeding. From the Latin *duces tecum*, meaning "you shall bring with you". The first page of the subpoena will display a date before or on which you have to provide the documents or evidence. Usually this refers to original clinical records.
- b) Asking for testimony: Subpoena *ad testificandum* (Latin phrase for "to testify"). This subpoena demands you to appear in person and give oral testimony for use at a hearing or trial. The first page of this subpoena will display a date and time on which you have to appear at the court.

You only have to provide the documents or items that have been asked for and listed in the subpoena. The subpoena will tell you who, where and when to deliver the documents to (for example, the relevant attorney or prosecutor who requested the documents).

Don't confuse a subpoena with a summons. A summons is a legal document that initiates a civil case or a criminal investigation against a particular defendant or accused while a subpoena is issued to a witness. Remember that you are obliged to comply with a properly issued and served subpoena unless the relevant attorney or prosecutor that issued the subpoena has agreed and confirmed in writing that you do not have to comply with it.

### **What to do first?**

When a witness receives a valid, issued and served subpoena, they are obliged to comply with its provisions. If they fail to do so, they can run the risk of being held in contempt of court, with an accompanying fine or even a warrant being issued for their arrest.



1. Immediately contact the claims department of your professional indemnity provider and provide them with a copy of the subpoena. They will deal with the matter on your behalf and shall advise you of the next steps.
2. Check the heading of the document and ensure that it is a subpoena and not a summons or any other legal document
3. Check whether the subpoena refers to the term “duces tecum” or “ad testificandum”
4. Check that the name of the person being subpoenaed is you. If the subpoena doesn’t describe you or your official capacity correctly, you should refuse the subpoena and inform the sheriff
5. If the sheriff insists on leaving a copy, then follow the steps set out below:
6. Take note of the name of the court on the top of the first page
7. Take note of the court date indicated in the subpoena
8. Identify what documents or evidence is required and listed in the subpoena

### **What is the next step?**

When you receive a subpoena, consider if you have any exposure to a claim or complaint. Is there a chance that providing information to the attorney or prosecutor creates a potential risk to be sued yourself? Your professional indemnity provider will discuss the possibility of exposure with you and advise you accordingly. Although you might just be a witness, they will need to ensure that the situation is appropriately managed to avoid or minimize any risk to you.

If you receive a subpoena, contact your professional indemnity provider as soon as possible, as they may be able to provide assistance assessing whether the subpoena is valid, has been correctly issued and served in good time, and then enter into communications with the lawyer for the party who issued the summons. In some situations, this can lead to negotiations to ensure that the practitioner is inconvenienced as little as possible.

Your professional indemnity provider will confirm whether the subpoena is a subpoena duces tecum or ad testificandum. If it is a subpoena duces tecum, your professional indemnity provider will ask you to send them all the records in your possession so that they can assess them against the documents demanded in the subpoena before they deliver them to the requesting attorney or prosecutor. If it is a subpoena ad testificandum, your professional indemnity provider will appoint attorneys to assist in preparing you for your testimony and to appear with you at court on the relevant day, if necessary.



Also, your professional indemnity provider may consider the potential objection to the issuance of the subpoena, if it is for an improper purpose, such as subpoenaing records that have no relevance to the proceedings, or subpoenaing persons who would have no evidence to present, or subpoenaing records or testimony that is confidential or privileged.

Remember that the ethical rules relating to confidentiality must be maintained and therefore you may not provide information relating to the treatment and management of your patient to anyone or any party without the patient's express consent. Similarly, in court, a practitioner may not give evidence regarding the treatment and management details of their patient without express consent – unless they are ordered to do so. This means that when consent is withheld, the practitioner must advise the presiding officer in court of their obligation of confidentiality and of the lack of patient consent, whereupon the presiding officer may order them to proceed to give the evidence.

If a patient subpoenas a practitioner to give evidence as a factual witness, the practitioner is allowed – but not obliged – to consult with him/her in preparation for the trial. Practitioners should therefore be wary of being misled into thinking that they must consult with the party subpoenaing him before and/or during the trial.

Being called upon to give evidence invariably means that a practitioner will have to spend time (and sometimes a considerable amount) away from their practice, and they may also be required to travel.

Unfortunately, recompense for practitioners doing civic duty, as provided for in the relevant legislation and the Rules of Court, is generally minimal. Reimbursements can be sought for reasonable travel expenses, accommodation and meal costs, as well as for lost income; however, it is capped at a modest nominal amount per day. Whatever the reason for a subpoena being issued, the onus on you remains the same: to provide the court with a factual account, free from bias or embellishment.