

Subpoenaed Documents Guidelines

Introduction

These guidelines have been published to assist solicitors who have been served with a subpoena for production of documents. As officers of the court, solicitors have a professional duty to comply with a subpoena. There can be serious consequences if a solicitor does not comply with a subpoena.¹

Validity and Scope

In general, provided it is in proper form and procedural requirements have been met (including the payment of conduct money), a subpoena from a court or tribunal must be complied with unless there are limitations or exceptions applicable.

A subpoena must correctly name the person to be subpoenaed and must direct the recipient to the specific court or tribunal where the documents are to be produced. Further, the subpoena should have a time and date by which the documents are required and allow a reasonable time for compliance.

If the recipient does not object to the order for production, the documents can be sent to the court or tribunal by the specified date. Upon receipt of the documents, the court or tribunal decides which parties (if any) are to have access to the documents.

If a subpoena is technically deficient, for instance, by not being in proper form or by not having been

properly served, it may be possible to avoid the obligations created by the subpoena.

However, if there are no technical deficiencies, the recipient must comply with the subpoena unless an application is made to have it set aside. Some of the reasons for such an application are:

1. The subpoena is an abuse of process in that it was issued for an improper or ulterior purpose.
2. Compliance is an undue or oppressive burden for the recipient (e.g. compliance would subject the recipient to unreasonable expense or require an inordinate amount of time).
3. The subpoena lacks adequate particularity.
4. The request for a subpoena amounts to a “fishing” expedition.²

Client Legal Privilege

The client file might contain documents that are subject to client legal privilege.

A solicitor must, on behalf of a client, object to the handing over of a document for inspection based on client legal privilege unless the client has instructed otherwise. Client legal privilege refers to those confidential communications between solicitor and client made for the dominant purpose

¹ See *R v Daye* [1908] 2 KB 333; *Gibbons v R* (unreported, Court of Appeal (Vic), no 5602/1996, 30 June 1997).

² *Commissioner for Railways v Small* (1938) 38 SR (NSW) 565 at 573 per Jordan CJ

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of either providing legal advice or use in existing or anticipated litigation.³

The fact that a document may be confidential does not automatically mean that it is also privileged. Note that claiming confidentiality is not a basis for refusing to comply with a subpoena.

Upon being served with a subpoena for production of documents in a client file, solicitors should immediately try to contact the client or former client in order to determine whether or not the client wishes to claim client legal privilege, as the privilege is that of the client, not the solicitor.

If the client wishes to claim the privilege, the solicitor should write to the subpoenaing party confirming receipt of the subpoena, advising that:

- the file will be delivered to the court;
- client legal privilege is not waived; and
- the documents are not to be made available for inspection by any party (other than the client/former client) unless ordered by the court or tribunal, or the privilege is waived by the holder of the privilege.

Where the solicitor's client or former client claims the privilege, documents the subject of the subpoena which are privileged should be identified. Having done so, the solicitor should place the privileged documents in a sealed envelope or something similar, together with a covering letter stating that the documents are delivered under the subpoena and that privilege is not waived. This applies even if all the documents are privileged.

The privileged documents, and where applicable, the other subpoenaed documents, should be conveyed to the court or tribunal either by hand or by post. In this regard, solicitors need to familiarise themselves with the applicable rules of the court or tribunal. The solicitor receiving the

subpoena should not simply copy the file and send it to the party who served the subpoena.

Where a solicitor is unable to contact the client or former client in time for compliance with the subpoena, the solicitor should claim privilege as above.

It is then for the court or tribunal to hear the objection and to decide whether the documents may be inspected by the party which sought the subpoena - there is no automatic right to inspect the documents produced.⁴

Refer to the *Inadvertent Disclosure Guidelines* if you accidentally receive subpoenaed documents.

Clarification of Scope of Subpoena and Cost of Compliance

In addition to the above, the Supreme Court of Victoria⁵ has suggested that solicitors should be aware that:

“(a) if there is doubt about the scope of the documents sought by the subpoena, a solicitor, who has been served with a subpoena, should consider contacting the issuing party’s solicitor to resolve any uncertainty;

(b) if a solicitor intends to apply for leave to redact documents or for an order that documents not be inspected on the ground of confidentiality, the solicitor should consider contacting the issuing party and informing it of the claim for confidentiality and a proposed protocol for dealing with the issue; and

(c) if a solicitor intends to charge substantially more than the conduct money for complying with the subpoena, the solicitor should consider contacting the issuing party and informing it of the estimated costs of compliance.”⁶

³ Dal Pont, G E, *Lawyers’ Professional Responsibility*, Sixth Edition, Thomson Reuters (Professional) Australia 2017, p 368

⁴ See *Burchard v McFarlane; Ex parte Tindall and Dryhurst* [1891] 2 QB 241 at 247 – 8, [1891-94] All ER 137

⁵ *Hera Project Pty Ltd v Bisognin* (No 4) [2017] VSC 270 per Riordan J

⁶ If a solicitor anticipates that the costs for complying with the subpoena will be substantially more than any conduct money

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The court pointed out that it has an obligation under s 8 of the Civil Procedure Act 2010 to give effect to the overarching purpose of the Act by encouraging *“discussions between the issuing party and the addressee for the purposes of clarifying the documents relevant to the dispute before the court; expediting the production of the documents; and minimising the inconvenience to the addressee and the costs of compliance.”* The court also noted that *“it is the solicitor for the issuing party who will normally be in the best position to assist the addressee about how to most efficiently comply with the subpoena; and, although the description of the documents cannot be expanded by oral communication, the issuing party can limit the extent of the production required.”*

How can we help you?

Visit the LIV Ethics & Professional Practice Department's website at: <http://www.liv.asn.au/Professional-Practice/Ethics>

These are guidelines only and do not have the force of law. A solicitor must comply with the *Legal Profession Uniform Law Application Act 2014* and the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*.

To discuss concerns about Subpoenaed Documents, contact the Ethics & Professional Practice Department on (03) 9607 9336.

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provided, the solicitor should so advise the issuing party, and, if possible, inform it of the estimated costs of compliance. Solicitors should check the relevant rules of court in relation to subpoenas and compliance with them.