



Subpoenas and You!

This fact sheet summarises the Ask LOIS webinar on this topic, presented by Alicia Jillard, Solicitor, Women's Legal Services NSW on 18 December 2012.

This webinar can be downloaded for free at www.asklois.org.au/webinars/past-webinars.

This fact sheet covers:

- What is a subpoena?
- Why are you being subpoenaed?
- What is the subpoena process?
- What to do if you are subpoenaed
- What grounds are there for objecting to a subpoena?
- What to do if you want to object to a subpoena

What is a subpoena?

- A subpoena is an **order of the court requesting information**
- Pronounced 'sah-pee-nah', it is a Latin term meaning 'under penalty'
- Sometimes also referred to as a summons
- If you do not obey a subpoena you could be charged with contempt of court

What a subpoena asks you to do

A subpoena may ask you to:

- Produce material to be considered in legal proceedings (**subpoena to produce**)
- Give oral evidence in court (**subpoena to give evidence**)
- Produce material AND give oral evidence

Why am I getting asked to provide information?

- The legal system requires access to relevant information so that a court case can be run fairly
- Subpoenas are issued by people involved in a legal case (parties) to get information to support their case
- Relevant information may be held by people who are not otherwise involved in the case ('third parties') and a subpoena allows the court to access that information in deciding a case
- This is why you might be subpoenaed regarding information on one of your clients
- There are laws in place regarding subpoenas that try to balance competing interests, for example, between the need of the court to access information and the privacy and confidentiality of you and your client

How does a subpoena get to you?

1. The first step is usually a **request**:
 - A party to a legal proceeding can request a subpoena to be issued. This does not necessarily have to be done by a lawyer, though usually is
2. The second step is **issuing the subpoena**:
 - This process usually involves a party drafting a subpoena (there are standard forms in most courts) and taking it to the relevant court



- Usually a registrar (a court administrative officer) will issue the subpoena after:
 - They check certain formalities have been complied with
 - They sign and date it
 - The court stamps it (if you receive a subpoena that has not been signed it may not be genuine – seek legal advice)

3. The final step is **serving the subpoena**:

- The subpoena is served to 'the named person' (which will be you if you are being subpoenaed)
- This includes anyone over the age of 16 years at the specified address (your home or work)
- The subpoena is served either in person OR by mail, depending on the type of case and type of subpoena
- If the subpoena needs to be delivered in person, the person delivering the subpoena:
 - Must be over 16 years of age
 - Is sometimes a person who does this for a living (a 'process server')
 - Can be a lawyer
- Generally an affidavit of service (a signed legal document) will be completed after service of the subpoena to confirm service has been completed
- A subpoena will have a date on it by which the named person (you) must be served. If you were not served before this date, seek legal advice as you can question the validity

NOTE: If you try to refuse accepting the subpoena, it can be left at your door and this is generally considered valid service.

Get subpoena ready!

If you have been served, the best thing that you can do is to get prepared!

- It is a good idea to have a clear policy in place at your workplace that tells staff how to handle subpoenas
- Larger organisations are likely to have this in place already
- For smaller workplaces that do not have such a policy in place, it is a good idea to seek the advice of a private lawyer, a Community Legal Centre, or other pro bono legal service in writing one up
- Have a senior employee/coordinator in charge of authorisation
- Include this policy in the induction of new employees
- Have a system in place to flag particularly sensitive notes or notes that may be **legally protected from disclosure** e.g. mandatory child at risk reports or sexual assault counselling records
- Be aware of your **right to object** to a subpoena (seek legal advice to assist you on this)

ALSO if you receive a subpoena regarding a client's information, you should contact them:

- To maintain a relationship of trust with your client
- To help your client to take steps to protect their confidentiality, such as seeking their own legal advice
- To seek their views as to what they want you to do with the subpoena, even if your service is not bound to comply with their wishes

Before you respond to a subpoena

CHECKLIST OF QUESTIONS BEFORE YOU RESPOND:

1. Who is the subpoena addressed to?
2. Who has requested the subpoena?
3. Who has issued the subpoena?
4. At what court and when do you have to provide the documents or appear in court?



5. What exactly is the subpoena asking me for?
6. What does my client want me to do?
7. What do I want to do?
8. What does my Service want to do?
9. Are there any grounds for objecting to the subpoena?
10. Can you get legal advice?

Much of this information is found on the document itself.

REMEMBER: You must 'obey' a subpoena by either objecting to it or agreeing to do what the subpoena asks. Do not ignore it!

Grounds for objecting

Objecting to a subpoena is a valid way to 'obey' the subpoena.

Some general grounds for objecting to a subpoena include:

- It is invalid
- It does not comply with the necessary formalities (time for service, conduct money, manner of service)
- It lacks relevance (lacks a legitimate forensic purpose)
- It is oppressive (it is unclear what you are being asked to do)

There are also specific objections that can be made to protect confidentiality, such as:

- Child at risk reports
- Protections available in criminal proceedings
- Protections available in family law
- Protections where a sexual assault has been alleged in relation to your client. See the Ask LOIS webinar on 'Subpoenas and Sexual Assault Communications Privilege' available at: <http://www.asklois.org.au/webinars/past-webinars>

Objecting to a subpoena

If you think you might have **grounds to object to a subpoena**, you need to seek legal advice to assist you in doing so.

If you are being subpoenaed for information regarding a client, **you can seek legal advice:**

- From a [Community Legal Centre](#), e.g. Women's Legal Services NSW
- Through [pro bono assistance](#), e.g. the Public Interest Advocacy Centre (PIAC) or the Public Interest Law Clearing House (PILCH)
- From Legal Aid NSW (although as an organisation the type of assistance available to you is very limited and generally requires a human rights issue be involved)
- From a Private Solicitor
- From your organisations In-House Legal Team (where applicable)

If your client wants to object to the subpoena, **your client can seek legal advice:**

- From the above options
- From their lawyer if they are already have one
- From the **Sexual Assault Communications Privilege Service** at Legal Aid NSW, if they have been a victim of sexual assault: <http://www.legalaid.nsw.gov.au/what-we-do/civil-law/sexual-assault-communications-privilege-service>