FOLEY'S LIST

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A Guide to Responding to Subpoenas for Production

1. Background

Purpose

The subpoena process is a fundamental and important process allowing potentially admissible evidence to be produced to the court. A subpoena, effectively, has the force of a court order (including where it is not complied with). On terminology, the party that prepares and files the subpoena will usually be called the "issuing party", although the court technically issues it. The person/entity named in the subpoena is the "addressee".

For the purpose of this presentation, we will focus on civil subpoenas in the Supreme Court of Victoria. The above terms are defined in the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) (**Rules**), r 42.01.

The Rules deal with subpoenas to parties and subpoenas to third parties slightly differently (in this context, when I say "third-party" I mean a "non-party" — not a "third-party" on the sense of a third-party notice). Third party subpoenas are dealt with under r 42A of the Rules. For brevity, I have not referenced r 42A throughout this presentation. Rules 42 and 42A operate in a very similar fashion (and, in any event, s 42A.01(2) applies r 42 as necessary). The rules for subpoenas in *criminal* matters are also similar and also expressly cross-refer to these Rules.

Where documents are produced, they are produced to the court. The issuing party will not necessarily be permitted to inspect the documents (or all of the documents), but may seek to once the documents are lodged. This is not automatic. The process for inspecting varies a bit from court to court (some courts requiring the subpoena to be returned before the court and a specific order being made in court).

Role of court

Generally speaking, pursuant to s 8 of the *Civil Procedure Act 2010* (Vic), a court must give effect to the overarching purposes. This includes encouraging discussions between the issuing party and the addressee for the purpose of clarifying the documents relevant to the dispute, expediting the production of the documents, and minimising inconvenience to the addressee and the costs of compliance (see Riordan J in *Hera Project Pty Ltd v Bisognin (No 4)* [2017] VSC 270; at [37]).

A court may play a role in relation to a subpoena (or documents produced subject to a subpoena) at a number of distinct stages of a proceeding (listed below sequentially):

- At the point where the issuing party seeks to issue a subpoena, the court may refuse to issue a subpoena bad on its face.

- If an application to set aside a subpoena as objectionable in form or oppressive is made, the court may grant that application in whole or part.

- The addressee may advance some other "good reason" why documents should not be produced (including that the documents are original title deeds or production would infringe the right against self-incrimination). This is an amorphous set of circumstances which does not necessarily depend upon the addressee attacking the basis of the subpoena itself.

- Assuming documents have been produced, upon the issuing party applying to inspect the documents, the court may qualify or even deny inspection.

- The court may refuse to permit a party to tender a document in evidence, despite it having been produced and inspection permitted.[1]

This presentation will basically concern the second and fourth stages.

What is an objection?

An "objection" refers to one of two principal things which are quite distinct.

There is objecting *to a subpoena* (or part of it) as distinct from *objecting to the inspection* of specific documents produced pursuant to a subpoena.

- An objection to a subpoena is where the addressee (or occasionally other persons) alleges that some/all of a subpoena is bad at law and that it ought to be set aside to that extent.

- Objecting to production is where your client is *not* alleging that the subpoena, itself, is bad at law, but that a particular document (or class) should not be inspected by the issuing party for a recognised reason (such as client legal privilege). This is akin to an objection to production in the discovery process.

Limited use

Privacy and confidentiality are not bases, in themselves, for objecting to a subpoena.

Documents produced may only be used for the purposes of *that proceeding*. They are protected in the same fashion as discovered documents.[2]

[1] See *Roux v ABC* [1992] 2 VR 577, at 595.
[2] See *Harman v Secretary of State for the Home Department* [1983] 1 AC 280 and *Hearne v Street* (2008) 235 CLR 125.

2. What do you do initially when your client is served with a subpoena?

Always properly read the rule named in the subpoena and the subpoena itself.

The Rules vary slightly from court to court and also when naming third-parties. Sone courts have useful informational documents in respect of complying with subpoenas. The forms of subpoenas and third-party subpoenas are also slightly different.

An "addressee" is required to comply with a validly issued subpoena to the extent of *the terms of the subpoena itself* and the relevant Rules of court. No more and no less. Non-compliance is very serious and can amount to contempt of court.

- Is your client properly named?
- Was your client properly served?[3]

  Subpoenas must be served in accordance with the relevant service and execution of process legislation (and objections must also have regard to that legislation).
- Was the subpoena served within time by reference to the terms of the subpoena/Rules?

Who is the addressee?

The Rules are slightly different in respect of third-parties, including that they have an absolute right to the costs of compliance, including seeking legal advice if necessary. Reasonable costs will ordinarily be ordered to be paid by the issuing party. A third-party must seek an order from the court to this end.

If you are a party, you may need to consider how the subpoena interacts with other compulsory processes like discovery. The subpoena may be issued because the issuing party had not sought discovery and the issuing party is trying to play a bit of "catch-up-tennis" – this not an express basis for objection in itself (but such an approach will likely allow objections for oppression etc – see below).

Separately, the addressee may also realise that it ought to have already discovered (and perhaps produced) the documents falling within the subpoena already.

3. What does the subpoena say about compliance and the documents themselves?

Time for compliance

Is the time listed in the subpoena consistent with the relevant legislative provision pursuant to which the subpoena is issued? If they are different there may be a range of reasons, including a "data entry" error. It may also be because the wrong form has been used (hence reading the form and provisions properly).

[3] Informal service may suffice so long as your client has "actual knowledge" of it within the date for service — see r 42.06(3) and 42.12(2) of the Rules.

Produce documents and give evidence?

Be careful to check whether the subpoena *seeks evidence* (oral evidence) as well as the productions of documents. If it is, "conduct money" must be provided a reasonable time before compliance is required — in the absence of this, the addressee need not comply with the subpoena at least as far as giving evidence (see r 42.06(1) of the Rules).

In at least few cases I have been involved in, the issuing party's practitioners have inadvertently sought both when they actually only intended to seek documents (this may be a relief to your client). If this has occurred, this should be confirmed in writing to avoid any confusion later.

Copies versus originals

Does the subpoena seek "originals" or "copies"? Under r 42.06(6) of the Rules, copies can be produced unless the subpoena expressly requires originals.

This is important for two principal reasons:

- If your client does not produce originals (and originals are sought in the subpoena), then the client will have failed to comply with the subpoena (and the practitioner may be directly liable for costs and/or liable in tort to the client).

- If the subpoena seeks originals, then you need to ensure that the relevant court registry (or Prothonotary) is made aware of this when you produce the documents, because some may have the documents destroyed without prior notice to you. Some administrative documents of court in relation to subpoenas actually specifically ask the lodging party to actually declare this (the court will return all documents if you declare at least one is an original)
.

4. Steps after being served

Who do the documents belong to?

Does the addressee simply possess the documents (but there belong or were created by some third party)? Either way, absent a proper objection, the documents must be produced.

If the documents were created (or are owned) by some other person (or if they have some interest in their contents), it may be *prudent* to advise that person (though this will not change the addressee's obligations to the court). That other person may wish to make objections, and/or may be willing to defray the costs of making objections.

Initial contacts/correspondence

If there is any doubt that your client will be able to comply with the subpoena in a timely fashion, it is preferable to raise this as early as possible with the issuing party.

Things to consider referring to in initial contacts/correspondence with or to the issuing party, include:

- You could seek copies of pleadings and/or any orders in the proceeding referring to or dealing with subpoena. The former may assist you to understand whether there is a technical basis for objecting to the subpoena. It may also assist you to understand what documents are sought (and assist you to consider offering to provide a narrower range of documents). Regarding relevant orders, sometimes, there may be court orders requiring subpoenas to be filed by a certain date (and/or subject to leave) — if there is and the instant subpoena was filed out of time (and without leave), the subpoena should not have been issued (see r 42.02(2) of the Rules).

- Foreshadow any likely issues of compliance, including timings for compliance. You may even wish to seek that the date for compliance be adjourned (or foreshadow that this may be necessary) (this is permitted under rr 42.03.1 and 42.06(4)(b) of the Rules).

- Foreshadow objections, including oppression (this could note that the classes of documents are broad/unconstrained and/or note the approximate number of hours/pages that they would cover). The benefit of doing this at this time is that the other side *may* quickly amend or constrain the documents referred to which may obviate the need for your client to provide more settled particulars for a similar result. Any particulars regarding compliance (including estimates of time) referred to at this stage should be qualified — this is so they do not prejudice particulars given later. Similarly, an addressee may foreshadow an objection that there is no "legitimate forensic purpose" (**LFP**) for seeking the documents and request the issuing party to state the LFP.

- You may wish to carbon copy the other party/parties and *even non-parties* in on any correspondence (those people may object to subpoena without the need for you to do so and/or underwrite your objection).

5. What must be done by the date set out in the subpoena (assuming the date is consistent with the empowering legislation etc)

Absent situations where it is literally impossible to comply with any aspect of a subpoena, it is incumbent upon a party to comply to the extent possible, with the subpoena. This is even if an application to have the subpoena set aside in whole (or part) is foreshadowed.

An example of a situation where it would be literally impossible would be where that addressee has no idea, based on the subpoena (and any pleadings etc), what documents fall within it. This might arise because the description of the documents set out in the subpoena, themselves, do not make sense. Theoretically, but less clearly, it may include situations where such a broad class of documents are described that it is not really possible for the addressee to know what to produce and what not to produce.

If some classes (or *even just parts of those classes*) of documents named in the subpoena are capable of being produced (or if some documents within a single but objectionable class), those documents should be produced in compliance with the subpoena. Producing something is better than nothing even if your client is seeking to have some or all of the subpoena set aside. It is quite common for parties to agree to provide some classes of document but raise objections in relation to other classes.

If some/all of the documents are subject to claims (or if your client has not been able to assess them), you should produce the relevant documents to the registry (or Prothonotary) noting on the relevant administrative documents submitted that they are or may be subject to claims. It is prudent to actually *physically place* the documents that are (or may be) subject to claims in sealed envelopes or bags, *clearly marked* to say that the documents *are or may be* subject to objection. There are administrative documents of the court which can also be filled out to this end

Pursuant to r 42.07(3), if more than one document is produced, the Prothonotary may request the addressee to produce a list of documents.

6. Objecting to subpoena itself

Background

The vast majority of disputes regarding subpoenas are resolved without the need for an objection to be actually heard by a court.

Having said that, parties of often put to the trouble of raising objections in correspondence and/or filing applications to object to a subpoena *before reaching* an agreed position.

Where an actual hearing is conducted:

- The parties to the application will make submissions on the law (what the LFP is etc).
- There may also need to be submissions made on the nature of any oppression.
- There may need to be evidence, including affidavit evidence, filed regarding oppression (eg regarding the number of likely documents and person hours to find and assess them etc).
- The court may inspect the documents prior to making any ruling (particularly if there is argued to be no LFP).[4]

[4] The principles governing such application were set out by Derham As J in *Webb v Wheatley* [2015] VSC 153, at [55].

Correspondence setting out the basis for any objection should be sent prior to any formal application being filed.

For costs purposes and in order to try to resolve an objection without undue cost, objections should be properly raised (and characterised) in correspondence before any formal application is filed. Under the cover of any such correspondence, it may *also* be open to a party to propose a different or narrow range of document that the party is willing and able to produce (eg limited by time, hard or digital copy documents/type of document).

Where this is done, the proposing party should do this on the basis the issuing party will "not press" the relevant item number (or class of document described) in the subpoena. If the issuing party agrees to this, that issue will no longer be in dispute. Others may still subsist, of course. The parties may exchange a number of letters hammering out a mutually-acceptable class of documents.

If the addressee has not been able to review the relevant documents at the time of the offer is made (including for privilege), it is *prudent to note this* in the correspondence and say words to the effect that:

> Our client has not yet been able to assess these documents, including for privilege. Subject to this letter and your client's agreement, our client will produce these documents pursuant to the subpoena, but reserves the right to raise objections should they properly arise.

Who can seek to have a subpoena set aside?

Rule 42.04 of Rules provides (r 42A.07 is of similar effect in relation to third-party subpoenas):

> **42.04 Setting aside or other relief**
>
> (1) The Court may, of its own motion or on the application of a party or of any person having a sufficient interest, set aside a subpoena in whole or in part, or grant other relief in respect of it.
>
> (2) An application under paragraph (1) shall be made on notice to the issuing party.
>
> (3) The Court may order that the applicant give notice of the application to any other party or to any other person having a sufficient interest.

A superior court of record also has the inherent jurisdiction to intervene to prevent an abuse of process.

Sometimes, a person (who is not the addressee) may object to a subpoena, including on the basis of the imprecise language of a subpoena or the absence of LFP. There can be good reasons to do so. See, example, *Slaveski v Attorney-General (Vic)* [2013] VSCA 165, in which subpoenas were issued to various judges and officers in circumstances where the issuing party alleged a wide-ranging conspiracy against him. The Attorney-General objected. In that case (and the

decision below), the subpoenas were found to be vague, to seek irrelevant documents, to be oppressive and to be an abuse of process.

While there may be an circumstances where you client may wish to allow *others to object in your client's place*, your client may be the most appropriate person to put objections (eg oppression based on impermissibly broad terms will normally merit affidavit evidence regarding how long it would take the addressee to search for and assess documents). Separately, if the addressee does not object to a subpoena, this may (but may not always) undermine the objection of a third party.

If you are producing documents created or the property of others, it is advisable to inform those persons of the subpoena *in writing* and *well prior* to producing them. They may then opt to make an objection and that will be a matter for them.

Usual bases

Some of the following bases have a degree of overlap. They are also often argued alongside each other.

Abuse of process:

This is argued according to the ordinary definition of what amounts to an abuse of process, including where a subpoena is being used for a purpose ancillary to the proceeding itself.

LFP:

An issuing party must:

- Identify expressly and precisely the legitimate forensic purpose for which access to the documents is sought — this is irrespective of whether other grounds of objection can be made out.

- Essentially, identify how the documents would assist its case.

This is not a particularly demanding test but demands more than simple relevance, at minimum, requiring the issuing party to establish it is "on the cards" or there is a "reasonable possibility" that it will assist its case. It *is permissible* to subpoena documents regarding credit alone (but the credit of the relevant person would also have to be in issue).

A so-called "fishing expedition" (ie seeking documents to see if they are relevant and/or if there is an LFP) or a subpoena for some "abstract purpose" is not permitted.

In correspondence to the issuing party:

- You may request that the issuing party identify the LFP.

- You may even state that the documents could not affect any issues in dispute based on your reading of the court documents (this would generally require

some familiarity with the case and it may also, in the case of a client who is party, unintentionally reveal weaknesses in the issuing party' case which it could then attempt to fix).

- Remind the issuing party that a subpoena cannot be used as a proxy for discovery.

Any such correspondence (and any response/non-response) can be produced in support of an objection).

Oppressive:

For oppression even to arise, the issuing party must satisfy the court that there is a legitimate forensic purpose.

Oppression can be based on the subpoena being expressed imprecisely, unclearly or impermissibly broadly. Examples of this include (these are slightly edited real examples):

- "Documents, including… *[then a narrow category or set of categories]*"

  Note — this technically requires the addressee to produce *any and all* documents possessed by it.

- "Documents in relation to the Commissioner's understanding of the purpose of the Policy."

  Note — this requires the addressee to form a view regarding what the term "in relation to" means (does this mean "about", "expressly referring to", "evidencing"?) and, separately, what "understanding of the purpose" means. A subpoena must identify the documents falling within it with a proper degree of particularity.

Even if the subpoena identifies the subject documents relatively clearly, oppression may also be argued where a subpoena has unduly onerous timelines (having regard to the documents subpoenaed) or would require an unreasonable degree of effort and/or voluminous documents to be assessed (and/or actually produced). This may include circumstances where:

- The addressee is required to make fine judgments about the relevance of documents and/or calling upon the addressee to intimately know the issues in dispute. This is particularly relevant where the addressee is a third-party.

- Irrespective of whether the documents are expressed with a proper degree of particularity, the addressee is required to undertake a search of an excessively large volume of documents.

  Note — *if* the issuing party is prepared to meet the costs of this and the timings allow for proper searches, this *may* undermine such an objection (but the issuing party may have difficult establishing an LFP).

In correspondence to the issuing party, you may set out particulars of the above matters:

- The approximate full-time equivalent hours that it would take to:

    - Conduct searches for and/or assess all of your client's documents, including hard copy and digital files. There could also be references to searches conducted (with search terms identified and the number of "hits" listed).

    - Seek legal advice in respect of producing the documents.

    This is highly relevant for institutional/Government clients.

- Any relevant issues regarding access to the documents, including if they are archived off-site.

- Any particularly resourcing constraints, including staffing and business flows (ie complying with the subpoena would put your client out of business, or in the case of a Government client, preclude it from carrying out its statutory responsibilities).

- For completeness, particularly where the addressee is a party, it may be relevant to note what other documents have been produced as part of other processes, including discovery or prosecutorial disclosure obligations.

This can be produced in and/or supplemented by affidavit material filed in support of an objection.

Some specific scenarios where this comes up

Objections are often made in the following circumstances:

- In criminal matters, where an accused seeks to impugn search warrants or warrants for listening devices so attempt to subpoena the background documents.

    In such situations, in the absence of clear and articulated basis to impugn a warrant (as opposed to a "mere assertion" of bad faith), courts will find there is an insufficient LFP and set the subpoena aside (public interest immunity may also be raised in tandem).[5]

- In criminal matters generally, where the accused seeks documents outside the ordinary range of documents ordinarily produced as part of the prosecutorial disclosure obligations.

[5] See *Commissioner of AFP v Magistrates' Court of Victoria* [2011] SC 3 (J Forrest J), [28]-[30].

- In civil matters involving the State as a party (or where its documents may be relevant even if it is not a party) simply because a poorly-worded subpoena can pick up so many documents. Cases in which conspiracies are alleged are often ones in which subpoena objections are made, particularly where the issuing party is not legally represented.

Costs?

Where a subpoena objection is successful, an addressee, particularly a third-party, will ordinarily be awarded its costs. They can even be fixed on the day (this will save the need for taxation etc). While a third-party will normally be awarded the costs of compliance, it may not be awarded the costs of an unsuccessful objection.

If you do this, you may need to check if there are any relevant scale fees and/or have bills at court setting out the costs, including of that day and any relevant disbursements (including Counsel's fees). See r 42.11 of the Rules.

In appropriate cases, costs can be ordered against an issuing party's solicitors.

7. Objection to inspection

At the time of producing documents pursuant to a subpoena, the addressee (or a party/person with a sufficient interest) may advise the court that it objects to the inspection of one or more documents (see r 42.09 of the Rules and r 42A.08 in relation to third-party subpoena). The addressee must, in writing, set out the basis for the objections. Parties and third parties can also raise objections at this point.

Where this occurs, r 42.09(7) of the Rules precludes a court from permitting inspection and the objection must be referred for hearing and determination (and the issuing party notified so it can also appear and be heard).

Categories of objection include things like:

- Client legal privilege.
- Public interest immunity.[6]
- Medical privilege.

These will be argued according to their ordinary legal principles and limitations. This type of application could be heard at the same hearing as an objection to a subpoena but, ordinarily, there would need to be rulings made on the subpoena objections first.

Costs orders can be made in respect of these objections, too. The costs position will be better for a person who properly sets out the basis for the claim beforehand so as to give the issuing party a meaningful opportunity to not press the subpoena to the

[6] On public interest immunity, see a separate Foley's List CPD presentation delivered by me: *Understanding Public Interest Immunity In The Age Of Lawyer X* (2020) (see https://foleys.com.au/ResourceDetails.aspx?rid=397&cid=58).

extent of the objection. The costs position may also vary having regard to the nature and strength of the objection and the reasonableness of the issuing party in pressing the subpoena.

8. Tips and issues

Is it easier to just give the other side the documents?

The addressee is still required to comply with the subpoena unless the other side formally withdraws it.

Either way (and even if the subpoena is withdrawn or the issuing party agrees to do so), practitioners must be very careful here. Subpoenas are an intrusive power overseen by the courts. Improperly circumventing or misapplying the protections on that power is very serious. While it is not necessarily professionally wrong to request (or give) documents in parallel to a subpoena, any such arrangement must be cognisant of the following matters:

- Any production in parallel can only ever be asked for (and given) on a voluntary basis (ie not under threat). Practitioners should be at pains to ensure that this is clear.

- Such production should be made only where the documents are not ones which might reasonably be the subject of objections by others persons (eg for client legal privilege/public interest immunity) (so as not to render the ordinary objection process nugatory).

- Requests made for this (and the giving pursuant to such a request) should always be expressed to be made (or given) on the basis that the documents will be treated as if they had been produced pursuant to the subpoena (eg limited use etc) (it would be prudent that the issuing party and the addressee exchange correspondence *confirming this* before any documents are actually provided).

In a similar way, it is problematic to allow (even a well-meaning) issuing party to assist with the lodging of documents produced pursuant to a subpoena.

Conduct of this nature may amount to a contempt of court and/or professional misconduct/unsatisfactory conduct.

Do I need to turn up in court if my client's document are lodged in time?

This is generally only an issue in respect of third-party subpoenas.

If the documents are lodged within the timings set out in the subpoena (or any later date agreed by the issuing party), attendance is not usually necessary.

If there is any doubt (and assuming nothing is in dispute in relation to the subpoena), it may be prudent to (in writing) ask the issuing party whether they require attendance and/or simply advising the other party that you do not propose to attend (or that, if you are forced to attend, you will seek your client's costs).

If you wish to seek your client's reasonable costs, including legal costs, you should attend court (in some courts, you may, yourself, need to apply to have the subpoena "returned"). Have a look at any informational documents in the relevant jurisdiction — they will assist with this.

Can I use the documents for a different proceeding if the addressee agrees?

Assuming the documents have not been tendered (other otherwise made publicly available), no.

- The *Harman* obligation is owed to the court. The agreement of the addressee is not sufficient to discharge and subsisting obligation.

- To use the documents, an application would have to be made to the court in which the subpoena was issued and an order made to permitting this. It may also be possible for a fresh subpoena to be filed in the new proceedings.

9. Further reading

LexisNexis, *Civil Procedure Victoria*, [I 42.01] onwards and [I 42A.01] onwards.