

Your guide to subpoenas in family law

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What is a subpoena?

A subpoena is a legal document issued by the Court that compels a person to produce documents or give evidence. Subpoenas are issued at the request of a party to the proceeding. The Court does not take it upon itself to issue subpoenas in a matter.

An example of when you might issue a subpoena in family law, is when the other party is refusing to disclose financial documents, like their bank account statements. You could then issue a subpoena to their bank to produce the bank statements directly to the Court.

It is important to remember that you need to make every attempt possible to get the information or the documents yourself before issuing a subpoena. Subpoenas should only be issued once the discovery process (exchange of relevant documents by the parties, usually through their lawyers) has been exhausted.

Types of subpoenas in family law

There are three types of subpoenas in family law matters.

1. A subpoena for production

A party that has been subpoenaed to produce documents must produce any books, documents or things as described in the subpoena by a specific date and time. The Court will decide when the books, documents or things are to be provided.

It is important to note that the subpoena needs to specifically state what kinds of documents are being requested. So as to allow the party to properly respond to the subpoena, it should not be a vague request. If the request is too broad, the party named in the subpoena can object to providing the documents on this basis.

Instead of physically attending the Court to deliver the books, documents or things, the subpoenaed party may post or deliver them to the 'address of the Court'. The 'address of the Court' will change depending on what Registry the matter is listed in (for example, the Melbourne Registry or the Dandenong Registry).

2. A subpoena to give evidence

A party that has been subpoenaed to give evidence must attend Court on a specified date and time unless they are excused by the Court, or until the hearing of the matter is completed.

3. A subpoena for production and to give evidence

A combination of the two. You should not issue a subpoena both for production and to give evidence if producing the documents on their own would be sufficient to obtain the desired information.

Does the subpoenaed party have to comply?

A subpoenaed party must comply with the subpoena.

A subpoena acts as an Order of the Court and there are serious consequences for failing to comply (for example, the Court may order a non-compliant party to pay costs, issue a warrant for their arrest, or find them guilty of contempt of court).

A subpoenaed party will only **not** have to comply with a subpoena:

- if the subpoena was not served correctly;
- if the person served is under 18 years old; or
- if conduct money was not provided.

Conduct money is explained in more detail below.

If you are not sure how to serve a subpoena properly, we recommend that you seek legal advice.

Limitations and other things to be aware of

There are a number of things to be aware of when issuing subpoenas in family law matters.

Issuing proceedings

A party to a matter can only issue a subpoena if the matter is before the Court. Unfortunately, the Court cannot issue a subpoena beforehand (proceedings have to already be on foot).

Sometimes, if your former partner fails to disclose important documents and information, it may be a last resort to issue proceedings in an effort to compel them to comply with their obligation to disclose. However, there are still steps that should be taken in between issuing proceedings and issuing subpoenas – such as obtaining a court order to compel the other party to provide disclosure. This step (obtaining a court order) should happen after issuing proceedings, but before issuing a subpoena.

Issuing proceedings can be complicated. We recommend that you speak to a lawyer before doing so, to see if there are any alternative solutions.

Self-represented litigants

Self-represented litigants (parties who do not have a lawyer) must get permission from the Court to issue subpoenas.

Due to the complexities of filing, serving and viewing subpoenas, it is recommended that you seek legal representation before attempting to issue a subpoena.

Quantity limit – 5 subpoenas each

A party can only request the issuing of five subpoenas in an application for interim orders (where proceedings have been issued but the matter is ongoing – so matters that are not yet at trial) for production without the Court's permission.

If a party wants to issue more than five subpoenas, they must get permission from the Court before doing so. This rule does not apply to Independent Children's Lawyers. They may request any number of subpoenas without permission from the Court.

Filing the subpoenas

Filing a subpoena is different to filing other family law documents.

You cannot file a subpoena/upload the document onto the online Court portal like you can for all other family law documents. They need to be emailed directly to the relevant Court Registry and,

sometimes a letter in support is required to be emailed directly to the Court at the same time.

Fees, conduct money and witness fees

The Court charges a fee for each subpoena issued (currently $55 per subpoena).

The party subject to a subpoena to produce documents may also require what is known as ‘conduct money’. This is money to meet the reasonable expenses the party will incur through complying with the subpoena; for example, the time it takes for them to identify, copy and collate the requested documents.

Conduct money for a subpoena for production will usually be at least $25.

The party subject to a subpoena to give evidence may also require ‘witness fees’. This is a fee payable to the witness who has to appear in Court. This is usually $75 for each day, or part of a day, that the witness is absent from their place of employment or residence, in order to meet the requirements of the subpoena.

Expert witnesses will sometimes charge a higher fee as agreed.

Using subpoena documents

A party can only use subpoena material for the purposes of the proceeding and cannot disclose the contents or give a copy of the document to anyone else without the permission of the Court.

Objecting to a subpoena

A party can object to documents being produced on the basis that:

- the requested documents are irrelevant;
- the requested documents are privileged (for example, documents resulting from a lawyer/client relationship); or
- the terms of the subpoena are too broad.

If someone objects to a subpoena, the Court will need to decide whether to make an Order to either set aside the subpoena or allow the viewing of the subpoena material. This will usually be done at a Court hearing.

How to view subpoena documents

If the subpoena is for production only (that is for documents to be produced as opposed to someone being subpoenaed to give evidence) and no objections have been filed or upheld, a party to the matter can view the subpoena material by filing a ‘Notice of

Request to Inspect'.

This form can only be filed either on or after the day of production of the subpoenaed material. This is the date the Court has asked the party named in the subpoena to provide the documents.

The process for viewing subpoena material changes depending on what kind of documents there are.

Photocopy access material

Photocopy access subpoena material means exactly that – documents that the parties are allowed to photocopy to take with them for future reference. This kind of subpoena material is usually emailed out to the parties.

Inspection only material

Inspection only material differs from photocopy access in that parties are not permitted to take copies with them. They may only view or 'inspect' the documents in person at the Court.

Examples of inspection only material can include medical records or police/child welfare agency records that relate to the investigation or allegations of child abuse. In order to view inspection only material, the parties' or their legal representatives would have to attend the Court in person to inspect the documents.

However, due to the COVID-19 pandemic, the Court has changed how parties can view 'inspection only' subpoena material. In circumstances where both parties are represented, the subpoena material can be emailed out to the parties' legal practitioners provided that they sign an undertaking (a promise) that they will not make copies of the material and/or send the material to their client and will delete all electronic copies of the documents (usually after 14 days after the conclusion of the matter).

If one of the parties is self-represented, the parties will not be able to have the documents emailed to them. They will be required to attend the Court Registry in person to view the documents.

As such, the request to inspect will be referred to the Court for consideration. The Court will decide whether it is essential that the upcoming hearing of the matter proceed, or if there is no urgency the matter will be adjourned (put off to a later date) until such time as the parties can inspect the subpoena material in person.

It may be that (especially while the physical Court is still mostly closed due to pandemic restrictions), it is easier to have a lawyer on the record so that they can view the subpoena material via email (under strict conditions) and move your matter forward.

How a family lawyer can help

Subpoenas are technical documents that are important to get right in the first instance due to the time and costs associated with them. It is important to note that it is much more difficult for self-represented litigants to issue and view any subpoena material due to the limitations the Court has in place.

If you want to know how subpoenas can help you in your family law matter, contact us for a free consultation. We can assist you in identifying who to subpoena and complete the process of drafting, filing and serving the documents.

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