

Practice Guideline No. 5

Return of a Subpoena to Produce Documents

- Although there is usually no ‘property in a witness’ at large, a person producing documents under Court ordered compulsion, and subject to legal sanction, falls into an entirely different category of witness. That person is required to produce the documents to the Court, **not** to any party to the proceeding. “If a witness produces the documents he produces them to the Court not the parties”: per the NSW Full Court in *Commissioner for Railways v. Small* (1938) 38 SR NSW 564; at page 573.
- The requirements for issuing and complying with subpoenas, and the use of the documents produced in answer to them, are dealt with in the rules of each superior Court. A subpoena for production of documents is returnable at a specific time and place. This is usually the first day of trial, but it may be earlier (such as permitted by SCR 496 (6)).
- The party who issued the subpoena does not have an entitlement to inspect any document that is produced in answer to it. The Registrar may give permission to inspect (such as under SCR 500B (4)). Otherwise, the party must seek the leave of the Court to inspect the document.
- The rules of each superior Court specifically allow a person producing a document to object to it being inspected, and separately allow any party or any person “having a sufficient interest” to object to it being inspected.
- Practitioners should be mindful:
 - (a) of the background and circumstances surrounding the issue of the subpoena, especially where the relevant material, and its admission into evidence, is being or may be disputed;
 - (b) of the fact that the witness (and the documentation) is being produced under legal compulsion and that the witness may well be an extremely reluctant witness; and
 - (c) of the fact that the documents in question may in some cases be the subject of some form of legal privilege that resides in a third party who is not a party to the litigation and who therefore has independent legal rights to be acknowledged and protected.
- Practitioners must be aware that any person in charge of documentation and who is appearing in answer to the subpoena may be totally unfamiliar with Court processes and legal procedures and may be easily influenced by a legal representative in such cases. Practitioners must therefore not seek to take advantage of or exploit this situation to advance their client’s case by accessing the relevant material directly.

- Practitioners must not seek to obtain an advantage for their client by pre-empting the giving of permission to inspect, or the granting of leave by the Court to inspect, by seeking to access the documents directly from the person producing them, whether or not the practitioner has issued the subpoena;
- Practitioners must not mislead a witness by creating the impression, that it is part of the witness's obligation to produce the documents to the Court, and is therefore appropriate, for that witness to show to any party (or their legal representatives) the relevant documents. That is, a practitioner must avoid any premature disclosure to the party issuing the subpoena, or any other party. Should any attempt by the witness be made to make the documents available, the practitioner should refuse and direct the witness to the relevant Registry;
- The Council of the Law Society considers that where a jurisdiction does not have its own rules or procedure dealing with the production of documents under subpoena, practitioners should apply the procedure in the Rules of the Supreme Court.

Approved by the Council on 5 May 2012