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Mental health practitioners and subpoenas

Grace Lawson[1]

Introduction

Psychiatrists, psychologists, social workers and mental health nurses are frequently called to court to give evidence. They may be called to give evidence about a factual issue, such as what they saw or heard. In this instance they are called as lay witnesses. They cannot give a professional opinion about why or how they believe something happened. However, if the practitioner is called as an expert witness, their professional opinion assists the court in making a decision.[2] Expert mental health practitioners may be called to give evidence in any court, tribunal or commission, in a variety of cases. These may range from criminal cases where the decision maker must determine whether a person was of a sound mind when they committed the offence, to civil cases where the decision maker must determine whether the claimant suffered a psychiatric injury as a result of an incident.

Mental health practitioners who are required to give evidence are called by way of a subpoena. Being served with a subpoena is a daunting experience. Opening an envelope and reading an official court document which names the practitioner and requires them to attend court can cause great stress and anxiety. This is generally for two reasons. First, practitioners are concerned that giving evidence about a patient breaches their duty of confidentiality and negatively impacts on the therapeutic relationship they have developed with the patient. Second, they are concerned that giving evidence can lead to potential negligence claims against them. They are not familiar with the legal system, may never have been inside a courtroom, and don't know how to answer questions honestly without incriminating themselves and potentially damaging their career.

The purpose of this paper is to assist mental health practitioners who are served with a subpoena by addressing the following questions:

1. What are the mental health practitioner's relevant professional duties?

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2. What are the obligations arising from subpoenas and how do they impact on these professional duties?
3. What is a subpoena?
4. What are the circumstances in which a mental health practitioner may be subpoenaed?
5. How should a mental health practitioner respond to subpoenas?
6. Are there any limits of compliance requirements?
7. How should a mental health practitioner:
    a. deal with court appearances;
    b. prepare for cross-examination; and
    c. effectively deal with legal counsel?

This paper is primarily focused on practice and procedure in Queensland and the federal jurisdiction. It recognises that each of the jurisdictions referred to, such as the coroner's court, the mental health court, the family law courts, and the state courts, have enacted specific procedures and practice directions that apply to expert witnesses giving evidence under subpoena. Unfortunately, it is beyond the scope of this paper to refer to each and every one of these practice directions. Those jurisdictions most commonly encountered by mental health practitioners will be specifically referred to.

Professional duties of mental health practitioners relevant to subpoenas

A number of National Health Practitioner Boards were established by the *Health Practitioner Regulation National Law Act* 2009 (Qld). These include the following relevant boards:

1. the Medical Board of Australia for the medical profession;
2. the Nursing and Midwifery Board of Australia for nurses and midwives; and
3. the Psychology Board of Australia for psychologists.

Each board's functions include registration of the health professionals, assessment and investigation of any notifications, and conducting hearings about health, performance and professional standards matters in relation to registered practitioners. The boards may also refer matters about health practitioners to tribunals,[3] and develop registration standards and codes and guidelines for practitioners.[4] These standards, codes and guidelines are

[3] *Health Practitioner Regulation National Law Act* 2009 (Qld), s. 35.
[4] Ibid, ss. 38-39.

admissible in proceedings against a health practitioner registered by the board as evidence of what constitutes appropriate professional conduct or practice for the health profession.[5]

Inappropriate professional conduct can either become mandatory notifiable conduct or voluntary notifiable conduct. Mandatory notifiable conduct includes the practitioner placing the public at risk of harm by practising in a way that constitutes a significant departure from accepted professional standards.[6] Voluntary notifiable conduct includes conduct being of a lesser standard than that which might reasonably be expected by the public or the practitioner's professional peers.[7] If the board reasonably believes that the practitioner has behaved in a way that constitutes professional misconduct, unsatisfactory professional performance or unprofessional conduct, the practitioner may be subject to disciplinary proceedings.[8] Some of the more specific standards set for each profession include:

1. Doctors: explicit standards of ethical and professional conduct expected of doctors are set out in the Medical Board of Australia's *Good medical practice: a code of conduct for doctors in Australia*.[9] It provides that a good doctor–patient partnership includes protecting patients' privacy and right to confidentiality, unless the release of information is required by law or by public interest considerations.[10]

2. Psychiatrists: in addition to the above named *Code of conduct for doctors*, psychiatrists must abide by *The Royal Australian and New Zealand College of Psychiatrists Code of Ethics 2010*.[11] It provides that "psychiatrists shall strive to maintain confidentiality of patients and their families",[12] justifying a breach of confidentiality only "on rare occasions in order to promote the best interests and safety of the patient or of other people".[13] If psychiatrists are required to disclose confidential clinical information, they are to "divulge only what is necessary in a given situation".[14] If the psychiatrist is asked to provide a medico-legal report, the limits of confidentiality must be explained to the patient.[15]

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[5] Ibid, s. 41.
[6] Ibid, s. 140.
[7] Ibid, s. 144.
[8] Ibid, ss. 193, 242-243.
[9] Available at: http://www.medicalboard.gov.au/Codes-Guidelines-Policies/Code-of-conduct.aspx.
[10] Ibid: 8.
[11] Available at https://www.ranzcp.org/Files/Resources/College_Statements/code_ethics_2010-pdf.aspx.
[12] Ibid: 8.
[13] Ibid.
[14] Ibid.
[15] The Royal Australian and New Zealand College of Psychiatrists *Professional Practice Guideline 11: Developing reports and conducting independent medical examinations in medico-legal settings*: 3. Available at https://www.ranzcp.org/Publications/Guidelines-for-clinical-practice.aspx.

3. Psychologists and social workers are bound by similar duties of confidentiality.[16] There are circumstances in which confidential information may be disclosed, such as where there is a legal obligation to do so. As with the medical profession, the demands of the legal system sometimes conflict with psychologist's and social worker's ethical obligations to maintain confidentiality of client records.[17]

4. Nurses: historically, there were few occasions when nurses or midwives were subpoenaed to give evidence on the accepted standards in nursing practice. Doctors were the preferred witnesses to give such evidence as recently as the 1970s.[18] However, with nurses becoming a legislated profession, they are frequently subpoenaed as expert witnesses. Nurses may also be called to give factual evidence about an incident involving a patient. Breach of confidentiality, where it was not required by law, constitutes unprofessional conduct and may result in disciplinary proceedings against the nurse. Nurses therefore face the same dilemma as other health professionals when they must divulge confidential information.[19]

Mental health practitioners may be subpoenaed to give evidence either as the patient's treating practitioner, or as an independent expert. Issues of confidentiality specifically arise when the practitioner is subpoenaed as the patient's treating practitioner rather than as an independent expert. When subpoenaed as an independent expert the practitioner is aware that their medico-legal report forms part of the evidence and would be subject to cross-examination. The patient seeing a practitioner for the purpose of such a report is also aware that the report would be disclosed to other parties. However, a treating practitioner doesn't generally expect to be subpoenaed about every patient they consult, and a patient consulting a practitioner on their own initiative also does not expect that the details of the consultations could be disclosed to other parties. Hence, release of confidential information in this setting raises potential problems.

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[16] Australian Psychological Society *Code of Ethics.* Available at http://www.psychologyboard.gov.au/Standards-and-Guidelines/Codes-Guidelines-Policies.aspx. See also Australian Association of Social Workers. 2010. *Code of Ethics*, p. 27. Available at http://www.aasw.asn.au/practitioner-resources/related-documents.

[17] Committee on Legal Issues, American Psychological Association. 2006. "Strategies for Private Practitioners Coping with Subpoenas or Compelled Testimony for Client Records or Test Data". *Professional Psychology: Research and Practice,* 37(2): 215.

[18] Starr, Linda (2011) "Witnesses in health care – what role do they play?" *Australian Nursing Journal,* Vol. 18, No. 9: 30.

[19] Nursing and Midwifery Board of Australia. 2010. *Code of professional conduct for nurses*: 2. Available at: http://www.nursingmidwiferyboard.gov.au/Codes-Guidelines-Statements/Codes-Guidelines.aspx. See also Nursing and Midwifery Board of Australia. 2008. *Code of ethics for nurses.* Available at: http://www.nursingmidwiferyboard.gov.au/Codes-Guidelines-Statements/Codes-Guidelines.aspx.

The duty that all of the mental health practitioners have in common, and which is significantly affected when subpoenaed, is that of confidentiality. This is supported by case law:

> *A doctor is under a duty not to voluntarily disclose, without the consent of his or her patient, information which the doctor has gained in his or her professional capacity save in very exceptional circumstances. … Those "very exceptional circumstances" include circumstances where the information which the doctor obtains is information which, if not disclosed, could endanger the lives or health of others …; where the information which the doctor gains in the relationship is information concerning a dishonesty … incapable of being the subject matter of an obligation of confidence …; where the information is acquired in the course of an actual or reasonably apprehended breach of the criminal law …; or where a statute requires certain types of information to be disclosed.*[20]

In addition to the risk of breaching confidentiality when being subpoenaed, mental health practitioners are also concerned that such release of information damages the therapeutic relationship and impedes the patient's treatment. This will be discussed in the following section.

Obligations arising from subpoenas and how do they impact on professional duties

Mental health practitioners recognise that the duty of confidentiality encourages patients to develop a therapeutic relationship with the practitioner and divulge sensitive information that allows them to be properly diagnosed and treated.[21] When confidentiality is breached, the patient's confidence in the profession is diminished or completely lost. Their treatment may be impeded. Some may lodge a formal complaint against the practitioner.

A complaint of a breach of confidentiality may not necessarily result in the practitioner facing disciplinary proceedings, but it may result in an investigation of the practitioner's conduct.[22] Such an investigation causes significant stress and anxiety. Not only may practitioners have to respond to a complaint, but many fear that the documents they provide, or the testimony they give, could lead to other legal action against them.

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[20] *Kadian v Richards* [2004] NSWSC 382: [44-45].
[21] Bird, Sara. 2003. "Dealing with subpoenas". *Australian Family Physician*, 32(11): 923; Levy John, Galambos Gary and Skarbek Yvonne. 2014. "The erosion of psychiatrist-patient confidentiality by subpoenas". *Australasian Psychiatry*, 22(4): 333.
[22] *Re Australian Nurses Federation* (1990) 38 IR 302.

It has been argued that the number of cases filed each year in civil, family, and criminal courts is so high that every nurse should anticipate having their patient's records subpoenaed at some point during their careers.[23] This argument could be extended to all mental health professional. For example, "since 1801, Australians have witnessed 39 inquiries into Australian psychiatric facilities and mental health services concerning maladministration, including resourcing, overcrowding, abuse, harassment, and inadequate legislation".[24] Each of those inquiries would have heard evidence from a significant number of practitioners employed by those facilities and services. Confidential records of many patients would have been examined. One author states that "in New South Wales at least, patients should probably be routinely warned that everything can end up in the courts and court-like bodies",[25] and that

> *subpoenas appear to be issued by someone with an illegible rubber stamp, on payment of a fee. The discretion exercised by a judge (or judgelike person or body) is hardly a protection: that person or body may decide they can't decide until the party issuing the subpoena has presented the material*.[26]

Psychiatrists have raised similar issues. In fact, there is a high and growing concern amongst Australian psychiatrists that psychiatrist-patient confidentiality is being eroded by the unrestrained and prolific use of subpoenas by legal practitioners to obtain indiscriminate access to confidential psychiatric records.[27] Psychiatrists argue that the current inappropriate and harmful use of subpoenas is insufficiently curbed, that there is unfettered access to these records, and that this is "inconsistent with professional ethical guidelines and risks undermining the provision of quality psychiatric care".[28] They specifically argue that:

- subpoenas are used to obtain highly confidential psychiatric records of third parties such as a family relation, victim or witness, who are not involved in the court case;[29]
- where the records do pertain to a party to the proceeding, the concern is that the notes of treating psychiatrist are not indented to be read by third parties and there is significant potential for misinterpretation;[30]

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[23] Murray, Ruth. 2005. "The subpoena and day in court: guidelines for nurses. *Journal of Psychosocial Nursing*, March: 8.
[24] Walton, Merrilyn. 2013. "Deep sleep therapy and Chelmsford Private Hospital: have we learnt anything?" *Australasian Psychiatry,* 21(3): 206.
[25] Wade, Rob. 2000. "Letter to Editor". *Australasian Psychiatry,* 8(4): 379.
[26] Ibid.
[27] Levy et al., ibid: 332.
[28] Ibid.
[29] Ibid: 333

- some records include the patient's collateral history that had been obtained from the patient's family and other sources sometimes unknown to the patient, and the release of these records carries the risk of the patient being aware of facts which may cause further harm;[31]
- in family law proceedings subpoenas often ask for the entirety of the patient's psychiatric records and some are then used as a fishing expedition to "dig up dirt" on an estranged spouse and use it against them;[32] and
- although psychiatric records relevant to a case may be obtained by other means, such as an independent psychiatric report, this option is rarely utilised because the cost of such a report is significantly higher than the cost of issuing a subpoena.[33]

Most mental health practitioners are well aware of such issues when subpoenaed. Some have already been subpoenaed to either produce their patient's file to the court or attend to give evidence. However, for those who have never been served with a subpoena, some basic questions remain unanswered. The following discussion addresses the basic question of what is a subpoena, and follows by providing guidance on how to deal with one once served.

What is a subpoena?

"Sub poena" is a Latin term that means "under penalty". It originates from English common law where the Lord Chancellor required a person to attend the King or Queen's Court to give evidence or to produce a document.[34] If the person refused to do so, they were penalised. The term "subpoena" is now universally used throughout the English common law world and refers to an order of the court that requires a person to whom it is directed to produce a certain document to the court by a specified date, or to attend in person on a specified date to give oral evidence.[35] A subpoena may require both. It is sometimes referred to as a "summons"[36] or a "notice to attend".

A subpoena is usually issued by a party who considers that specific evidence is necessary for that party to prove their case, or to defend a claim against them. That evidence may also

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[30] Ibid.
[31] Ibid.
[32] Ibid: 332.
[33] Ibid.
[34] Hayes, Paul. 2001. "Subpoenas". *Leo Cussen Institute Legal Professional Development*, August: 1.
[35] Bird, ibid: 923.
[36] Ibid.

be necessary for the court to determine what decision to hand down. To that end, therefore, the subpoena is necessary for the administration of justice.[37] In fact, when a plaintiff objected to the subpoena of his medical records because they were irrelevant to the proceedings and breached the confidentiality of the doctor/patient relationship, Judge Blaxell noted that:

> *As a general principle the objection raised is obviously a sound one. There is a public interest in patients being able to make a full and frank disclosure to their doctors without fear that that information will subsequently be made available to other parties. If the confidentiality of the doctor/patient relationship was not generally respected, the quality of medical assistance and treatment would be likely to suffer. On the other hand, there is also a public interest in parties to an action being able to access all evidentiary materials that are relevant to the issues between them. If this access was to be unreasonably restricted then there would be potential for the quality of justice to suffer.*[38]

A subpoena may be accessed by any person on the respective court's, tribunal's or commission's website. Once it is completed and signed, it is filed in the registry, usually in triplicate. The registry generally inserts the date when the subpoena is returnable, stamps all copies with the court's seal, and returns them to the issuing party. The issuing party serves one copy on the person to whom the subpoena is directed, provides one to the opponent, and retains one on file.

Once the subpoena is stamped with the court's seal it becomes an order of the court. The person being served with a subpoena should never ignore it.[39] Non-compliance with a subpoena without a reasonable excuse is contempt of court and a warrant may be issued by the court for the arrest of the person to whom it was directed. Compliance with a subpoena is "one of the exceptions to a medical practitioner's duty of confidentiality".[40] It is something that is required by a court of law. Therefore, the practitioner does not need to obtain the patient's consent for the release of the file. Even if the patient refuses to give that consent, the practitioner must comply with the subpoena or they risk being found guilty of contempt of court.

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[37] Downes, Kylie. 2006. "Challenging a subpoena". *Proctor*, 26(6): 39.
[38] *Di Nuzzo v Action Food Barns (WA) Pty Ltd and Another* (1999) 21 SR (WA) 382: 383-384.
[39] Bird, ibid: 923; Levy et al., ibid: 332
[40] Bird, ibid: 923.

A mental health practitioner may be served with a subpoena in a number of different circumstances. Those circumstances, and guidance on how to respond to the subpoena, are discussed in the following section.

Circumstances in which mental health practitioner may be subpoenaed

The practitioner may be subpoenaed in state or federal jurisdictions, in criminal or civil matters. The most common matters in which mental health practitioners are subpoenaed are family law proceedings, criminal law proceedings, worker's compensation and coronial inquests.

Family law proceedings

In family law proceedings mental health practitioners may be called to produce documents or to give evidence in both children and property proceedings. In children's matters, the practitioner's evidence may be relevant to determine whether a parent's mental condition is a relevant factor to be taken into account when determining where the child should live. In property matters, one spouse's mental condition may render their future medical needs to be greater than the other spouse's, which would influence how the property pool is to be divided between them.

The practitioner may be subpoenaed to give evidence in the Family Court of Australia, or the Federal Circuit Court of Australia.[41] Part 15.3 of the *Family Law Rules 2004* (Cth) governs subpoenas in the Family Court, and Part 15A of the *Federal Circuit Court Rules 2001* (Cth) governs subpoenas in the Federal Circuit Court. The provisions are similar in both courts.

A person may be served with a subpoena to attend court to give evidence, to produce a document, or both. The subpoena will provide the date for compliance and must include a notice that if it is not complied with, a warrant may be issued for the person's arrest, they may be liable to pay costs resulting from their failure to comply, and they may be subject to other orders, including penalties. Directions are provided on how the person may seek to set aside the subpoena or object to the production of any of the documents. In addition, the subpoena in both courts contains a separate section that permits the person to object to the subpoena. The person wishing to object must still attend court on the specified date. The

[41] The Family Court of Western Australia is a separate court with separate rules, however, because it is governed by the *Family Law Act 1975* (Cth), similar principles apply.

objection may be to the production or to the inspection and copying of some or all of the documents. Reasons for the objection must be provided. The documents will have to be produced to the court to allow the court to rule on the objection. However, in this case, the documents will not be shown to the parties. They will be examined by the court first. Only if the court permits inspection will the documents become available to the parties.

The Royal Australian and New Zealand College of Psychiatrists *Practice Guideline 3: Guidelines For Psychiatrists In Relation To Family Court Proceedings – Australian Family Court,*[42] provides guidelines for psychiatrists required to provide evidence in the family law courts. It states that the role of the psychiatrist is that of an expert on the psychological and emotional welfare of the child, on the psychiatric state of one or more parties (child, parent or carer), or on other pertinent matters, such as the testimony or records of psychiatrists, other health practitioners or other specialist opinion for the Court.[43] Part 15.5 of the *Family Law Rules 2004* and Division 15.2 of the *Federal Circuit Court Rules 2001* set out further details on the role of the expert witness.

Criminal law proceedings

Mental health practitioners may be called to give evidence in the Magistrates Court, District Court, or Supreme Court of Queensland in criminal law hearings. These may include committal hearings where the court must decide if there is sufficient evidence against the accused to commit them to stand trial, at the trial, or in an appeal. The expert's evidence will be relevant to determining questions of the accused person's mental state, for example when raising the defence of insanity. They may also need to provide an opinion on whether or not a convicted offender poses a risk to the community if released on parole, and what parole conditions could address that risk. Experts in this setting generally provide their evidence by way of a medico-legal report, which is then subject to cross-examination at the hearing.

Under rules 29 to 33 of the *Criminal Practice Rules 1999* (Qld), a person may be served with a subpoena to attend court and give evidence or produce a document, or just to produce a document by a specified time. Specific rules are provided where medical, hospital and government records are to be produced to the court in a sealed envelope marked 'court exhibits'. The document is then kept in a safe place, but may be produced to a party for inspection.

[42] Available at https://www.ranzcp.org/Publications/Guidelines-for-clinical-practice.aspx.
[43] Ibid: 2.

The subpoena must also include a notice that the failure to comply with it without lawful excuse is contempt of court and may result in the person's arrest. A separate notice must be served with the subpoena advising the person that they may apply to the court for an order to set aside the subpoena, or to narrow its scope, for example by reducing the number of documents to be produced.

If the application to set aside or narrow the subpoena is successful, the applicant may apply to the court for an order that all or part of the applicant's costs incurred in applying to have the subpoena set aside or narrowed be paid by the party who served the subpoena, or the party's lawyer if the court finds the conduct of the lawyer to have been oppressive, vexatious or an abuse of process. Similar courses of action are also available in other jurisdictions.

Worker's compensation

Worker's compensation matters are heard by the Queensland Industrial Relations Commission and the Industrial Court of Queensland. A party to a proceeding in the Commission or the Court may issue an *Attendance notice to give evidence* or an *Attendance notice for production and to give evidence* pursuant to Rule 58 of the *Industrial Relations (Tribunals) Rules 2011* (Qld). The mental health practitioner may be required to give evidence as a lay person as to factual matters, or as an expert giving an opinion about the claimant's mental condition. Both notices provide that failure to comply without lawful authority or excuse is contempt and may result in the person being penalised or imprisoned.

The person served with the notice may apply to have it set aside. Reasons for the objection must be provided, such as relevance, privilege, oppressiveness (including oppressiveness because substantial expense may be incurred and not reimbursed), or non-compliance with the rules.[44] The objection will be set down for a separate hearing where it will be determined whether the objection should be allowed.

Coronial inquests

Coroners investigate certain deaths including deaths in custody, deaths while the person was in care and there are issues about the care being provided, or if it is in the public interest to do so. Public interest may warrant a death being investigated if there is significant doubt about the cause and circumstances of the death or where an investigation may help prevent

[44] *Industrial Relations (Tribunals) Rules 2011* (Qld), s. 59.

future deaths from occurring. After the initial investigation, the coroner makes written findings about matters such as the identity of the deceased, when, where and how they died, and the cause of the death. The coroner may also decide to hold an inquest.

An inquest is a court hearing conducted by the coroner to gather more information about the cause and circumstances of the death. It is not a trial and there is no jury. Inquests are less formal than conventional court hearings and the coroner can inform themselves in any way they consider appropriate. Although formal rules of evidence do not apply, the coroner must still ensure that the proceedings are conducted fairly. People who have information about the death will be required to give evidence on oath. This includes expert witnesses.

After an inquest the coroner may make recommendations about other issues connected with the death that aim to prevent similar deaths from occurring in the future. Thus the coroner is often said to "speak for the dead to protect the living".[45] For example, recommendations may be made about improving hospital procedures or safety standards. Such recommendations are generally based on the evidence of expert witnesses.[46]

The coroner is prohibited under the *Coroners Act 2003* (Qld) from making any finding that a person is civilly liable or guilty of an offence. The coroner's findings and recommendations cannot be used as evidence in any other court or tribunal. To that end the coroner's investigation is fact-finding and not fault-finding. This is because the focus of the *Coroner's Act* is to help to prevent further deaths from occurring in similar circumstances. However, the coroner is able to refer a matter to the Director of Public Prosecutions or to a disciplinary body for consideration and possible action by them. For that reason appearing before the coroner may make practitioners nervous. Practitioners whose patient dies while in care, for example, are aware that the death has to be reported to the coroner and will be investigated. When they are asked to provide statements regarding such matters, or give evidence at an inquest, they often seek legal advice. Over 90% of cases, however, are finalised after the investigation stage and do not proceed to an inquest.[47]

Under section 16(2) of the *Coroner's Act* the coroner may require any person to provide the coroner with information, statement, report, document or other thing relevant to its

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[45] Burns, Bernie. 2014. "Lessons learned from the coroner's court". *Kai Tiaki Nursing New Zealand*, 20(8): 21.
[46] See http://www.courts.qld.gov.au/courts/coroners-court/common-questions/inquests.
[47] Tang, Jayr. 2013. "The coroner's court and nursing practice". *Australian Nursing Journal*, 21(1): 30; Swain, Phillip. 2005. "No expert should cavil at any questioning': Reports and assessments for courts and Tribunals". *Australian Social Work*, 58(1): 51-53.

investigation of a death or suspected death. The person must comply with the request by the specified date. Failure to do so is an offence, unless the person has a reasonable excuse. *S*ection 16(6) states that "it is, for example, a reasonable excuse for a person to fail to comply with the requirement if complying with the requirement would tend to incriminate the person". If the coroner nevertheless requires the witness to give the information, it is not admissible against them in any other proceeding (except for perjury where false information was given).[48] Section 17A further provides that a person:

- is not liable civilly, criminally or under an administrative process for complying with the request;
- cannot be held to have breached any code of professional etiquette or ethics;
- cannot be held to have departed from accepted standards of professional conduct;
- has a defence of absolute privilege in defamation proceedings for publishing the required confidential information; and
- is not liable to disciplinary action for giving the required confidential information.

In addition to family law matters, criminal law hearings, worker's compensation claims, and coronial inquests, a mental health practitioner may be subpoenaed to produce documents or give evidence in other jurisdictions. These will be referred to in the following discussion.

Use of subpoenas in different proceedings

Other common circumstances in which mental health practitioners may be subpoenaed include personal injury cases in civil courts, guardianship and administration applications, and the Mental Health Court.

Personal injury cases in civil courts

A mental health practitioner may be subpoenaed to give evidence in a personal injuries claim, either as a lay person as to what they saw or heard, or as an expert witness as to the injuries suffered.

Rules 415-420 of the *Uniform Civil Procedure Rules 1990* (Qld) specify the subpoena requirements in the civil jurisdiction of the Supreme, District or Magistrates Courts in Queensland. The subpoena may be issued for production of documents, to give oral

[48] *Coroners Act 2003* (Qld), s. 39.

evidence, or both. The documents to be produced must be adequately described. The subpoena for production must be in the approved form and must bear a notice that failure to comply with it without lawful excuse is contempt of court and may result in the person's arrest.

However, the mental health practitioner may apply to have the subpoena set aside on any sufficient ground including want of relevance, privilege, oppressiveness, including oppressiveness because substantial expenses may not be reimbursed, or non-compliance with the rules.[49] The application will be set down for a separate hearing where it will be determined whether the application to set the subpoena aside should be allowed.

Guardianship and administration proceedings

A mental health practitioner may be requested to produce a copy of their patient's file, or write a report that will assist the decision maker to determine whether a person has capacity to make their own decisions, where an application for administration or guardianship is made. These applications are heard by the Queensland Civil and Administrative Tribunal.

A person making such an application may request information from the practitioner by completing an *Application for notice requiring witness to attend or produce document or thing*. Details of the hearing date, or the document that is to be produced, must be provided. If the Tribunal issues the notice, whether on the application of a person or of its own initiative, the person must comply with it, unless there is a reasonable excuse for non-compliance.[50] An example of a reasonable excuse is if it might tend to incriminate the person. Immunity of participants is also provided for.[51]

Mental Health Court

Under section 257 of the *Mental Health Act 2000* (Qld) the question of a person's mental condition at the time of an alleged offence can be referred to the Mental Health Court. The function of this court on the hearing of this question is to determine whether the person was of sound mind when the alleged offence was committed.[52] In order to determine this

[49] Downes, ibid: 39.
[50] *Queensland Civil and Administrative Tribunal Act 2009*, ss. 97, 214.
[51] Ibid, s. 237.
[52] *Mental Health Act,* s. 267; Scott, Russ. 2009. "The Function of the Assisting Psychiatrists in the Queensland Mental Health Court". *Psychiatry, Psychology and Law,* 16(1): p. 7; Russ Scott. 2009. "Expert Evidence in the Queensland Mental Health Court". *Psychiatry, Psychology and Law*, 16(supplement): 13-17.

question, this court may issue a subpoena to a person to produce a document to the court, or to give evidence. The registrar may issue a subpoena of its own initiative, or at the request of a party to the proceeding. The person to whom the subpoena is directed must comply with it. Failure to comply with the subpoena without lawful excuse is contempt of court.

When a mental health service is being subpoenaed for the production of documents such as the patient's medical records, the administrator of the service must comply with the notice despite any obligation under an Act or law not to do so.[53]

Therefore, in all of the circumstances where a mental health practitioner is subpoenaed to produce a document or to give evidence, the following principles apply:

1. the subpoena, order or notice must be enforceable (filed and served in accordance with the rules and practice directions of the court, tribunal or commission);
2. the subpoena, order or notice must be complied with;
3. failure to comply with it is contempt of court and may result in fines, penalties or a warrant for the arrest of the person;
4. provisions are made to object to the subpoena, order or notice or to apply to have it set aside;
5. a reasonable excuse may be provided for non-compliance in all circumstances although what is considered to be a reasonable excuse varies; and
6. generally some immunity is provided for practitioners who give evidence under a subpoena, order or notice.

Clearly, the obligations which arise from subpoenas impact on the mental health professionals duties to the patient. However, the subpoena must be complied with. In this case, how does a practitioner respond to a subpoena? The following section explains.

Responding to subpoenas

It cannot be stressed enough: a subpoena should never be ignored. This begs the question: how does a practitioner respond to a subpoena? The practitioner has three options:

1. seek further information;

[53] *Mental Health Act,* s.400.

2. comply with the subpoena; or
3. object to the subpoena.

In order to determine whether the practitioner should comply or object to the subpoena, the practitioner should read the subpoena carefully and ask themselves the following questions:

- Am I the person the subpoena is directed to?
- Is the subpoena stamped with a court's seal?
- Is the subpoena served within the time required by the rules of that court?
- Is there a notice included which advises me how to respond to the subpoena?
- Is there a notice included which advices me how to object to the subpoena?
- Is the matter familiar to me and is or was the patient my patient?
- If the subpoena requires me to attend court to give evidence, am I available to attend on the day requested?
- If I am unable to travel to attend in person, can I attend by telephone?
- If the subpoena requires me to produce documents to the court, are the documents in my possession and control?
- Is sufficient time provided for me to comply with the subpoena, or would I have to engage additional staff to collate and photocopy the documents?
- Is there sufficient conduct money included to cover my expenses of attending court in person, to photocopy all of the documents requested, or to engage additional staff to do so?
- Are there any extraordinary circumstances which warrant the requested information remaining confidential, and am I prepared to object to the subpoena on that basis?

If the subpoena does not appear to be an official document, the practitioner should contact the court for confirmation. The practitioner should contact the person issuing the subpoena (and in some instances the court) for further information in the following circumstances:

1. Subpoena is too wide: If the subpoena requests an entire file of the patient, the practitioner should seek written clarification of which documents are required. A simple explanation that the documents are voluminous and the amount of conduct money that would be required to be provided to the practitioner in order to photocopy all of the documents is generally sufficient for the issuing party to narrow down the

documents requested. If the issuing party agrees, an amended subpoena should be served.[54]

2. Insufficient conduct money is provided: the practitioner should write to the issuing party advising how much conduct money is required. If no response is forthcoming within a reasonable time the letter should be followed by a telephone call. If additional conduct money is not provided, the practitioner may either cover the cost of complying with the subpoena and raise the issue in writing and while in court, or object to the subpoena on that basis.[55]

3. Insufficient time is provided to comply with the subpoena: the practitioner should immediately telephone the issuing party and raise this issue. If the issuing party's response is unfavourable, this should be put in writing to the party and to the court. The practitioner should advise the court and the issuing party how much time is required to comply with the subpoena.[56] In the meantime, the practitioner should endeavour to do whatever is possible to comply.

4. Information should remain confidential: the practitioner may object to the subpoena by completing the relevant notice and filing it in court. It may be an objection to the production, copying or inspection of the documents by either or all parties. The documents will still need to be produced to the court to allow it to rule on the objection. It would be prudent for the practitioner to obtain legal advice about the procedure of filing and serving the objection, the cost of arguing the objection, the prospects of success, and any consequences if the objection being denied.[57]

If there are other problems with the subpoena, such as the practitioner not being familiar with the matter at all (perhaps never having treated the patient), or the documents not being in their possession or control, the practitioner should immediately write both to the issuing party and to the court. The subpoena may be withdrawn by the issuing party and the practitioner may not have to file and argue the objection. If the practitioner needs to appear by telephone, this should also be clearly corresponded to the issuing party and to the court, with details of the time and the correct telephone number.

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[54] Bird, ibid: 923.
[55] Ibid.
[56] Ibid.
[57] Ibid.

If the subpoena is otherwise compliant, then the practitioner should forward the requested documents to the court. The documents should never be forwarded to the issuing party.[58] The parties to the proceedings may still need to obtain the court's leave to inspect the documents. Once the practitioner complies with the subpoena, either by providing the documents to the court or attending to give evidence, they are then discharged by the Court. The documents are returned to the practitioner.

However, if the practitioner ignores the subpoena, the hearing will most likely be adjourned to determine whether there is a reason for the non-compliance or to prove that the subpoena was served. In most jurisdictions, repeated non-compliance with a subpoena will result in penalties or costs orders against the practitioner, or a warrant for their arrest. For that reason, if the practitioner has difficulty with complying with the subpoena, it should not be ignored, but action should be taken to address those difficulties, or an objection should be filed. The following section gives some examples of the grounds on which a practitioner may object to the subpoena.

Limits of compliance requirements

As discussed above, if the subpoena is not compliant with the rules, some jurisdictions provide that the practitioner need not comply with the subpoena.[59] It is not recommended that the practitioner should ignore it. The issues should be raised by the practitioner with the court and the issuing party. This may require a formal objection by the practitioner. However, once the subpoena is rectified it is again served on the practitioner. It then has to be complied with. Therefore, objecting to a subpoena simply on the ground that it does not comply with the rules of that court may only be delaying the inevitable. When the non-compliance is rectified, the practitioner will need to comply with the amended subpoena.

There are many other grounds on which a practitioner may object to a subpoena. The ground of legal-professional privilege, abuse of process where a third party notice may be the better alternative or the subpoena appears to be a fishing expedition, the subpoena being against public interest, or waiver of the doctor-patient confidentiality,[60] are largely irrelevant to this discussion and will not be referred to.

[58] Bird, ibid: 923; Hayes, ibid: 15.
[59] Bird, ibid: 923.
[60] Bird, ibid: 923.

Those grounds which are relevant to this discussion are the ground of relevance, oppressiveness, and breach of the doctor-patient confidentiality. These will be discussed next.

1. Relevance

The practitioner may be of the view that the information contained in the requested file does not appear to be directly relevant to the proceedings. Some litigants in family law proceedings, for example, subpoena the opposing spouse's psychiatric records to attempt to prove that they are not a fit parent, or that their conduct led to financial loses. They simply use subpoenas to "disadvantage patients by stigmatising them, because they have consulted psychiatrists".[61] These subpoenas are not being issued for a legitimate forensic purpose, but are used as a mechanism to intimidate, humiliate and stigmatise the opposing spouse.[62]

Practitioners who consider challenging a subpoena on this basis should be cautious. They are not a party to the proceedings and being unfamiliar with their specific nature they should not take the role of assessing the relevance of the documents or why they are being requested.[63] It would be difficult for a practitioner to succeed in such a challenge. In cases where psychiatric records are irrelevant, the opposing spouse or their lawyer may object to the subpoena on the ground of relevance.[64]

This is precisely what occurred in *Theophane & Hunt (Inspection of Medical Records)*.[65] The father issued a subpoena to a hospital seeking production of various documents relating to mental health assessments and treatments of the mother. The mother challenged the subpoena on the basis that some documents were not relevant to the proceedings, and that permitting the father to inspect them would be an undue intrusion into her privacy. The Judge needed to examine the material in question. One of the documents which the father specifically sought was any file relating to a pregnancy being terminated by the mother. The father argued relevance on the basis that such termination would show that the mother is prepared to indiscriminately harm others, and hence poses a risk to the child. However,

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[61] Levy et al., ibid: 332.
[62] Ibid: 335.
[63] Bird, ibid: 924.
[64] Levy et al., ibid: 332.
[65] [2014] FamCA 707. See also *Kirby v Kirby* [2014] FCCA 2332 where the mother was unsuccessful in her objection on the ground that the subpoena was a fishing expedition and the father was permitted to inspect her medical records. In *Duffy v Gomez (No. 2)* [2015] FCCA 1757 it was held that there is no recognition of a clinician-patient relationship and professional confidence above and beyond the application of the test of relevance [46]. Relevance was therefore the primary consideration in the objection to the subpoena.

Justice Tree found the argument "wholly unsustainable" and held that there is "no sensible connection between the termination of a pregnancy on the one hand, and a risk of actual physical harm to a child in the mother's care on the other".[66] Any records which included any reference to a termination of a pregnancy by the mother were held to be wholly irrelevant to these proceedings. The father was not permitted to inspect them. He was, however, permitted to inspect documents which related to the mother's mental health. Those documents were relevant because they assisted the Judge to determine whether the mother's mental health history posed a risk of harm to the child when in her care.

2. Oppressiveness

The subpoena may be oppressive if it is too wide and insufficiently precise so that compliance with it would impose an onerous obligation on the practitioner or their practice.[67] The practitioner may lack the man-power to collate and photocopy the documents, or there may be concern that the substantial expense of complying with the subpoena may not be reimbursed.[68] Medical centres are often served with subpoenas that require the production of the patient's entire file.[69] If the issuing party refuses to provide sufficient conduct money or to clearly identify the documents required, the practitioner may object to the subpoena. A subpoena may be set aside on these grounds. The practitioner will still need to attend court and argue the objection. Although this will require time, an order that the subpoena be set aside, amended, or that sufficient conduct money be provided, may solve the practitioner's dilemma and enable the practitioner to then comply.

3. Breach of doctor/patient confidentiality

This objection is generally raised if the practitioner believes that disclosing the patient's file could be harmful to the patient because it would violate the therapeutic relationship with their mental health practitioners. In the alternative, the practitioner or the patient's lawyer may argue that it could be harmful to another person.

[66] Ibid: [5].
[67] Bird, ibid: 922; Downes, ibid: 40.
[68] Bird, ibid: 922.
[69] Ibid.

In a NSW case of *R v Kelsall (No 3)*[70] the defendant was accused of indecent assault and murder. The accused made certain statements to a general practitioner, a psychiatrist, and a psychologist before the alleged murder. Justice Hulme had to determine whether those statements were relevant and therefore admissible. His Honour held that admitting the evidence would not be harmful to the accused in the sense that it would violate the therapeutic relationship, because the relationship was no longer ongoing.[71] His Honour referred to the decision in *R v Leung*[72] where an objection was raised to the admissibility of the evidence of a clinical nurse specialist who assessed a person accused of manslaughter. The accused was hysterical when taken into custody and police summoned the nurse to assess his risk of self-harm. The statements made to the nurse were excluded because the nurse was a "confidant ... acting in a professional capacity and was under an express obligation not to disclose the contents of the interview, save for her assessment of the accused's risk of self-harm".[73] Justice Price stated that:

> *Ensuring that a person in custody is not a risk of self-harm is a matter of importance not only to the police force but to our society as a whole. It is fundamental to the reliability of the assessment that accused persons be able to speak freely to the health professional without fear that their conversation might be used in evidence against them. To be balanced against that consideration is the public interest in solving serious crimes such as manslaughter. However, it is unlikely that accused persons in custody would co-operate in a mental health assessment if they understood that the interview was not to be confidential*.[74]

The evidence of the clinical nurse specialist was excluded in that decision. Justice Hulme admitted the evidence of the general practitioner, psychiatrist and psychologist in his decision on the basis that the statements the accused made before the alleged murder fell outside the scope of what is required to be kept confidential, and patients are usually informed about this.[75] It is therefore recommended that if practitioners consider it necessary to object to produce documents or give evidence in court because it may harm the patient or

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[70] [2015] NSWSC 253. The objection in this case was based on protected confidences and the doctor-patient confidentiality provisions in the *Evidence Act 1995* (NSW). There are no similar provisions in the *Evidence Act 1977* (Qld) or the *Evidence Act 1995* (Cth). However, the common law principles applied in this case may be applied in Queensland cases.
[71] Ibid*:* [22].
[72] [2012] NSWSC 1451.
[73] *R v Kelsall (No 3):* [25].
[74] Ibid.
[75] *R v Kelsall (No)*: [26].

another person, they first seek advice.[76] In any event, in most cases it will be the patient or their lawyers who will raise the objection.

To succeed in objecting or challenging a subpoena on any of these grounds, the practitioner would be required to attend court, give the evidence, and detail the grounds as to why the subpoena should be set aside. The practitioner must be available for cross-examination and should be legally represented. In view of the frequency that subpoenas are served on mental health practitioners, it has been argued that it is impractical for those in private practice to cancel their scheduled appointments in order to attend court each time a subpoena is received.[77] If the objection fails the practitioner would have to bear their own legal costs, and possibly the costs of the opposing party. Practitioners feel that objections are futile because the party who issued the subpoena will almost invariably secure access to the subpoenaed medical records. There are concerns that this occurs without appropriate consideration by the court of the risk of abuse of process, breach of the doctor-patient confidentiality, or consideration of harm that may be caused to the patient or the therapeutic relationship.[78] This potential outcome has deterred practitioners and their patients from pursuing their legal rights.[79]

If the practitioner has serious concerns about the subpoena and is considering challenging it, the following steps should be taken:

1. seek legal advice;
2. telephone the issuing party and discuss the concern with a view of them amending or withdrawing the subpoena;
3. write to the issuing party and to the court raising the objection or complete the attached notice of objection and file it in court;
4. send the documents to the court with the objection; and
5. attend court to argue the objection.

Attending court either to argue the objection or to give the evidence under the subpoena is a daunting experience for any professional. The following section outlines how to deal with court appearances, how to prepare for cross-examination, and how to effectively deal with counsel.

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[76] Bird, ibid: 924.
[77] Levy et al., ibid: 334.
[78] Ibid: 333.
[79] Ibid: 333-334.

Dealing with court appearances

Prior to attending court the practitioner should familiarise themselves with the location and parking so that they may arrive on time. Arriving early will allow the practitioner to speak with the lawyers in the matter who will explain where the practitioner will sit and how to address the Judge. Practitioners who are particularly nervous may attend the court beforehand to see how the court conducts the hearings as most courtrooms are open to the public.

When the case is called, the practitioner remains outside the courtroom. It may be some time before the practitioner is called inside. Some witnesses are advised to bring reading material to keep occupied while waiting.

If the practitioner is attending to produce documents, then the court will most likely interpose the hearing to allow the practitioner to enter and hand over the documents. Every person must bow to the Jude when entering or leaving the courtroom (a lowering of the head is sufficient). There is no cross-examination when producing documents. The practitioner generally produces the documents and leaves the courtroom when excused by the Judge. If the practitioner is attending to give evidence, then once called, the practitioner will be taken by the court officer to the witness box. While standing the practitioner is asked to give an oath or an affirmation. An oath is sworn on the Bible. An affirmation is not. A practitioner appearing by telephone will be given the same option. Once the oath or the affirmation is given, the practitioner sits down.

The practitioner will be questioned by one party or their lawyer, and cross-examined by the other. Judges may interrupt and ask their own questions, and they often do. Cross-examination is generally what practitioners fear the most. They fear that being discredited, proved incompetent, or shown to have made a significant error in their judgment, will have detrimental effects on their professional reputation and career. However, this fear is generally unfounded. The following section explains why.

Cross-examination

The final section of this paper discusses the purpose of cross-examination, and provides practical advice on how to prepare for it, respond to questions when in the witness box, and deal with legal counsel.

Purpose of cross-examination

Giving evidence in a courtroom can be anxiety-provoking and daunting for anyone.[80] Practitioners giving evidence in court want to be viewed as competent and credible professionals. They may feel that their reputation is on the line. Indeed, it may be. However, cross-examination should not be aimed at proving the professional incompetent, unless it is a type of a malpractice matter. The purpose of cross-examination is, first and foremost, to elicit favourable evidence by obtaining concessions from the expert, or an agreement with alternative or hypothetical facts that support the party's case.[81]

For example, if the practitioner agrees with the alternatives, the lawyer will argue that they therefore agree with the lawyer's proposition. If the practitioner refuses to vary their opinion, the lawyer will argue that the practitioner "holds fixed opinions that would never change, evidencing bias or lack of credibility".[82] Another example is where the practitioner is forced to admit that in their area of expertise, legitimate differences of expert opinion exist. The practitioner may have to admit that in the past they disagreed with another expert, or another expert disagreed with them.[83] This may appear to attack the credit of the expert, however, it does not.

Although another purpose of cross-examination is to discredit the witness,[84] in the case of expert witnesses this is generally done only in the examples provided above. In other words, it is not the credit of the expert that is challenged, but their conclusions.[85] Lawyers are not experts even if they appear to be knowledgeable in the respective medical field. In fact, when lawyers are trained to cross-examine an expert witness they are reminded that:

> *the expert knows far more about the subject than you, and is often an experienced witness. When it comes to the content, you are on the expert's turf*.[86]

Attempting to discredit an expert witness without proper basis will embarrass the lawyer and damage their professional reputation. Where a lawyer intends to discredit the expert, it is

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[80] Lywan, Lillian and Hatters Friedman, Susan. 2015. "Testifying in a mock court: the experiences of forensic advanced trainees". *Australasian Psychiatry* 23(2): 177; Piesse, Barbara. 1987. "Coroner's Court: purpose and jurisdiction". *The Australian Nurses Journal*, 16(9): 51.
[81] Mauet, Thomas and McCrimmon, Les. 2001. *Fundamentals of trial techniques*. LBC Information Services: 200, 242; Glissan, James. 2011. *Advocacy in Practice*. 5th ed. LexisNexis Butterworths: 77.
[82] Mauet and McCrimmon, ibid: 242. See also Gaughwin, ibid: 23.
[83] Ibid.
[84] Mauet and McCrimmon, ibid: 200; Glissan, ibid: 77.
[85] Glissan, ibid: 114.
[86] Ibid: 240.

most likely done on the basis that they lack the necessary qualifications and experience to give the specific evidence, that the qualifications and experience they posses are not directly applicable to the facts in issue, or that the expert is biased.

Preparing for cross-examination

Preparation for cross-examination should start when the practitioner sees the client and commences writing the file notes or the medical report. Every practitioner is aware that they may be required to give evidence about their patients. Therefore, when writing reports or file notes, practitioners should be professional, accurate, balanced, comprehensive and fair. The practitioner's expertise in investigation, technique, diagnosis and treatment should be evident.[87] Other recommendations include using accepted medical terminology and avoiding the use of jargon, clearly setting out all the facts, and providing a clear conclusion. The conclusion should be qualified where appropriate by explaining the sources of information and any further matters which might alter the opinion.[88]

Writing comprehensive reports and file notes and ensuring they comply with the practitioner's rules of conduct is the first step when preparing for cross-examination. The practitioner should also have a current curriculum vitae. This is generally annexed to their report.

Next, when the practitioner has been subpoenaed to give evidence, they should read the rules pertaining to the role of the expert in the relevant jurisdiction. These must be provided to the practitioner by the party issuing the subpoena. In most jurisdictions the role of the expert witness is to:

- assist the court;
- provide an objective and unbiased opinion that is also independent and impartial on matters that are within the expert witness' knowledge and capability;
- consider all material facts including those that may detract from the expert witness' opinion;
- state the facts or assumptions on which their opinion is based; and
- never assume the role of an advocate.[89]

[87] Swain, Phillip. 2005. "No expert should cavil at any questioning': Reports and assessments for courts and Tribunals". *Australian Social Work*, 58(1): 44.
[88] Ibid: 47.
[89] The Royal Australian and New Zealand College of Psychiatrists. 2015. *Practice Guideline 3: Guidelines For Psychiatrists In Relation To Family Court Proceedings – Australian Family Court*: 3. Available at

In all jurisdictions the duty of the expert is to assist the court.

Finally, prior to attending court, the practitioner should read the report they provided, or refresh their memory by reading the patient's file. Familiarity with the report or file will allow the practitioner to answer questions promptly. Counsel who is more familiar with the report or the file than the practitioner will not discredit the practitioner but may cause them some embarrassment.

Responding to questions

When the practitioner is being questioned in the witness box, they may ask to see their report or file notes to refresh their memory, and if the question is ambiguous they may ask for it to be repeated or rephrased.[90] The practitioner should answer all questions honestly and to the best of their ability.

Most jurisdictions have enacted legislation or rules dealing with cross-examination and allowable questions. For example, section 41 of the *Evidence Act 1995* (Cth) provides that a court must disallow a question in cross-examination, or inform the witness that they need not answer the question, if the question is:

- misleading or confusing;
- unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive;
- is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate; or
- has no basis other than a stereotype based on the witness's sex, race, culture, ethnicity, and age or mental, intellectual or physical disability.

The opposing counsel will object to such questions, and the questions will either be rephrased, or the cross-examiner will move on. Therefore, the practitioner need not worry that they will be intentionally intimidated, insulted, or harassed while in the witness box. They will be required to answer questions that may challenge the truthfulness or consistency of their testimony, or which discuss a private or distasteful subject. These questions should

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https://www.ranzcp.org/Publications/Guidelines-for-clinical-practice.aspx; Gaughwin, ibid: 22-23. See also rule 15.59 of the *Family Law Rules 2004*; rule 426 of the *Uniform Civil Procedure Rules 1999* (Qld).

[90] Lywan and Hatters Friedman, ibid: 177

also be answered honestly and to the best of their ability. In all cases, if the opposing counsel does not object to an improper question that is put to the practitioner, the Judge will.

In cross-examination lawyers often say "I put it to you" or "I suggest to you". This is necessary to comply with what is referred to as the rule in *Browne v Dunn.*[91] The rule stipulates that if the cross-examiner intends to later contradict the witness by calling further evidence or suggesting that the witness's evidence can be otherwise explained, the witness should be given the opportunity in cross-examination to comment on the suggested contradictory version. If the witness disagrees, the lawyer may call the further evidence. If the witness agrees, there is then no need to do so.

Some practitioners may have the opportunity to attend seminars or training sessions that incorporate mock court hearings where junior psychiatrists have the opportunity to draft expert reports for the purpose of cross-examination, and where junior barristers have the opportunity to cross-examine the practitioner on that report. Such mock hearings were found to have great value.[92] Practitioners are encouraged to contact their association to enquire about such opportunities.

Dealing with legal counsel

Most hearings which include cross-examination are conducted by barristers rather than solicitors. The barrister will be briefed by the solicitor, and both will be sitting at the bar table when the practitioner enters the courtroom. The practitioner may have had the opportunity to speak with the barristers for both sides prior to appearing in court. This can be done as there is no ownership in witnesses.[93] If that is not the case, the practitioner should not fear or be intimidated when the barrister rises to commence the cross-examination.

Barristers and solicitors are under ethical obligations to deal with the court, their colleagues, and witnesses in a courteous manner.[94] Although sometimes the cross-examiner may come across as aggressive, cross-examination is not meant to be "cross". Barrister's advocacy styles vary and are often affected by their personality type. Some are more reserved and monotone. Others are more robust and energetic. Barristers often abruptly interrupt the witness mid-sentence. This should never be taken personally. It is crucial that barristers

[91] (1894) 6 R 67 (HL) in Mauet and McCrimmon, ibid: 202.
[92] Lywan and Hatters Friedman, ibid: 177.
[93] Hayes, ibid, p. 14.
[94] Glissan, ibid: 94.

control the witness and the evidence they give, and sometimes this appears to be rather hostile.

In many jurisdictions, and particularly in the family law courts, there is an increasing number of self-represented parties.[95] The practitioner may be cross-examined by a self-represented party who lacks the knowledge about improper questions and has never cross-examined. They may not understand the report or the evidence given by the practitioner.[96] In this case the practitioner should answer the questions to the best ability, and raise an objection only if they consider that answering it could cause harm to the patient or others. In all cases where there is a self-represented party the Judges take more of a pro-active role. This is not to assist the self-represented party, but to ensure that a fair hearing is conducted and no improper questions are asked.

Conclusion

Serious concerns have been raised by mental health practitioners about an improper use of subpoenas to obtain confidential information about a patient. It has been argued that there are currently insufficient provisions to protect the doctor-patient confidentiality, that there is an unfettered use of subpoenas, and that objecting to them is futile. As a result, recommendations have been made for uniform legislation to be implemented giving effect to a primary rule of privilege with clear exceptions.[97] The following "Statement of Principle of Psychiatrist-Patient Privilege" is recommended:

> *The content of psychiatric records is confidential and should not, in civil and criminal proceedings be adduced in evidence or compelled for production, whether by subpoena or any other procedure, without the written and free consent of the patient or where the patient cannot consent, their legally appointed guardian or attorney unless:*
>
> 1. *The circumstances are such to constitute a medical emergency where the patient cannot provide consent. Such disclosure should be to the extent necessary to protect the patient's life or health.*

[95] The Honourable Alastair Nicholson AO RFD. 2000. "Psychiatrists and psychologists in the family court process". *Psychiatry, Psychology and Law*, 7(1): 3.
[96] Ibid: 4.
[97] Levy et al., ibid: 332.

2. *There is a reasonable basis for the belief that the patient may cause imminent and serious harm to themselves, an identifiable individual or group of persons. In such circumstances, disclosure may be necessary to lessen or prevent a serious and imminent threat to an individual's life, welfare, safety, health or a serious threat to public safety, public health, or public welfare. Such disclosure should be made only to the relevant authority such as the police.*
3. *Disclosure is required where a child is at significant risk of harm from abuse or neglect. In such cases, the Court is to have regard to whether there are any other appropriate means by which the psychiatric information can be obtained and made available such as through the appointment of an independent psychiatrist.*
4. *It can be demonstrated to the satisfaction of a State or Territory Supreme Court Judge that a refusal to disclose the psychiatric records would significantly impede the investigation of an indictable (serious) criminal offence.*
5. *Disclosure is compelled by mandatory disease notification requirements. Should one or more of the above exceptions apply, such disclosure should be to the minimum extent necessary to achieve the objective.*[98]

This Statement of Principle is not directed at proceedings addressing circumstances where production of a patient's records may be sought, such as complaints handling, audit and quality assurance, accreditation, funding, incident monitoring, insurance, or obtaining medico-legal opinions and insurance.[99]

Until such legislation is implemented, the status quo remains. Even if such legislation was implemented, it may take some time to review its effectiveness. Indeed, "no system is perfect and no rules of court or ethical guidelines are going to resolve the innumerable problems that arise regularly" in these type of matters.[100] For this reason, practitioners who are subpoenaed to produce documents to give evidence in court are encouraged to comply with the subpoena, unless they have valid grounds to object or challenge it.

The purpose of this paper was to discuss the current issues surrounding mental health practitioners and subpoenas, and to provide guidance on how to respond to subpoenas,

[98] Ibid.
[99] Levy et al., ibid: 335.
[100] Gaughwin, ibid: 24.

challenge them if the grounds exist, deal with court appearances, prepare for cross-examination, and deal with legal counsel. In all instances, it would be prudent for practitioners under subpoena to seek legal advice before challenging what it requires.

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5 November 2015

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