



VICTORIAN BAR

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## ETHICS COMMITTEE BULLETIN

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### DOCUMENTS PRODUCED UNDER SUBPOENA

1. This Bulletin relates to the obligations of counsel in dealing with documents which are subject of a subpoena to produce (**a document subpoena**). This Bulletin supersedes Bulletin 1 of 1991(issued on 3 September 1991).
2. Where documents are produced pursuant to a document subpoena, the proper course is to follow the three stage procedure set out in *National Employers Mutual General Association Limited v Waind* [1978] 1 NSWLR 382.
3. A person complies with a document subpoena by producing the documents specified in the subpoena to the Court and not to the party issuing the subpoena or any other party. A party has no right to inspect the documents which a subpoenaed person brings to the Court before they are produced: *Burchard v McFarlane* [1891] 2 QB 241 at 274 to 278; *Hodgson v AMCOR Limited* [2011] VSC 269 at [48]-[62].
4. There may be an opportunity, with the consent of the subpoenaed party, for counsel to review documents specified in the document subpoena at Court on the day of the hearing and prior to their production to the Court. Should such an opportunity arise:
  - (a) It would be improper for counsel to give the person subpoenaed (or any person representing the person subpoenaed) the impression that the party issuing the subpoena is entitled to inspect the subpoenaed documents before production to the Court or to allow the person to permit inspection under that impression;
  - (b) It would also be improper for counsel to inspect the subpoenaed documents where those documents contain or may contain material in respect of which the person subpoenaed or another party might be entitled to claim privilege or has a claim of confidence where inspection may result in the disclosure of the privileged or confidential material.
  - (c) Caution must be exercised where the person responding to the subpoena is a relatively junior member of an organization and, therefore, may lack authority to allow inspection.

Richard W McGarvie QC  
Chair

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