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I. POLICY SUMMARY

Receiving a legal document commanding one to appear at a legal proceeding or to turn over records to attorneys, especially if unexpected, can be a very stressful experience. This section of the Handbook is intended to support ANR personnel by connecting them to someone who will assist them (ANR's office of Administrative Policies and Business Contracts), and by providing general information about subpoenas in the context of the ANR environment.

This section of the Handbook addresses subpoenas to which the University of California (UC) is not a party, nor is the ANR employee. (If UC and/or the employee is a party, the UC attorney assigned to the matter will advise ANR of any necessary action.)

A. When should I accept service of a subpoena?

Accept a subpoena if:

1. You are the person named in the subpoena;
2. You are the custodian of the records requested; or if
3. You are the immediate supervisor of the person identified in the subpoena, and the person identified in the subpoena is an Advisor.

As a general rule unless there is something clearly wrong with the subpoena on its face you may accept it, making note of the time and date that you did so. If there is any concern that the subpoena was served on you in error let Administrative Policies and Business Contracts know and they will consult with OGC as to how to proceed.

B. When should I refuse service of a subpoena?

Do not accept service of a subpoena if:

1. You are not the person named in the subpoena.
2. You are not the immediate supervisor of the person identified in the subpoena.
3. The entity named in the subpoena is "The Regents of the University of California."

ANR personnel cannot accept service of a subpoena on behalf of The Regents of the University of California. Any such document should be directed to OGC as follows:

Office of the General Counsel of The Regents University of California

1111 Franklin Street

Oakland, CA 94607

(510) 987-9800; toll-free (800) 933-9777

<http://www.ucop.edu/ogc/>

C. How do I refuse service of a subpoena?

Tell the process server that the person qualified to accept the subpoena is not available. Usually the process server will leave with the subpoena and try again to serve it in person on another occasion. If the process server insists upon leaving the subpoena it may be invalid. Contact ANR's Administrative Policies and Business Contracts unit for help in this situation.

II. DEFINITIONS

A **subpoena** is an official document served in a legally prescribed manner on a person who is generally not a party to a case (i.e., not the plaintiff or defendant) requiring that person to produce documents, appear and give testimony at a deposition or trial, or both. Subpoenas are time-sensitive documents with court-imposed deadlines.

The three types most often received by ANR personnel are:

- A. Subpoena Duces Tecum** – Latin for “bring it with you,” this kind of subpoena requires that a person produce specified documents (and possibly testify about them).
- B. Deposition subpoena** to appear at a pre-trial deposition.
- C. Subpoena to appear as a witness** at a trial.
- D.** The three types of subpoena can also be combined in various forms. For example, a deposition subpoena could include a requirement that the witness produce records.

III. POLICY TEXT

A. Responding To A Subpoena

1. If I am served with a subpoena do I have to comply?

Yes, you usually do. A subpoena is a legally binding court order that must be complied with, unless OGC advises ANR's [Administrative Policies and Business Contracts](#) unit that there is a legal basis to object to the subpoena. Generally there is no right to refuse to comply with a valid subpoena, even if testifying would be inconvenient and/or awkward. However, if compliance with the subpoena would be severely problematic, let [Administrative Policies and Business Contracts](#) know and they will consult with OGC to determine if anything can be done to mitigate the situation, and/or if there is any possibility of seeking a continuance or a release from the subpoena.

2. Must I respond per the deadlines stated in the subpoena?

Yes, you usually must. However, subpoenas in civil cases must provide for a reasonable response time (generally at least 10 days) so one is not usually required to respond (i.e., to produce records, and/or to testify) immediately. Subpoenas in criminal matters must be responded to quite quickly, usually within 5 days. If the deadline provided for in the subpoena is problematic, tell ANR's

[Administrative Policies and Business Contracts](#) unit so that he/she may consult with OGC to determine if an alternative date can be arranged with the subpoenaing attorney.

3. What is a deposition and how is it different from a trial?

A deposition is a sworn testimony (just like you would give in court), that is given before the actual trial, and outside of the presence of a judge or jury. Generally it is conducted in a conference room provided by one of the parties. As with a trial, testimony is given under oath and must be truthful and accurate.

However, the opportunity exists to correct any testimony given at a deposition that is accidentally inaccurate.

4. I have a schedule conflict with the date of my appearance. Can I reschedule?

Usually yes. In most cases the subpoenaing attorney will be willing to reschedule the appearance to a mutually satisfactory time. If the subpoena is for a trial appearance, however, the attorney's ability to schedule your appearance at your convenience may be constrained by the trial schedule. Tell [Administrative Policies and Business Contracts](#) about your schedule conflict so that they may follow up with OGC and arrange a better date if possible.

5. How far do I have to travel if I am subpoenaed?

There are some limitations on how far an individual may be required to travel in response to a subpoena. If the identified location is problematic, tell [Administrative Policies and Business Contracts](#) so that they may consult with OGC to determine if an alternative location can be agreed upon.

B. Giving Testimony

1. What if I am subpoenaed in a personal matter?

UC employees subpoenaed to testify about non work-related matters are not entitled to receive wages for the time used to respond to the subpoena. However, they are entitled to use vacation, personal leave, or compensatory time off to compensate for their time away from work. Their supervisor must approve the time off prior to the employee's appearance.

2. What's the difference between an expert witness and a percipient *witness*?

a. An expert witness is a person who has been retained, identified and declared by a party as an expert; and who, on the basis of their special knowledge, skill, experience, training, and/or education may provide their opinion at a deposition or trial.

b. A percipient witness ("one who perceives") is a person who may testify only about factual matters based on their personal perception.

c. Owing to the nature of their work, ANR academics are often qualified to act in

both capacities. For example, a pomology Advisor would be qualified to provide expert testimony on pomology given his or her special knowledge, skill, experience, training and/or education. That same Advisor may have made a site visit to a peach orchard at the request of a grower. If a legal dispute over the site subsequently arises, the Advisor could potentially be called upon as a percipient witness because s/he personally visited the site and can provide factual information about what s/he saw.

- d. Confusingly, subpoenas do not usually identify the capacity in which the named individual is being asked to testify (e.g., expert or percipient or both). Generally speaking, ANR personnel must comply if they are subpoenaed as percipient witnesses but cannot be compelled to give expert testimony against their will. In other words, an Advisor who did not want to testify and had no percipient knowledge of the matter might not be compelled to testify. The ANR employee should tell [Administrative Policies and Business Contracts](#) if they have concerns about the capacity in which they are being subpoenaed. [Administrative Policies and Business Contracts](#) will consult with OGC to resolve the problem.

3. May I act as an expert witness on a private consulting basis (i.e., as a compensated outside professional activity)?

No, not usually. In the main, ANR personnel are discouraged from seeking private outside consulting work as expert witnesses in legal actions, as doing so may present a conflict of interest and/or commitment (whether actual or apparent) with their UC duties. ANR employees who wish to pursue the issue should follow the procedures detailed in ANR's Administrative Handbook Section 345, [Consulting and Other Outside Professional Activities](#).

4. What kind of general guidelines should I follow when testifying?

While under oath you are bound to tell the truth whether you are appearing as a percipient or an expert witness, and whether at trial or at a deposition. When under oath you should:

- a. State that you are appearing as an impartial witness – your testimony may be as helpful to the defendant as it is to the plaintiff.
- b. Listen carefully to the question and answer only that question. Do not volunteer additional information unless it is necessary to do so in order for your answer to be clear.
- c. If you are asked to appear as a percipient witness but are asked for your expert opinion on any matter, stick to the facts. Testify truthfully based on personal knowledge. Never guess or give an answer that cannot be substantiated.
- d. If asked for your testimony as an expert, respond with relevant research-

based, data-driven information to the greatest extent possible. As an alternative to taking a personal position on a proposed policy or regulation, simply make reference to the scientific research that supports your viewpoint.

5. Can I refuse to testify if it will jeopardize my clientele/collaborator relationships or compromise my standing in my community?

No, you usually can't. A subpoena is a legally binding court order that must be complied with. However, be sure to advise [Administrative Policies and Business Contracts](#) of your concern. They will then work with OGC to determine if there is any legal basis to object to the subpoena, and/or any other way to minimize the difficulty about which you are concerned.

IV. COMPLIANCE / RESPONSIBILITIES

Records

A. What is the difference between a subpoena duces tecum and a request for documents under the California Public Records Act (CPRA)?

A subpoena duces tecum requires you to submit records at a certain place and time, and sometimes to go in person to testify about them. As is true for the other types of subpoenas, a subpoena duces tecum is a legally binding court order that must be complied with.

Subpoenas may only be issued in relationship to a pending lawsuit, whereas a CPRA request may be made by anyone at any time. Most documents have to be produced in response to a subpoena duces tecum but the CPRA allows for more exceptions under which documents might potentially be withheld. It may be appropriate to redact certain information from documents produced in response to a CPRA request, but it would almost always be inappropriate to make any redaction to records that have been subpoenaed. Finally, the CPRA allows UC to charge only for the "direct cost of duplication." In contrast, UC may bill for all reasonable costs incurred in responding to a subpoena duces tecum.

For further information on CPRA requests, contact [Administrative Policies and Business Contracts](#) and/or see ANR Administrative Handbook Section 402, [Records](#).

B. What should I do in response to a subpoena duces tecum?

As mentioned above, a subpoena duces tecum is issued in the context of a pending lawsuit and requires the submittal of records at a certain place and time. It may also require the individual named in the subpoena to appear to testify about the records.

If you receive a subpoena duces tecum contact [Administrative Policies and Business Contracts](#) who will first work with OGC to verify that the subpoena is valid. If it is, copies of the requested records usually have to be produced. However, other factors may have to be considered. For example, if the subpoena duces tecum requests

records that contain personal information about an individual, that individual usually must be notified first and given an opportunity to object before the records are produced. Based on OGC's guidance to them, [Administrative Policies and Business Contracts](#) will assist you with the process that applies in your specific situation.

C. If records are subpoenaed, should I turn them over when the subpoena is served?

No. Nothing should be given to the process server at the time the subpoena is served, no matter how aggressive their request. Some records are exempt from disclosure and UC could be penalized if certain information were to be disclosed without due process. Accordingly, you should contact [Administrative Policies and Business Contracts](#) who will ask OGC to review the subpoena and confirm its validity.

D. What is “e -discovery ” and what should I do if I receive a “litigation order to preserve?”

Federal and state “e-discovery” regulations require that when a lawsuit is filed, or if the University “reasonably anticipates” that a lawsuit may be filed, all information relevant to the suit, including electronically stored information (ESI), must be preserved. A “litigation order to preserve,” also referred to as a “litigation hold notice,” puts record- holders on notice that a lawsuit may be pending, and that they are now obligated to identify, secure, and preserve all related ESI. While the general requirement to preserve documentary evidence has always existed, the addition of ESI to the mix creates formal obligations regarding retention of electronic information. If you receive a litigation hold notice, immediately contact [Administrative Policies and Business Contracts](#) who will work with you, with OGC, and with ANR's [Communication Services and Information Technology](#) unit to ensure that all e-discovery requirements are met.

V. PROCEDURES

Reimbursement And Leave

A. Is UC reimbursed for the time I spend responding to a subpoena?

Usually yes. The majority of the subpoenas issued to ANR employees relate to a client site visit made sometime in the past by an Advisor. Such subpoenas are usually issued in California's civil court. When an ANR academic is required to testify in such a state civil matter, the California Government Code section [68097.2\(b\)](#) requires the subpoenaing attorney to reimburse UC for the full direct actual cost of the individual's salary and travel expenses.

B. Does the subpoenaing attorney have to give UC a deposit against full reimbursement?

Yes. At the time the subpoena is served on the UC employee, the subpoenaing

attorney must provide a deposit of \$275 per day against the ultimate full direct cost of the individual's appearance. This deposit (a.k.a., "witness fee") is due either at the time the subpoena is served or upon ANR's request (e.g., when ANR issues a letter billing the subpoenaing attorney for the deposit).

If payment of the deposit is not made at the time of the service of the subpoena, ANR usually contacts the subpoenaing attorney as a courtesy and requests payment. A sample letter requesting deposit before the ANR employee's appearance at trial and/or deposition may be found in Appendix C.

When the deposit is received, it should be acknowledged with a letter similar to the sample provided in Appendix B.

If the subpoenaing attorney fails to provide the deposit of \$275.00, and/or if payment of the deposit should become a problem in any other way, let [Administrative Policies and Business Contracts](#) know so that they may work with OGC to resolve it.

C. What happens if the actual cost of my appearance exceeds the \$275 deposit amount?

ANR is entitled to subsequent reimbursement of the employee's full direct salary cost. When testimony is complete, if the \$275/day deposit does not cover the full direct cost of the employee's salary and travel expenses, the subpoenaing attorney must pay any additional amount owed. A sample letter billing for the balance due after the ANR's employee's appearance at trial and/or deposition is available in Appendix D.

To calculate the full direct daily cost of an academic's salary, divide their annual salary amount by 236. (Reference Academic Personnel Manual section [664](#).) Questions about calculating this rate may be directed to the ANR the [Business Operations Center-Kearney](#) (for personnel associated with Cooperative Extension offices) or the [Business Operations Center-Davis](#) (for personnel associated with Research & Extension Centers, Statewide Programs, and ANR service units located in Davis).

To calculate the full direct daily cost of a staff member's salary, divide the staff member's regular annual salary by the number of working days in the year. Questions about calculating this rate may be directed to the ANR [Staff Personnel](#) unit.

Reimbursement must be made for the full actual travel costs incurred in responding to the subpoena. Mileage is usually reimbursable in accordance with federal government's reimbursement rate. UC's mileage reimbursement rate is usually consistent with that of the federal government and can be found in UC's Business and Finance Bulletin G-28, *Policy and Regulations Governing Travel*, [Appendix A, Mileage Reimbursement Rates For Private Vehicles And Aircraft](#).

Should the full direct cost prove to be less than the deposit of \$275, the subpoenaing attorney must be reimbursed.

D. Can the rate of reimbursement vary?

Yes it can. The rate of reimbursement may vary by the type action being heard. For example, federal court provides that witnesses shall be reimbursed at a rate of \$40.00 per day, but for California criminal cases the witness fee is \$12.00 per day (and the witness is not entitled to the fee until after appearing, and then only if the court so orders). Tell [Administrative Policies and Business Contracts](#) about any concerns regarding witness fees, and they will consult with OGC to resolve the problem.

E. Is UC reimbursed for the cost of subpoenaed records?

Yes, UC may charge for costs incurred in responding to a subpoena duces tecum. Payment is required at the time the records are provided. The rate of reimbursement is set by statute and is as follows.

1. Ten cents (\$0.10) per page for copying,
2. Twenty cents (\$0.20) per page for copying documents from microfilm,
3. Actual costs of copying oversized documents or for the reproduction of documents requiring special processing,
4. Reasonable clerical costs incurred in locating and making the records available to be billed at the maximum rate of up to twenty-four dollars (\$24.00) per hour per person, computed on the basis of six dollars (\$6.00) per quarter hour or fraction thereof,
5. Actual postal charges, and
6. Actual costs, if any, charged to UC by a third party for the retrieval and return of records held by that third party.

F. How is my absence from work accounted for in my leave records?

In most cases such time away from work would be recorded as administrative leave with pay. Note that the time used to travel in response to a subpoena should also be accounted for in this way.

VI. RELATED INFORMATION

- UC Business & Finance Bulletin RMP-10, [Instructions for Responding to Subpoenas](#)
- UC Business & Finance Bulletin RMP-8, [Legal Requirements on Privacy of and Access to Information](#)
- UC Business and Finance Bulletins – [Records Management and Privacy Series](#)
- ANR's Administrative Handbook Section 345, [Consulting and Other Outside Professional Activities](#)

- UC ANR Administrative Handbook Section 402, [Records](#)
- UC ANR APBC Webpage, [Information Practices Frequently Asked Questions](#)

VII. FREQUENTLY ASKED QUESTIONS

VIII. REVISION HISTORY

November 2017:

Format updated.