

A Law Firm's Guide for Responding to Third-Party Subpoenas Served on Clients

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If your client has been served with a third-party subpoena, numerous considerations should be analyzed when determining how to respond. Your firm or your clients must balance the legal obligations associated with responding to a subpoena and the desire to protect proprietary or confidential information as well as understanding the implications for reputation and stakeholder trust. Here, we explore the various approaches, considerations and best practices that enable companies to effectively navigate subpoenas.

INITIAL ASSESSMENT OF A SUBPOENA

Subpoenas seek documents (duces tecum) and/or testimony. Regardless of the type of subpoena that is served, three overarching principles should guide the responding party: (1) whether the underlying action presents a legal risk; (2) whether producing the documents presents a legal risk; and (3) whether the requested documents contain proprietary trade secrets or confidential information.



RESPONDING TO A SUBPOENA

Producing Documents

If there is no legal risk and no confidential or proprietary information, companies should produce documents without any limitations. Documents must be produced as kept in the normal course of business or organized to correspond with the categories in the subpoena. If the request contemplates documents or things that are electronically stored, the responding party can produce the materials either as stored or in a reasonably usable format.

Before producing any information, Social Security numbers and financial information (e.g., account numbers) must be redacted. Similarly, employee contact information (e.g., addresses, phone numbers, personal emails, etc.) may need to be redacted. Importantly, if a document does not exist, it does not need to be created.

Additionally, the documents must be reasonably accessible such that

production does not create an undue burden or expense. If production will create an undue burden or expense or seeks confidential or proprietary information, a responding party can object to the subpoena or move to quash or modify the subpoena.

Objecting to a Subpoena

State and federal procedural rules permit objections to subpoenas. Objections must be in writing and served within 14 days of service or before the time specified for compliance if that time is less than 14 days after service. If objections are not timely served, they will be waived. Once timely objections are made, no further response is required absent a court order.

In addition to undue burden and expense, a subpoena is objectionable if there is insufficient time to respond; the required compensation is not paid; the subpoena is overbroad; or responding to the subpoena would require the disclosure of confidential or proprietary information.

When a subpoena seeks employment records or health information, businesses should be extra cautious. Law firms should also be careful when the requested documents may contain confidential client information, including attorney-client communications and work product.

Serving a written objection will force the requesting party to work with the responding party to resolve disputes, such as narrowing the scope of the requests or relying on a protective order to designate documents as confidential. An objection also buys time and provides the responding party with protection from production. If an agreement is reached with the requesting party, the same considerations discussed above apply.

Motions

An alternative to a written objection is filing a motion to quash or modify a subpoena with the court. Although court involvement adds costs, it may be necessary where the requesting party is unwilling to modify its requests after written objections or if the responding party is contractually obligated to confidentiality and cannot obtain a waiver. If the court denies the motion, the same considerations discussed above apply.

COMPENSATION FOR RESPONDING

Generally, a company or person responding to a subpoena is entitled to compensation. In Minnesota, a witness subpoenaed for testimony must be compensated for the time and expense spent preparing for the testimony. A company producing documents must be reimbursed for the time spent pro-

ducing documents and copying costs. The compensation must be paid before the production of documents or testimony. If the requesting party does not agree to the requested compensation, the responding party is not required to comply with the subpoena, unless there is a court order.

FOREIGN SUBPOENAS

Subpoenas that are issued in a state different than where they are served or from a federal agency are called “foreign” subpoenas. For a “foreign” subpoena to be enforceable, the subpoena must comply with the rules of the state where the subpoena originated, as well as where the subpoena is being served. A “foreign” subpoena must be domesticated in the state where it will be served.

SUBPOENA FOR DEPOSITION TESTIMONY

Subpoenas for testimony may be directed to fact witnesses or corporate representative designees. A subpoena is objectionable if it does not provide enough notice for the deposition (e.g., the deposition date is within seven to 10 days after service) or requires the witness to travel great distances.

Subpoenas for a designee’s deposition may be objectionable for the same reasons as a subpoena duces tecum. If any of the designated topics cover privileged, confidential or trade secret information or are burdensome, written objections or a motion should be served within the 14-day window. A designee must be prepared to discuss all the topics identified in the subpoena unless the topics have been narrowed either by agreement or a court. “I don’t know” is not an acceptable response. Preparation is critical because the de-



SUBPOENAS CAN BE DAUNTING, BUT THEY ARE MANAGEABLE

signee’s testimony will bind the corporation.

Preparing fact witnesses may include familiarizing themselves with documents where they are an author, contributor or recipient. However, they do not need to memorize the documents. Unlike a designee witness, “I don’t know” or “I don’t remember” are acceptable answers.

CONCLUSION

Subpoenas can be daunting, but they are manageable. Law firms and their clients should determine the applicable deadlines for compliance or objections, then consider whether there is a basis for objecting, and if so, act quickly to avoid waiving the right to object.

If the requesting party agrees to narrow the subpoena or a court modifies the subpoena, then produce the responsive documents, but do so under the provisions of a protective order. While the above information is not comprehensive, it provides useful guidance for law firms and their clients to navigate the subpoena process.

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