

UNDERSTANDING YOUR CLIENT'S REIMBURSEMENT RIGHTS WHEN RESPONDING TO THIRD-PARTY SUBPOENAS



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When a company receives a subpoena, a few questions usually come to mind immediately – Is the company at risk? Do we need to respond? Who is going to pay for our employees’ time lost responding to the subpoena? The first question is very fact-dependent and requires a case-by-case analysis. We addressed the second question in our September edition of *The Bassford Brief: Legal Issues for Lawyers* where we discussed your client’s obligations regarding responding to third-party subpoenas. We also touched briefly on the third question – your client’s rights to compensation. In this edition of *The Bassford Brief*, we will take a deeper dive into the rules regarding compensation for responding to or appearing for a deposition pursuant to a third-party subpoena.

State and federal court rules control compensation for time and expenses a non-party incurs in complying with a subpoena. This is particularly impor-

tant when the subpoena will require the diversion of employees from their normal duties and the inevitable data mining of electronically stored information.

MINNESOTA RULES OF CIVIL PROCEDURE

Minnesota’s Rule 45 explicitly mandates reimbursement to non-parties for time and expenses incurred in complying with a subpoena. Minnesota Rules of Civil Procedure Rule 45 states, “a witness who is not a party to the action or an employee of a party and who is required to give testimony or produce documents...is entitled to reasonable compensation for the time and expense involved in preparing for and giving such testimony or producing such documents.” Minn. R. Civ. P. 45.03(d). The subpoenaing party is required to make arrangements regarding the compensation before the return date indicated on the subpoena. Minn. R. Civ. P. 45.02(d).

FEDERAL RULES OF CIVIL PROCEDURE

Under the Federal Rules of Civil Procedure, the default rule is that the non-party bears the cost of complying with the subpoena. However, Rule 45 provides an avenue for a non-party to shift the costs to the subpoenaing party. Rule 45 states that the subpoenaing party must take “reasonable steps to avoid imposing undue burden or expense on” a third party receiving a subpoena. Failure to do so could result in sanctions against the subpoenaing party, including paying the non-party for lost earnings and reasonable attorney’s fees. Fed. R. Civ. P. 45(d)(1). In other words, expenses associated with responding to a subpoena are borne by the non-party unless doing so would cause an undue burden on the non-party.

If a company is concerned about undue burden due to cost, it must act swiftly to either assert written objections or bring a motion. When deciding whether a subpoena is unduly burdensome such that shifting the expense to the subpoenaing par-

ty is appropriate, the federal courts consider several factors. For example, the courts consider the non-party's interest in the outcome of the underlying case, the non-party's ability to bear the costs of complying with the subpoena, and the public importance of the underlying case.

While the path for seeking reimbursement of a non-party's time and expense is not as straightforward at the federal level, it is not impossible.

SEEKING COMPENSATION

If a subpoena does not address compensation, companies have several options. The company can object to the subpoena and request a conference with the subpoenaing party to establish the compensation parameters. Absent a pre-existing contentious relationship, objecting and conferring is the most cost-effective method for settling the issue of compensation.

If the object-and-confer is not an option or has failed, the company can move to quash or modify the subpoena. When moving to quash or modify the subpoena because of compensation, the moving papers must address the components of the applicable procedural rule (e.g., Minn. R. Civ. P. 45, Fed. R. Civ. P. 45). More specifically, the motion papers should address the nature of the burden in responding to the subpoena and the reasonableness of the anticipated time and expense that will be required to respond.

A company should have a sense of the expense and time it will expend to respond to the subpoena in advance of an informal conference with the subpoenaing party. This information may eliminate the need for a motion and have a side benefit of the subpoenaing party voluntarily narrowing

BOTH THE FEDERAL AND STATE CIVIL PROCEDURE RULES ADDRESS COMPENSATION ALBEIT WITH DIFFERENT APPROACHES.

the scope of the subpoena. If motion becomes necessary, companies will need to include such information in their moving papers.

Reasonable Compensation for Time and Expenses

Reasonableness is the key phrase when assessing compensation for responding to a subpoena. The most significant expense associated with responding to a subpoena is often the cost associated with diverting employees from their normal duties to gather and review documents for responsiveness, confidentiality and confidential business information.

Other expenses may include the consumption of technology and systems; attorneys' fees necessary to protect privilege or confidentiality; and the cost of production (e.g., printing fees). While companies should not be shy about requesting their time and expense, the request must be reasonable. In other words, don't be like some subpoenaed parties who sought compensation for employee and attorney time that amounted to \$59 per page of documents produced. *Nike, Inc. v. Wu*, No. 13 CIV. 8012 (CM), 2020 WL 257475, at *11 (S.D.N.Y. Jan. 17, 2020).

Fees for Attendance and Mileage

In addition to time and expenses, both the federal and Minnesota Rules require the payment of mileage and an attendance fee to a non-party wit-

ness. In federal court, the attendance fee is currently \$40 per day and mileage is paid at the same rate a federal government is paid. 28 U.S.C. § 1821 www.gsa.gov/mileage. Where a witness is required to travel more than 100 miles, additional compensation may be appropriate. In Minnesota, the attendance fee is currently \$20 per day and mileage is paid at .28 cents per mile. Minn. Stat. § 357.22.

CONCLUSION

Although subpoenas can be financially burdensome, companies are not without recourse. Both the federal and state civil procedure rules address compensation albeit with different approaches. Regardless of which rule applies, companies should include the issue of compensation in their initial analysis of a subpoena and whether to assert objections, and then act accordingly.

Disclaimer: This article provides an overview of the payment requirements and obligations related to non-party deponents and subpoenas under the rules of civil procedure. Litigants should always consult the relevant federal or state rules and consider seeking legal advice for more complex situations involving subpoenas. The information conveyed in this article is not an exhaustive treatment of the issues this article focuses on and is not intended to be relied upon as legal advice. There is no attorney-client relationship between Bassford Remele, P.A. and any reader of this article.

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