

Served with a Subpoena? Understand the Duties, Deadlines to Protect Yourself



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**COMMENTARY BY
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Parties in lawsuits frequently attempt to obtain documents or testimony from nonparty individuals or companies (also known as third parties) by serving them with a subpoena. When a third party receives a subpoena, it oftentimes is uncertain as to both its rights and responsibilities under the subpoena. As a result, the person or entity receiving the subpoena can miss critical deadlines and lose important protections. By having a process in place to handle a subpoena once received, a third party can avoid this.

When a third party is served with a subpoena, the first step should be to provide the subpoena to an attorney, which is normally in-house counsel. If the subpoena's recipient is an individual or entity without a legal department, then consideration should be given to retain an attorney. This is important because the attorney will help with understanding the subpoena, gathering documents in response to the subpoena, preparing a witness who is being asked to testify under the subpoena, and evaluating whether the third party has any legal exposure as a result of compliance (or noncompliance) with the subpoena.

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If the subpoena is directed to a business and calls for the production of documents, the business should also issue a “legal hold” to advise its employees that they must preserve any documents covered by the subpoena. Similarly, even if documents belonging to the third party are in the possession of someone else, those documents may nevertheless be considered to be in the “possession, custody or control” of the third party and could be responsive to the subpoena. As such, other parties, like accountants, consultants or outside attorneys, should also be given notice of the subpoena if they could possess documents that might be responsive.

The next step is to review the subpoena for the compliance date. This may be the date on which the documents need to be produced or the date on which the testimony will be taken. Generally, the compliance date will be at least 10 days after the date the subpoena was served. If additional time is needed, the attorney who issued the subpoena can provide additional time for compliance, which should be confirmed in writing if granted.

For subpoenas that call for the production of documents and to which the third party does not object, all of the individuals who may possess responsive documents or who will be tasked with searching for them (like IT personnel conducting an electronic search) should be given instructions for their retrieval.

This may include not just what to search for (like applicable date ranges and search terms or subject matter), but also how to gather these documents and to whom to give them.

In some instances, the search will require searching through and reviewing a large amount of electronic documents or messages, which may require hiring an outside vendor. Many times, the party requesting these documents will offer or be required to pay the costs of this search. Regardless of who is paying, however, all documents—both good and bad—must be gathered so that they can be reviewed and produced, if necessary.

A third party must not always comply with a subpoena. Based on how onerous the subpoena is, if it would subject the recipient to potential future liability, or if the requested documents are protected from disclosure, the third party may want to challenge the subpoena by objecting to it or seeking judicial relief. In either instance, where a third party does not intend to comply with the subpoena as it is written, it is recommended (and sometimes required) that the third party attempt to resolve its concerns with the subpoenaing party before objecting to the subpoena or seeking relief from it.

If a third party cannot resolve its concerns with the subpoena, depending upon the circumstances, it may simply object to the subpoena. Typically, the objection must be made by the earlier of either a certain number of days—normally 10 or 14 depending upon the applicable rules of civil procedure—after the service of the subpoena or the date of compliance listed in the subpoena.

It is important that these deadlines are met, as the failure to do so may operate as a waiver. If the third party objects, then the subpoenaing party will need to move to compel the production of the documents.

In some instances, the third party may also timely move for a protective order or to quash the subpoena. A protective order is normally helpful in situations where the third party is OK with producing some or all of the requested documents, but is looking for some type of safeguard in so doing, such as the protection of confidential information. In other instances, the third party may not want to comply with the subpoena at all and may move to quash it.

Grounds for this sort of relief include, but are not limited to, where the subpoena was not properly served, fails to comply with the applicable procedural rules, is unduly burdensome (perhaps in terms of time or cost), or requires the production of privileged information.

Regardless of which decision is made, simply failing to comply with a subpoena is not an option. Third parties that fail to comply with a subpoena may be held in contempt of court, which may result in fines or imprisonment. By understanding the rights and responsibilities associated with a subpoena, a third party can limit its potential liability and appropriately and efficiently respond.

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