SUBPOENAS: WHAT THEY ARE AND HOW TO RESPOND TO THEM

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Every day, in almost every city, and in almost every state, a business is served with a subpoena. Your business may have received one in the past or may receive one soon. For those who are not regular participants in lawsuits, subpoenas are a mysterious document which you should know about.

The purpose of this article is to discuss what a subpoena is and how you should respond to a subpoena if you are served with one.

What is a Subpoena

Generally speaking, a subpoena is a formal request that you either attend a court hearing (whether it be a deposition, court hearing or trial) or to produce documents in conjunction with a lawsuit or administrative proceeding. In California, subpoenas are governed by the Code of Civil Procedure (Code of Civil Procedure § 1285, et seq.), while in Federal Court actions, subpoenas are governed by the Federal Rules of Civil Procedure (FRCP Rule 45).

Federal and state laws also permit legislative and administrative bodies to serve subpoenas to compel attendance at hearings or to produce documents, and arbitration tribunals (such as the American Arbitration, etc.) are also authorized to issue subpoenas.

In California, subpoenas are issued either through the courts, legislative body or administrative body, or self-issued, meaning that an attorney will obtain an approved form from the court and will issue it by signing it, in which case it is issued by the attorney rather than by the court. [Code of Civil Procedure §1986.]

What to do if You Receive a Subpoena

The first step you should take if you receive a subpena is to determine if it was properly "served" upon you. Generally, a subpena must be "personally served," meaning that you must personally receive it. [Code of Civil Procedure §1987(a).] If you are a business,

that means that an authorized representative of your company must actually be handed the subpoena; giving it to a receptionist or secretary, who may not realize the importance of the document, is not sufficient. Nevertheless, subpoenas are often delivered in this manner.

If a subpoena is not properly served, you may not have an obligation to respond to it. You should not, however, ignore the subpoena. That is because failure to respond to a subpoena is considered to be contempt of court, and the court may impose "sanctions" (e.g., a civil penalty) and, in extreme circumstances, may also jail you for failure to comply with the subpoena.

Therefore, if you are not personally served with the subpoena, we recommend that you contact your attorney, who will notify the party that it was improperly served. Since responding to a subpoena may be a minor inconvenience, early contact with the party that served the subpena may ultimately save you time and expense. It may also allow you to avoid having to respond to the subpoena altogether.

Assuming that the subpoena is properly served, the next step is to determine if it is 2 properly prepared. Oftentimes, subpoenas are prepared by individuals who are representing themselves or by inexperienced attorneys who fail to properly complete the subpoena. In this regard, the subpoenas must properly identify the person to respond to the subpoena. Merely asking for a "corporate representative" to respond is insufficient; you must designate either a specific individual or the "custodian of records" of a company. If the name of custodian of records is not known, merely stating the title "custodian of records" or a particular officer of the company may be sufficient.

In addition, if the subpoena requests that you attend a court hearing or deposition, the date, time, and location of the event must be set forth with specificity in the subpena. Failing to identify the date, time, or place may render the subpena so vague that it is incapable of being enforced. Again, if there is information left out, you should contact your attorney, who may be able to work out a solution with the party serving the subpoena.

Similarly, if the subpena requests that you produce documents, the subpena must specifically identify the documents to be produced and the category of documents requested must be sufficiently narrow to allow you to determine which documents need be produced. For example, a request that "all letters you sent to or received from

party xxx" sufficiently allows you to identify that certain letters are requested. However, a subpoena which requests that you produce "all documents relating to company xxx" may be so broad as to make it difficult to respond to the subpoena.

If you believe that the category of documents requested is overly broad, contact your attorney to prepare a proper response. Remember, even if it appears that the subpoena is impermissibly over broad, you should take steps to respond to it so that you can avoid a request to hold you in contempt of court.

You should also review the subpena to see if you have been given sufficient notice. If you are requested to attend a hearing or deposition, you must be served with the subpoena within a "reasonable time." [Code of Civil Procedure §1987(a).] If you are requested to produce documents, you must be served with the subpoena at least 20 days before the documents are to be produced, unless the court provides a shorter time. [Code of Civil Procedure §1987(c).] More time may also be required, as service of the subpoena must be made "so as to allow the witness a reasonable time for preparation and travel to the place of attendance." [Code of Civil Procedure §1987(a).]

In addition to determining whether or not the subpoena itself is proper, and was properly served, determine whether or not the proper "witness fees" have been delivered to you, or at least offered. Generally, when a subpoena is served, the witness is entitled to receive witness fees and anticipated mileage to and from court. [Code of Civil Procedure §1986.5.] If documents are requested, the witness is also entitled to receive the reasonable costs of compiling and photocopying the documents requested. [Ibid; Evidence Code §§ 1560, 1563.] The reasonable cost for photocopying records is 10¢ per page and 20¢ per page of documents for microfilm, the actual cost of reproducing oversize documents and documents such as x-rays; the clerical cost in locating and making records available is a maximum of $16.00 per hour per person to be billed in increments per $4.00 per quarter hour, actual postage costs and actual costs incurred in having a third party retrieve the documents. [Evidence Code §1563.] These costs are to be paid before any witnesses are required to attend and before any documents need to be physically produced.

If you have received a subpena as an "expert witness," you are entitled to receive a reasonable rate for your services in traveling to and attending the hearing. [Code of Civil Procedure §2034.]

Again, it is important to determine exactly what is being requested of you because, in many instances, you will receive a document entitled "Deposition Subpoena Business Records Only." This document generally merely requests that you produce documents at a certain place and time. If the party requesting the documents is an attorney, the attorney may request that you produce documents to a photocopy service. The photocopy service will pay you a $15.00 fee (authorized by Evidence Code §1563), and you will merely present the documents to the photocopy service so that they may photocopy them.

It is important that before you produce any documents, you determine whether or not the document may be considered "personal records." Personal records are defined as records maintained by a "physician, chiropractor, veterinarian, veterinary hospital, veterinary clinic, pharmacy, hospital, state or national bank, state or federal association, state or federal credit union, trust company, anyone authorized by the state to make or arrange loans that are secured by real property, security brokerage firm, insurance company, title insurance company, underwritten title company, escrow agent . . . attorney, accountant, institution of the farm credit system . . . telephone corporation which is a public utility... ., or psychotherapist . . ., or a private or public preschool, elementary school or secondary school." [Code of Civil Procedure §1985.3(a)(1).] A party who requests such "personal records" must send a notice to the party whose records are sought that their "personal records" are being requested, and the notice must be given at least 10 days prior to the date of production unless the notice to the "consumer" is delivered by mail, in which event it must be delivered at least 15 days before the date of production. [Code of Civil Procedure §1985.3(d).] In any event, the recipient of the subpoena must be given at least 15 days to respond to the subpoena and must also be served with an affidavit which confirms that the consumer has received a notice that personal records are being sought. [Code of Civil Procedure §1985.3(b) and (d).]

If personal records are being sought, and if a notice to consumer has not been served, or if you have not received an affidavit confirming that the notice to consumer has been served, then you have no duty to respond to the subpoena. [Code of Civil Procedure §1985.3(k).] In fact, delivering personal records in response to the subpoena, without compliance with the law requiring notice to the consumer, may constitute dissemination of privileged information, and could cause you to be sued for invasion of privacy.

How to Respond to a Subpena

As referenced above, there are many instances in which you should not respond to a subpoena: If you were not properly served; if you were not given sufficient time; if the category of documents requested is not sufficiently described; failure to pay witness fees; failure to pay expenses for photocopying of documents; failure to serve notice to the consumer that personal records are being sought; and failing to serve an affidavit confirming that the notice to consumer was properly delivered.[1]

If you believe that the subpoena is somehow deficient, consult with an attorney immediately, as time is of the essence. You do not want to be in a situation in which the party serving the subpoena will claim that you have failed to comply with it, will serve you with a motion for contempt which you will then have to resist.

It is the better practice to immediately confront the party who has served the subpoena and try to work out your differences. This is known as the "meet and confer" process.

Unfortunately, in many instances, after you meet and confer with the party serving the subpoena, you may be nowhere closer to a resolution. They believe that the subpoena is proper and you believe that the subpoena is somehow deficient. Similarly, there may also be instances in which the records being requested are extremely confidential or otherwise privileged. In such an event, even after you have attempted to meet and confer, and are no closer to a resolution, you can ask the court to "quash" (e.g. strike) or modify the subpoena. [Code of Civil Procedure §1987.1.] In order to do so, you must first meet and confer with opposing counsel. (Ibid.) You must thereafter file a formal motion with the court to ask it to quash or modify the subpoena. If you are successful, the court may, at its discretion, award attorneys' fees if it finds the party opposing the motion did so in bad faith, was without substantial justification, or that one or more of the requirements of the subpoena was oppressive. [Code of Civil Procedure §1987.2.]

In our practice, we often confront situations in which either personal records of consumers are being sought which otherwise should not be produced, or in which the category of documents requested is overly broad. In many of those instances, personal medical records are sought that have no relation to the lawsuit we are handling for the client. We are thus forced to try and limit the subpoena.

Unfortunately, we have found that opposing counsels do not wish to voluntarily limit their subpoenas and we are often required to go to court and ask them to either quash or limit the subpoenas. Fortunately, we have had great success in limiting or

otherwise quashing subpoenas. You should therefore take heart that if you believe that a subpoena is overly broad or otherwise improper, you should take immediate steps to prevent its enforcement.

If, however, you intend to respond to the subpoena in which documents have been requested, you may provide a response within five days after the subpoena is served, stating which documents will be produced and which documents will not be produced and why. [Code of Civil Procedure §19867(c).] If the party serving the subpoena disagrees with your response, they must meet and confer with you in an attempt to work out your differences and, if your differences cannot be worked out, they can then ask the court to order you to comply with the subpoena. [Code of Civil Procedure §1987.1.] Alternatively, you can also ask the court to quash or modify the subpoena in the manner set forth above. (Ibid.)

Conclusion

Although subpoenas can seem somewhat intimidating when you receive them, they are generally routine and do not cause problems. You should not, however, ignore them. Instead, carefully review them, determine if the party serving the subpoena has complied with the necessary requirements and, if you have any questions, consult your attorney. Failing to do so may open the door to sanctions which could otherwise be avoided by prompt action on your part.

[1]This is not an exhaustive list of all the grounds for objecting to a subpoena but is a highlight of many of the most common grounds for objecting to a subpoena. You should, of course, consult with an attorney anytime you are served with a subpoena and have doubts regarding its validity.

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