



Legal Minute

Spring 2008

When the Constable Knocks: How to Respond to Subpoenas

Never ignore a subpoena.

This legal minute provides information about how to deal with subpoenas issued as part of civil cases in which the nonprofit is **not** a party. A subpoena is a court order that commands a person or an organization to appear or to produce documents at a required place and time. Subpoenas are typically issued as part of an ongoing civil or criminal case. A subpoena of the person requires the person to appear at the time and place specified in the subpoena. A subpoena *duces tecum*, or subpoena for production of documentary evidence, requires a person to produce specified documents or other physical evidence.

How is a subpoena served?

A subpoena must be given to the person identified in the subpoena and may be served at any place within the State of Texas. The organization may accept the subpoena by fax or mail if it is not opposed to releasing the records. A subpoena may be served by a Texas sheriff or constable, or any adult who is not a party to the suit. Witness fees and any fees for copying the records listed in the subpoena must be attached to the subpoena.

Can a subpoena be served on an employee or client of a nonprofit at the nonprofit's office?

Yes. A subpoena may be served at places of employment, offices and places of shelter. The subpoena may be directed at an individual who can be found at the nonprofit's location. The subpoena must be delivered to the person named; the nonprofit is not required to make the person available, and should not accept the subpoena on behalf of the person. In some situations, nonprofit staff and volunteers may be prohibited by confidentiality rules from releasing information about clients, including confirming or denying whether the client is staying at the location.

Who should accept a subpoena for a nonprofit?

Subpoenas will be served on nonprofit's registered agent at its registered address. An organization should make sure the registered agent and principal location on file with the Secretary of State is updated and correct. If a nonprofit's registered agent is not usually found at the registered address, the nonprofit may designate a staff member, such as the Executive Director, to accept subpoenas on behalf of the registered agent or custodian of records. If a nonprofit fails to maintain a current registered agent or the server cannot find the registered agent after several tries, the Texas Secretary of State will accept the subpoena for the nonprofit and mail the subpoena to the registered address for the nonprofit. Additionally, the nonprofit's president and vice-president are considered the agents of the corporation and may be sent the subpoena.

How long does a nonprofit have to respond to a subpoena?

The subpoena will state the dates for appearance, response, and production. A person may be ordered to appear immediately without prior notice.

Subpoena Compelling Production of Documents or Things

A nonprofit that is not a party to a case will receive both a notice and a subpoena. The notice will be served **10 days** before the subpoena is served. The person or corporation will typically be given at least **30 days** to respond after being served.

Subpoena Compelling Testimony

A nonprofit that is not a party to a case will receive both a notice and a subpoena. However, provided that the time allowed is reasonable, both the notice and the subpoena may be served at the same time. The subpoena should describe the topics which will be covered during the witness' questioning, so that the organization can designate the right person(s) to testify on its behalf.

How can a nonprofit challenge a subpoena?

Texas law provides several ways in which a nonprofit may challenge a subpoena.

Object

A nonprofit served with a subpoena compelling production may object in writing to the subpoena before the time to reply has expired. The objection must be specific. A nonprofit served with a subpoena compelling testimony may challenge the subpoena by filing a motion to quash. Common reasons to object include that the requested information is:

- not relevant to the case;
- not reasonably available from the nonprofit or is readily available from an alternate source;
- not easily identified from the request (lacks specificity);
- burdensome to produce;
- that the request itself is harassing and/or overbroad; or
- that the subpoena violates the limitations on the geographic range of 150 miles.

Claim a Privilege

A subpoenaed person can claim that material or testimony requested by the subpoena is protected by a privilege. Typical privileges include the:

- Lawyer-Client
- Member of the clergy
- Mental Health Information
- Husband-Wife
- Physician-Patient

File a Motion for a Protective Order

A court may issue a protective order that limits, controls, or discharges the need to comply with the actions required by the subpoena if the court determines that the request:

- creates an undue burden by asking for information that is duplicative, obtained from alternate source, and/or creates a great expense to produce;
- constitutes harassment or annoyance on the party that is named in the subpoena;
- is overbroad; or
- invades protected right.

What happens if a nonprofit does not comply with a subpoena?

If the nonprofit does not challenge the subpoena and fails to appear or produce the required items, the Court that issued the subpoena may treat this failure as a contempt of court and may assess a fine or a jail term against the responsible persons. A judge may also issue a writ of attachment to take the person who fails to respond into custody for delivery to the court.

Best Practices

An organization should establish clear procedures that describe how to handle a subpoena that is served on the organization, as well as subpoenas served on employees or clients of the organization. The procedures should specify:

- The steps to be taken before responding to a subpoena, which should always include talking to the organization's attorney immediately upon receiving the subpoena.
- The person(s) authorized to accept a subpoena.
- What to do if an unauthorized person accepts a subpoena.
- The persons designated to respond to a subpoena.
- The standard policy regarding what types of subpoenas to challenge. For example, the nonprofit may not challenge subpoenas requesting paycheck records for employees who are required to pay child support, but may challenge subpoenas requesting records on its clients.
- The persons to be notified if a subpoena is served on an employee or client;
- Whether a subpoena served on a client will be accepted (and if so, what is the procedure for notifying the client of the subpoena); and
- If, and under what circumstances, client information will be revealed (i.e. with the client's consent).