



KEN PAXTON  
ATTORNEY GENERAL *of* TEXAS

# Responding to Third-Party Subpoenas

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# I. Receiving and Evaluating a Subpoena

# Subpoena Statutes and Rules

- Federal Rule of Civil Procedure 45
- Texas Rule of Civil Procedure 176
  - TRCP 192 (permissible discovery; protective orders)
  - TRCP 193 (responses and objections)
  - TRCP 199 (deposition)
  - TRCP 200 (deposition on written questions)
- Code of Criminal Procedure Chapter 24
- Texas Government Code § 2001.089 (subpoenas in contested cases)

# Prepare for Subpoenas

- Develop an agency process for responding to subpoenas
  - Expect to be served with subpoenas
  - Act immediately when served
  - Subpoenas must be treated differently than open records requests
- Train Board Members and Agency Staff on:
  - Agency subpoena process
  - Alerting legal staff (or Agency contact person) about out of the ordinary inquiries into obtaining documents, taking a deposition, or testifying at trial
  - Subpoenas to former employees

# Require Proper Service

- Require proper service of a subpoena to establish clear deadlines for response.
  - FRCP 45(b): Any person who is at least 18 years old and not a party may serve a subpoena by delivering a copy to the named person.
  - TRCP 176.5: A subpoena must be served by a sheriff, constable, or any person who is not a party and is at least 18 years of age by delivering a copy to the named person.

# Immediate Steps on Service of a Subpoena

- All Agency employees and Board/Commission members: Alert legal staff or designated Agency contact
- Agency legal staff or designated contact:
  - Evaluate the subpoena to determine next steps (see next slide).
  - Check the docket to learn about the case and discovery deadlines.
    - In State court, go to the website for the county in which the case is pending to determine whether the docket is publicly available.
    - In Federal court—check PACER
  - Institute a litigation hold to preserve documents.

# Evaluate the Subpoena

- Type of Subpoena
- Deadlines for objections and production
- Plan for response
  - Locate Documents
  - Determine Appropriate individuals to designate for deposition
  - Determine Objections

# Subpoena Types

- Subpoena duces tecum (document subpoena)
- Deposition Subpoena (either to an individual or the agency)
- Trial Subpoena
- Deposition on Written Questions
- Subpoena for both documents and testimony
- Grand Jury Subpoena
- Administrative Subpoena

# Important Deadlines

- **Objection Deadlines:**
  - Federal Court document subpoenas: Objections must be served by the earlier of the subpoena compliance deadline or fourteen calendar days after service. *See* FRCP 45(d)(2)(B).
  - State Court: Objections must be served before the time specified for compliance. *See* TRCP 176(d).
  - State Court objection to time or place for deposition: An objection filed within three business days of service stays the deposition until the objection is resolved. *See* TRCP 199.4.
- A person or entity served with a deposition on written questions in State court has a minimum of 20 days to respond. *See* TRCP 200.1(a).

# Note: Grand Jury and Criminal Subpoenas

- An agency will almost always be required to comply with a grand jury subpoena because these proceedings are secret. *See* CCP Art. 20.02.
  - A person that discloses anything transpiring before a grand jury is liable for a fine of up to \$500 and/or imprisonment for up to 30 days.
- Objections and motions for protection in a criminal subpoena are limited due to the liberty interests involved.

## II. Agency Subpoena Response

# Matters to Immediately Refer to OAG

- If the Agency is served with a deposition subpoena and needs to file an objection to the time or place, refer the matter to the OAG. An objection must be filed by the third business day after service to stay the deposition.
- If the Agency is served a subpoena that has a compliance deadline of fewer than five days, and the Agency is not certain it can comply before the deadline, refer the matter to the OAG.

# Plan for Response

- Do you understand what the subpoena is requesting?
- Does the agency have documents or other information responsive to the subpoena? Begin locating this information.
- Are there statutes that make the information sought confidential and not subject to subpoena? If so, may the information be provided under a protective order?
- Note: Public Information Act statutes generally do not provide a basis for objecting to a subpoena.

# Attempt Agreement with Issuing Counsel

- Once you have developed a plan for response, contact the issuing attorney to attempt to reach agreement about the Agency's response to the subpoena.
  - Note: Even if the subpoena came from a records service company, call the issuing attorney.
- Attorneys are generally responsive to requests for further explanation, narrowing, or additional time.
- Often attorneys will accept (or even prefer) a business records affidavit in response to a deposition on written questions.
- Confirm agreements in writing.

# Prepare and Serve Objections

- Agency attorneys may serve objections to both federal and state subpoenas.
- Objections are served on the issuing party, not filed with the court.
- The individual/entity subpoenaed is only required to comply with the subpoena to the extent it does not object.
- Serving objections shifts the burden to issuing counsel to file a motion to compel and obtain a ruling before compliance with the subpoena is required. *See* FRCP 45(d)(2)(B)(i); TRCP 176.6(d).

# Potential Objections

- Potential Objections:
  - The information sought is confidential by law and not subject to subpoena.
  - The subpoena gives insufficient time to comply.
  - The subpoena is overly broad and is not tailored to avoid undue expense and burden on a non-party.
  - Certain requests are vague, so the Agency does not know how to comply.
- Review the applicable Rules for other objections that may apply.
- Objections should be specific. Do not merely include boilerplate language.
- Remote depositions and trials limit objections to time and place for compliance.

### III. Requesting OAG Representation on a Third-Party Subpoena

# Submitting a Request for Representation

- Requests for representation may be submitted by email to `agency_req_rep@oag.texas.gov` addressed to Shawn E. Cowles, Deputy Attorney General for Civil Litigation.
- Request representation well before the compliance deadline (or objection deadline, if applicable). OAG's options are extremely limited after the compliance deadline.
- Include details in the request for representation:
  - What steps is the Agency requesting OAG take? (e.g., file a motion for protective order, seek an extension of time)
  - What steps has the Agency has taken to resolve issues with the subpoena?
  - Are there applicable confidentiality statutes?

# When Does OAG Accept Representation?

- OAG generally accepts representation to:
  - File a motion for protection;
  - Represent Agency employees at depositions;
  - Represent the Agency in responding to a motion to compel.
- OAG may only represent agency employees or former employees on matters within the course and scope of employment. *See Civ. Prac. & Rem. Code Ch. 104.*
- OAG generally will not represent an agency served with an administrative subpoena.

## IV. What to Expect When OAG Accepts Representation

# Scope of Representation

- When OAG accepts representation, the acceptance letter will explain that the Administrative Law Division (ALD) will determine the scope of representation on the subpoena.
- OAG and the Agency will generally share responsibility for responding to the subpoena.
- The scope of representation will vary by subpoena type and complexity.

# Subpoena-Related Motions

- ALD may file a motion for protective order or motion to quash.
  - ALD may seek a protective order where information responsive to the subpoena is made confidential by law.
  - In state court, filing a motion for protective order shifts the burden to issuing counsel to obtain an order on the motion before the Agency is required to comply with the subpoena. *See* TRCP 176.6(e).
- ALD may also serve or file objections to the subpoena.
  - In both state and federal court, serving objections shifts the burden to issuing counsel to obtain an order before the Agency is required to comply with the objected-to portion of the subpoena. *See* FRCP 45(d)(2)(B)(i); TRCP 176.6(d).
- ALD will generally defend an Agency on a motion to compel compliance with a subpoena.

# Scope of Representation: Document Subpoenas

- **ALD Responsibilities:**
  - Point of contact for issuing counsel
  - Work with issuing counsel to determine appropriate scope of subpoena response
  - Represent the Agency in court
  - Work with the Agency to develop a procedure for document review and serve as final reviewer for questionable documents
- **Agency Responsibilities:**
  - Determine whether the Agency has responsive documents or information
  - Estimate time and personnel required to gather, review, and produce documents
  - Gather all responsive and relevant documents and information
  - Review documents and redact responsive documents

# Scope of Representation: Deposition Subpoenas

- ALD Responsibilities:
  - Point of contact for issuing counsel
  - Work with issuing counsel to determine time, place, format, and topics for deposition
  - Prepare Agency witness for procedural aspects of deposition
  - Represent Agency witness at deposition
- Agency Responsibilities:
  - Prepare the witness on deposition topics
  - Attend deposition to observe and provide guidance to the OAG attorney and Agency witness

# Scope of Representation: Trial Subpoenas

- Absent exceptional circumstances, OAG generally only accepts representation on trial subpoenas to file motions (e.g., motion for protection or to quash trial testimony).
- Since the Agency is not a party to the suit, there generally is no role for OAG at trial.
- The Agency may work with issuing counsel to determine a time and place certain for the witness's testimony.
- When in doubt, submit a request for representation.

# Discovery Sanctions

- A third-party or its attorney may face fees, sanctions, or be held in contempt for failure to timely and fully respond to a subpoena.
- FRCP 37: Sanctions for failure to cooperate in discovery
- TRCP 215: Sanctions for abuse of discovery

# Questions?

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