

## I. Introduction

Your client has just received a subpoena from a Texas civil court in a case in which she is not a party. She calls you and inquires about what her legal obligations are. Have you received a similar call? If so, then you have come to the right place. TYLA has created this guide to assist Texas lawyers in advising their clients about what subpoenas are, their duty to respond, and how best to respond to a subpoena issued to them by a Texas state or federal court.<sup>1</sup>

## II. Definition

A subpoena is an order from a court that commands a person or entity to appear in person or to produce documents at a required place and time. Subpoenas are issued to persons or entities that are not parties to a lawsuit by the court with jurisdiction over: (1) the person or entity that is to testify; (2) the person or entity that is the custodian of the documents that are to be produced, or (3) the person or entity that possesses the property that is to be inspected in a particular case. The rules governing subpoenas, and the responses thereto, differ slightly based upon whether the case is criminal or civil and whether the case is in Texas state or federal court.

## III. The Rules

STATE	FEDERAL
Texas Rules of Civil Procedure 176, 192-193, 199, 200, 205	Federal Rules of Civil Procedure 26, 30-31, 45
Texas Civil Practice & Remedies Code §§ 22.001, 22.002	

## IV. Purpose

In civil cases, subpoenas may be issued for purposes of discovery (“discovery subpoena”) or used to require a person to testify or produce documents at a hearing or trial (“trial subpoena”). A discovery subpoena is used to secure documents (“subpoena duces tecum”) or sworn testimony (“subpoena and testificandum”) during the applicable discovery period. A single subpoena can command a witness to both testify and produce documents. If the subpoena calls for the production of documents only, then the witness need not appear at the time and place of production. TEX. R. CIV. P. 176.6(c); FED. R. CIV. P. 45(c)(2)(a). A discovery subpoena cannot be used to circumvent the discovery rules. TEX. R. CIV. P. 176.3(b), cmt. 2; FED. R. CIV. P. 26(b).

From a practical perspective, you should contact the attorney issuing the subpoena (“issuing attorney”) to understand what documents she is particularly interested in, why the documents are needed, or why your client’s testimony is needed. The discussion with the issuing attorney may help narrow the scope of the subpoena and thereby minimize any undue burden and expense to your client whom you may have otherwise advised to serve objections, file a motion to quash, modify, or for protection. If you reach an agreement with the issuing attorney that limits the scope of the subpoena or releases your client from her obligations under the subpoena, you should send a letter memorializing the agreement.

## V. Requirements

### A. Form and Contents

Every subpoena issued by a Texas court must adhere to the form prescribed in the applicable rules. *See* TEX. R. CIV. P. 176.1, FED. R. CIV. P. 45.

A subpoena issued in a state case must be issued in the name of “The State of Texas” and:

- state the style of the suit and its cause number;
- state the court in which the subpoena is pending;
- state the date on which the subpoena is issued;
- identify the person to whom the subpoena is directed;
- state the time, place, and nature of the action required by the person to whom the subpoena is directed, as provided in TEX. R. CIV. P. 176.2;
- identify the party at whose instance the subpoena is issued, and the party’s attorney of record, if any;
- include the text of TEX. RULE OF CIV. P. 176.8(a)<sup>2</sup>; and
- be signed by the person issuing the subpoena.

A subpoena issued in a state case must also command the person to whom it is directed to do either or both of the following: (a) attend and give testimony at a deposition, hearing, or trial; (b) produce and permit inspection and copying of designated documents, or tangible things in the possession, custody, or control of that person. TEX. R. CIV. P. 176.2.

A subpoena issued in a federal suit is similar to one issued in a state case. The subpoena must:

- state the court from which it is issued;
- state the title of the action, the court in which the action is pending, and its civil-action number; and set out the text of the rule.
- include the text of FED. R. CIV. 45.

In addition, the subpoena issued in a federal case must command the person to whom it is directed to do the following at a specified time and place: (a) attend and testify; (b) produce designated documents, electronically stored information, or tangible things in that person’s possession, custody, or control, or (c) permit the inspection of premises. FED. R. CIV. P. 45(a)(1)(A)(iii).

### B. Geographical Limitations

In state court, a subpoena can commend a witness to appear or produce documents in any county within 150 miles of where the witness *resides* or *was served*. TEX. R. CIV. P. 176. For example, a subpoena issued by an attorney representing a party in an Amarillo civil case may compel a witness who lives or is served in Houston to appear for deposition or produce documents in Houston (or within 150 miles of Houston). However, that subpoena cannot compel the Houston resident witness to give a deposition or produce documents in Amarillo (unless the Houston resident witness is served within 150 miles of Amarillo).

A subpoena requiring a witness to appear for a hearing or trial in state court is slightly different than a subpoena for a

deposition or documents only. A witness must appear for trial or hearing in the county of suit if the witness resides or was served within 150 miles of that county. TEX. CIV. PRAC. & REM. CODE § 22.002. For example, a subpoena issued by an attorney representing a party in a Tarrant County suit can compel a witness who resides or is served in Dallas County to appear for trial or hearing in Tarrant County. That subpoena could not, however, compel a witness who resides or served in El Paso to attend the trial or hearing in Tarrant County.

In a federal court, a subpoena may be served at any place in the U.S. that is: (a) within the district of the issuing court; (b) outside of the court’s district, but within 100 miles of the place for the deposition, hearing, trial production, or inspection; (c) within the state of the issuing court if a state statute or court rule permits a state court to serve a subpoena; or (d) in a place that the court authorizes on motion and for good cause, if provided by federal statute. FED. R. CIV. P. 45(b)(2). Note that subpart (c) makes the range limits applicable to service of Texas state subpoenas applicable to federal subpoenas as well. There are also rules for issuing and serviced a subpoena to a U.S. national or resident who is in a foreign country that are not discussed here. FED. R. CIV. P. 45(b)(3); 28 U.S.C. § 1783.

### C. Who May Issue and Serve

In state court, a subpoena must be issued by the appropriate court clerk, an attorney authorized to practice in Texas, or a deposition officer authorized to take depositions in the state. TEX. R. CIV. P. 176.4.

In federal court, the appropriate district clerk must issue a blank signed subpoena, and the party requesting the subpoena must complete it. FED. R. CIV. P. 45(a)(3). It is imperative that the attorney obtains the subpoena from the appropriate court. A subpoena for a witness to attend a hearing or trial must be issued from the district court where the hearing or trial will be held. FED. R. CIV. P. 45(a)(2)(A). A subpoena for a deposition must be issued from the court where the deposition is to be taken. FED. R. CIV. P. 45(a)(2)(B). A subpoena duces tecum (not accompanying a subpoena for attendance) must be issued from the court where the production, inspection, copying, testing or sampling of documents or electronically stored information will be made. FED. R. CIV. P. 45(a)(2)(C). A subpoena may also be issued and signed by an attorney as an officer of: (a) the court where the attorney is authorized to practice; or (b) a court where a deposition is to take place or a production is to be made, if the attorney is authorized to practice in the court where the action is pending. FED. R. CIV. P. 45(a)(3)(B).

In state and federal cases, a subpoena may be served by anyone who is not a party and at least 18 years old. TEX. R. CIV. P. 176.5; FED. R. CIV. P. 45(b).

## VI. Objections, Motions, and Response

Whether the subpoena is issued from state or federal court, your client must do one or more of the following: (1) serving objections; (2) filing a motion to quash or modify the subpoena or for protection from compliance; or (3) simply complying with the terms of subpoena, unless the obligation to respond is discharged by the court or the issuing attorney. The burden of proof is on your client to have evidence to

support its objections or motion to quash. If your client fails to respond to the subpoena without an adequate excuse, then she may be held in contempt of court and may be fined, put in jail, or both. TEX. R. CIV. P. 176.8; FED. R. CIV. P. 45(c).

In state court, the subpoena may be challenged by the person who is the subject of the subpoena, the parties, or any other person affected by the subpoena. TEX. R. CIV. P. 176.6(d)-(f). A person who receives a discovery subpoena (for testimony or documents) may simply comply; or object, move to quash, modify, or seek protection from the court in writing **before the time specified for compliance in the subpoena**. TEX. R. CIV. P. 176.6. Conversely, a person who receives a trial subpoena (i.e., subpoena for a witness to testify or produce documents at a hearing or trial), may object or move for protection at the time and place specified in the subpoena. TEX. R. CIV. P. 176.6(f).

Like state court, a subpoena issued in federal court may be challenged by any person who is subject to or affected by the subpoena. FED. R. CIV. P. 45(c)(2)(B), (3)(B). In federal court, the timeline for objections to a subpoena differs slightly from state court. In federal court, **objections must be served within 14 days after service of the subpoena or before the time specified for compliance, whichever is sooner**. Fed. R. Civ. P. 45(c)(2)(B). A motion to quash, modify, or for protection must be filed “timely.” Fed. R. Civ. P. 45(c)(3)(B). In general, the motion should be filed as soon as possible if an agreement cannot be reached with the issuing attorney, and certainly no later than the earlier of (a) the time specified for compliance or (b) within 14 days after service of the subpoena.

### A. Objections

In state and federal court, all objections must be in writing and served on the issuing attorney. Objections can be made to both the form and substance of the subpoena. Objections can be made by the person subject to the subpoena, a party, or any other person affected by the subpoena and must be served within the time period referenced above. A witness receiving a subpoena need not comply with the part of the subpoena to which an objection is made unless required to do so by court order. TEX. R. CIV. P. 176.6(d); FED. R. CIV. P. (c)(2)(B). The table below is a non-exhaustive list of possible objections.

Moreover, in both state and federal court, a witness subject to a subpoena may assert any applicable privilege to any written discovery in the same manner as that of a party to the suit. *See* TEX. R. CIV. P. 176.6, 193.3; TEX. R. EVID. 501 et seq; FED. R. CIV. P. 26(b)5, 45(d)(2); FED. R. EVID. 501 et seq. Note that if you are withholding privileged documents requested by a Texas state subpoena, you must include a withholding statement as required by TEX. R. CIV. P. 193.3(a). In federal court (and in Texas state court after making a withholding statement and receiving a request), you must provide a privilege log that includes information sufficient to allow the requesting party to evaluate the applicability of the claimed privilege or production. *See* FED. R. CIV. P. 26(b)(5)(A); TEX. R. CIV. P. 193.3(b).

### B. Motion to Quash, Modify, or for Protection

A witness served with a subpoena, or any other affected person, may move the court to quash or modify the subpoena

<sup>1</sup> This pamphlet is intended as an overview and guide to Texas attorneys and not as a substitute to reading the actual rules or case law regarding subpoenas. As always, attorneys should read and interpret the applicable rules and case law to ensure complete compliance.

<sup>2</sup> Rule 176.8(a) explains the consequences for failing to comply with a subpoena, and reads as follows: **Contempt.** Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena is issued or a district court in the county in which the subpoena is served, and may be punished by fine or confinement, or both.

	STATE	FEDERAL
<i>Form</i>	<ul style="list-style-type: none"> <li>• Wrong date</li> <li>• Not signed by authorized person</li> <li>• Improper service (geographical limitation)</li> <li>• No witness fee attached</li> </ul>	<ul style="list-style-type: none"> <li>• Wrong date</li> <li>• Not signed by authorized person</li> <li>• Improper service (geographical limitation)</li> </ul>
<i>Substance</i>	<ul style="list-style-type: none"> <li>• Overly broad</li> <li>• Undue burden or expense</li> <li>• Harassing, annoying, or embarrassing</li> <li>• Irrelevant to claim or defense</li> <li>• Unreasonably duplicative or cumulative</li> <li>• Seeks disclosure of privileged information</li> <li>• Seeks confidential and proprietary information</li> <li>• Seeks discovery in a form not permitted by the rules or agreed by stipulation</li> <li>• Invasion of personal, constitutional or property rights</li> <li>• Seeks information that the issuing party has had ample opportunity to discover on its own or that is obtainable from some other source that is more convenient</li> <li>• Official immunity</li> </ul>	<ul style="list-style-type: none"> <li>• Overly broad</li> <li>• Undue burden or expense</li> <li>• Harassing, annoying, or embarrassing</li> <li>• Irrelevant to claim or defense</li> <li>• Unreasonably duplicative or cumulative</li> <li>• Seeks disclosure of privileged information</li> <li>• Seeks confidential and proprietary information</li> <li>• Seeks discovery in a form not permitted by the rules or agreed by stipulation</li> <li>• Invasion of personal, constitutional or property rights</li> <li>• Seeks information that the issuing party has had ample opportunity to discover on its own or that is obtainable from some other source that is more convenient</li> <li>• Official immunity</li> </ul>

or otherwise seek protection from complying with the subpoena. Before filing a motion to quash or modify the subpoena or seek protection from the court, the witness or affected person should in good faith, confer or attempt to confer with the issuing attorney to resolve the dispute without court intervention. Both state and federal courts require a certificate of conference before a motion can be filed.<sup>3</sup>

In state court, if the subpoena commands your client to appear for deposition, then your client may consider objecting to the time and place of the deposition in a motion to quash or for protection. A motion filed on these bases within three (3) business days after service of the subpoena automatically stays the deposition until the motion can be heard. TEX. R. CIV. P. 199.4. With respect to any other subpoena, the motion to quash, modify, or for protection should be filed as soon as possible and before the deadline to produce the requested discovery. TEX. R. CIV. P. 192.6(a).

In federal court, a person subject to, or affected by, a subpoena can file a motion to quash, modify, or for protection before the time for performance as set forth in the subpoena. On a timely motion, the court must quash or modify a subpoena if it: (a) fails to allow a reasonable time to comply; (b) requires the non-party witness to travel more than 100 miles from where that witness resides, is employed, or regularly transacts business in person; (c) requires disclosure of privileged or other protected matter (assuming no exception or waiver applies); or (d) subjects the witness to undue burden. Furthermore, if the issuing attorney fails to take reasonable

steps to avoid imposing an undue burden or expense on the witness subject to the subpoena, then the issuing court must impose an appropriate sanction—which may include lost earnings and reasonable attorney’s fees—on the issuing attorney or her client. FED. R. CIV. P. 45(c)(1).

The objections listed in the table above provide a non-exhaustive list of bases for moving to quash or modify a subpoena or for protection from the subpoena.

#### C. Response

Subject to any agreements with the issuing attorney, objections, motions, and rulings thereon, your client must respond to the subpoena. TEX. R. CIV. P. 176.6; FED. R. CIV. P. 45(d). Your client’s response to a subpoena will differ depending upon whether the subpoena is for testimony or documents.

In state and federal court, a witness responding to a subpoena commanding her testimony must remain at the place of deposition, hearing, or trial from day to day until discharged by the court or issuing attorney. TEX. R. CIV. P. 176.6(a). With respect to depositions, there are limits regarding the amount of time your client may be subject to examination. TEX. R. CIV. P. 199.5(c); FED. R. CIV. P. 30(d). If your client is a corporation, partnership, association, governmental agency, or other organization, then your client must designate one or more persons to testify on its behalf as to matters known or reasonably available to your client. TEX. R. CIV. P. 176.6(b), 199.2(b), 200; FED. R. CIV. P. 30(b)(6), 31.

In state and federal court, a witness responding to a subpoena duces tecum must produce the documents as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand. TEX. R. CIV. P. 176.6(c); FED. R. CIV. P. 45(d). In state court, your client’s production of a document authenticates the document for use against your client. TEX. R. CIV. P. 176.6(c), 193.7. In addition, the issuing attorney must reimburse your client for the reasonable costs of production. Tex. R. Civ. P. 205.3(f).

In federal court, if the subpoena does not specify a form for producing electronically stored information (“ESI”), then your client must produce it in a form in which it is ordinarily maintained or in a reasonably usable form. Your client need not produce the same ESI in more than one form or from a source that is not reasonably accessible because of undue burden or cost. FED. R. CIV. P. 45(d).

#### VII. Conclusion

Subpoenas are powerful devices that need to be taken seriously. If your client is served with a subpoena, read it over with your client carefully and follow the instructions. Contact the attorney who issued the subpoena in order to clarify any issues. Do not procrastinate in any action taken with a subpoena. Provide written objections and assert privileges before the date of compliance arrives. Read the applicable court rules and always check the local rules of each court in the district from the where the subpoena has been served to ensure compliance. It should not take that long to produce a few documents or give testimony at a hearing or trial, and your client will benefit greatly from your efforts.

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# ANSWERING THE CALL: RESPONDING TO A TEXAS CIVIL SUBPOENA



<sup>3</sup> This requirement is often articulated in a court’s local rules. Be sure to review any applicable local rules when responding or serving a subpoena.