

Subpoenas and Demand Letters: Steps you can take immediately (and get back to your real job!

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A subpoena is a legal document issued by a court or other legal authority that commands a person to appear at a certain time and place to give testimony or to produce documents or other tangible evidence.

Types of Subpoenas:

Subpoena Requesting Personal Appearance for a Deposition or to Testify:

- Requires the person named to appear and testify at a specific time and place.

Subpoena Duces Tecum:

- Requires the person named to produce certain documents, records, or tangible things at a specific time and place.

STOP/SUSPEND ALL
ROUTINE
DESTRUCTION
PROCESSES UPON
RECEIPT OF
SUBPOENA

CONSIDER INTERNAL
LITIGATION HOLD

Key Elements of a Subpoena:

Issuance: Typically issued by a court clerk, an attorney, or another authorized party, e.g., licensing board or state agency.

Service: Must be served personally to the individual (or entity) named in the subpoena.

Content: Specifies what is required (testimony, documents, etc.), where and when to appear, and who issued the subpoena.

Compliance: Failure to comply with a subpoena can result in legal consequences, including fines or even contempt of court charges.

Possible responses to a subpoena:

- **Respond to the Subpoena with information or witness**
- **Seek to have the Subpoena narrowed through informal communications.**
- **Challenge Subpoena:**
 - Objecting:** In some cases, you may have grounds to object to all or part of a subpoena, such as if it is overly broad, unduly burdensome, or seeks privileged information.
 - Motion to Quash:** You can file a motion to quash the subpoena with the court if you believe it is improper or unnecessary.
- **Seek Protective Order**

Steps you should take when you get a Subpoena

Review the Subpoena

Content: Carefully read the subpoena to understand what specific information is being requested.

Deadline: Note the deadline for responding to the subpoena and producing the information (or person to testify).

Consider whether legal counsel should be contacted immediately:

- Who is the subpoena from, e.g., licensing board, private firm (defense or plaintiff)?
- What type of subpoena (documents or testimony)? --Is it a grand jury subpoena?
- In state or out of state?
- Federal or State court?
- Internal expertise and/or time?
- Severity of underlying matter
- Does it request confidential/privileged/sensitive information?
- Is it the “1st step” toward facility being sued
- Are special laws invoked, e.g., KORA, risk management laws, licensing statutes/regulations?

Consider whether insurers need to be notified:

- Hospital or medical professional liability carrier?
- General liability carrier?
- Cyber liability carrier?
- Employment liability carrier?
- Others?

Evaluate Relevance

Determine why the information (or person) is being subpoenaed and its relevance to the legal matter at issue. (It can be useful to ask your attorney to locate and evaluate the underlying litigation, risk management, licensure issue.)

Identify what information in your possession is directly pertinent to the case.

Identify, Collect, and Preserve Information

Original Format:

- Who has responsive information?
- Who is the custodian of the information?
- Can the information be provided in original format, e.g., paper, electronic, etc., or will it have to be produced in some other fashion?

Ensure Accuracy and Completeness

Review the information to ensure all requested information is included for review by internal resources and your attorney. The attorney will help identify relevance to information requested and whether objections or privilege should be asserted. The attorney can also help evaluate whether a Protection Order is needed.

Verify the accuracy of data, dates, and any other details presented.

Address Confidentiality, Privacy, and Privileges

Assess if any of the information contains confidential, privileged, or sensitive information, e.g., risk management or peer review information; attorney-client information; proprietary or competitively sensitive information.

If necessary, the attorney will redact or protect such information to comply with privacy laws or court orders and seek a protective order if needed.

Consult Legal Counsel

Seek guidance from legal counsel.

Legal advice and review helps:

- ensure compliance with legal requirements
- refine whether the subpoena request can be narrowed
- identify what should or should not be produced
- claim applicable privileges
- file any needed objections or motions to quash

Prepare for Delivery

Documentation: Prepare any necessary documentation to authenticate the presentation's accuracy (e.g., affidavit, declaration, bate stamp or index information).

Delivery Method: Follow the instructions in the subpoena regarding how and where to deliver the presentation (e.g., electronically, in person). Prepare a cover letter. Keep a copy of transmittal letter, email, and a copy of what was sent.

Subpoena for Deposition or Testimony

If the subpoena requests a person testify, consult with legal counsel to help prepare the witness for such testimony or deposition and identify applicable privileges and confidential information and any applicable objections.

Additional Considerations:

Court Appearance: Be prepared to discuss or present the contents of the response in court or at a deposition if required.

Legal Protections: Understand any protections or privileges that may apply to the information (e.g., attorney-client privilege, risk management and peer review privilege, exceptions to KORA).

Tips:

Do a reasonably good search and keep track of the search terms so you can prove where and what you looked for.

Don't forget about the many ways people communicate – text, email, fax, letter, calendar invites, intra-company communications

Keep your own copy of what you sent and a cover letter/email of when you sent it

Consider objecting or seeking special protections when records are confidential, e.g., HIPAA or are protected by a “privilege” or if they contain sensitive business or proprietary information

More Tips:

Ask questions of the person requesting the documents if you don't understand or are concerned about the number of documents that will be responsive (but may have nothing to do with what the requestor is really looking for).

Document those communications with that requestor to show the subpoena or request was modified and keep that along with the response and cover letter.

By following these steps, you can effectively manage a subpoena, comply with legal obligations, and claim applicable privileges and protections to safeguard information that should not be disclosed (even in light of a subpoena).



Demand Letters

- Identify who what when and “possible” whys
- Identify key people inside with relevant information
- Identify outside resources who can assist in responding:
 - Attorney
 - Relevant outside subject matter experts, e.g., contract representative, business partner involved in the litigation personnel
- Notify relevant insurance carriers



Examples of Subpoenas

Federal Subpoena

UNITED STATES DISTRICT COURT

for the

District of

Plaintiff

v.

Defendant

Civil Action No.

SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS

OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION

To:

(Name of person to whom this subpoena is directed)

Production: YOU ARE COMMANDED to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and to permit inspection, copying, testing, or sampling of the material:

Place:

Date and Time:

Inspection of Premises: YOU ARE COMMANDED to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place:

Date and Time:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date:

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing (name of party)

, who issues or requests this subpoena, are:

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

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State Subpoena:

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION SEVEN

Pursuant to K.S.A. Chapter 60

SUBPOENA DUCES TECUM FOR BUSINESS RECORDS

TO:

(1) You are commanded to produce the records listed below to counsel for the defendant within fourteen (14) days after receipt of the subpoena.

(2) Records to be produced: **Full and complete copy of all medical, psychotherapy and counseling records including but not limited to therapy notes, narrative summaries, telephone messages, and correspondence relating to ____, DOB ____, SSN: XXX-XX-__.** An executed medical records authorization has been provided to ____.

(3) You may make a written objection to the production of any or all of the records listed above by serving such written objection upon ____ within fourteen (14) days of your receipt of this subpoena. If such objection is made, the records need not be produced except upon order of the Court.

(4) It is sufficient compliance with the Subpoena if the Custodian of Records delivers to the attorney for the defendant by mail or otherwise a true and correct copy of all the records described with the attached affidavit to _____ within fourteen (14) days after service of this subpoena.

(5) The records described in this subpoena shall be accompanied by the affidavit of a custodian of the records, a form for which is attached to this subpoena.

(6) If the business has none of the records described in this subpoena, or only part thereof, the affidavit shall so state, and the custodian shall send only those records of which the custodian has custody. When more than one person has knowledge of the facts required to be stated in the affidavit, more than one affidavit may be made.

(7) The reasonable costs of copying the records may be demanded of the party causing this subpoena to be issued. If the costs are demanded, the records need not be produced until the costs of copying are advanced.

(8) The copy of the records will not be returned unless requested by the witness.

Clerk of the District Court

AFFIDAVIT OF CUSTODIAN OF BUSINESS RECORDS

State of _____)

) ss:

County of _____)

I, _____, being first duly sworn, on oath, depose and say
that:

- (1) I am a duly authorized custodian of the records of and have the authority to certify those records.
- (2) The copy of the records attached to this affidavit is a true copy of the records described in the subpoena.
- (3) The records were prepared by the personnel or staff of the business, or persons acting under their control, in the regular course of the business at or about the time of the act, condition or event recorded.

Signature of Custodian

Subscribed and sworn to before me this _____ day of _____, 2017.

Notary Public

My appointment expires:



CASE STUDY

Conclusion:

Understanding the nature and requirements of a subpoena is crucial for individuals and organizations involved in legal proceedings. It is important to handle subpoenas carefully, seek legal advice if necessary, and ensure compliance with the instructions provided to avoid legal penalties.