

# LITIGATION MINUTE: RESPONDING TO THIRD PARTY SUBPOENAS

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## **U.S. Complex Commercial Litigation and Disputes Alert**

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### **WHAT YOU NEED TO KNOW IN A MINUTE OR LESS**

In civil litigation, litigants often seek information from third parties by using document subpoenas. In federal court, those subpoenas are governed by Rule 45 of the Federal Rules of Civil Procedure. Upon receipt of a subpoena, consider the following:

#### **Calendar the return date and any deadlines for objections**

A third party should calendar both the return date and the deadline for objections. The return date is listed on the subpoena, and is the deadline by which the requested documents must arrive at a particular location. Third parties should also calendar the deadline for objections. Unless local rules state otherwise, third parties must object to subpoenas by either the return date or 14 days after the subpoena is served, whichever date is earlier. Keep in mind that third parties always have the option of working constructively with the subpoenaing party in an effort to reach an agreement relating to the production of documents that satisfies both the third party and the litigant seeking information.

#### **Identify and preserve documents**

A duty to preserve and produce subpoenaed material arises once litigants formally serve third parties with subpoenas. The third party served with a subpoena must ensure that all potentially responsive documents are identified, collected, and preserved for production by, among other steps, issuing a litigation hold that instructs personnel to locate, identify, and preserve all documents (in hard-copy or electronic form) that are potentially responsive; and taking appropriate steps to ensure that custodians of the records preserve and maintain the integrity of the materials.

#### **Determine the best way to proceed**

Simultaneously with identifying and preserving documents, third parties should determine how they want to proceed. This may hinge on factors such as the nature of the documents requested, the scope of the requests and the quantity of potentially responsive documents, the cost of complying with the subpoena, and whether any basis for contesting the subpoena exists.

#### **Take Action**

### ***Complying with Subpoenas***

In this instance, a third party must produce all responsive documents in their custody and control which are not privileged. Privileged documents may be withheld, but a privilege log identifying the documents withheld and the grounds for withholding the materials must be produced.

### ***Objecting to Subpoenas***

A third party may serve written objections to a subpoena. Generally, parties objecting to subpoenas must address each objectionable request separately, state the objections to each request, and include the specific grounds for each objection. Common grounds for objections include that the subpoena: (1) imposes undue burden or expense; (2) seeks documents containing irrelevant information; (3) is vague and/or ambiguous; and (4) seeks disclosure of trade secrets or other privileged or confidential information.

### ***Moving to Quash or Modify Subpoenas***

A third party may move to quash or modify a subpoena, or for a protective order to limit the obligations under the subpoena. The procedure for filing motions to quash, modify, or for a protective order varies based on the court, but generally, courts require parties to file such motions before the return date.

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