

AVIATION BUSINESS

OFFICIAL PUBLICATION OF THE NATIONAL AIR TRANSPORTATION ASSOCIATION

JOURNAL

2nd Quarter 2008



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You've Been Served! Responding to a Subpoena

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You've Been Served!

Practical Considerations When Responding to a Subpoena

By Paul Alp, Esq.

The owner of the airport stopped me on the way to the airplane. A frown creased his usually cheerful face. "I don't know what to do," he said.

"Someone just handed me this thing. Can you take a look at it?"

The "thing" was a subpoena for a deposition and production of documents in a high-profile civil case. Arriving like a bolt out of the blue, it was an official document with a court caption that required him, in 30 days, to testify under oath and turn over his business records to attorneys. The airport owner was shocked. He had never brushed up against a serious litigation before, and like most "civilians" dragged into one, he was surprised and a little apprehensive.

If you are a party to an existing lawsuit or FAA action, you likely already have counsel and can anticipate working with your lawyer

to develop a plan for responding to the various requests for information you receive. If, however, you are a non-party that receives a subpoena without warning, you might be at a loss for what to do next. It can be a very stressful experience. My friend owns and manages a small airport with a busy flight school and maintenance shop. He does not regularly deal with lawsuits, consult litigators, manage document requests, or institute so-called "litigation holds." But our society is litigious, and subpoenas to non-parties are common. Moreover, being in the aviation business means you may find yourself brought into an administrative investigation that you had no idea was underway. Last year, for example, some of our clients received subpoenas from the FAA in connection with its investigation of an operator. Though they were bystanders to

the investigation, they still had to respond. It is, therefore, important to have a basic understanding of what a subpoena is before the day one drops into your lap.

We stood outside under the sun beside the wing of a battle-scarred Cessna 152, and I walked my friend through the basic things to think about when you receive a subpoena. Consider yourself an eavesdropper on that conversation. To many people, dealing with lawyers is on a short list of things to avoid, but if you take the time to read on, I will try to make this as painless and informative as possible.

What Is a Subpoena?

Ominously, the term "subpoena" is Latin for "under penalty." It is a legal document that commands someone to appear at a specified

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time and place, typically to provide deposition testimony and/or produce documents and records. A subpoena may also request the recipient's attendance to testify at a hearing or trial.

Subpoenas are commonly served as part of a civil lawsuit between two or more adversaries in the course of investigating the facts of their case through a process called "discovery." Parties often serve subpoenas on non-parties during discovery to obtain information, documents, or testimony relevant to the dispute.

Depending on the jurisdiction (state or federal), the authority issuing the subpoena may be a clerk of the court, a notary public, or even an attorney for one of the parties to a lawsuit. A subpoena typically contains a caption setting forth the name of the case (which identifies the litigants) and the court through which it was issued. Most jurisdictions have requirements governing how a subpoena must be served. Generally, a subpoena may be served by any adult who is not a party to the litigation.

If the subpoena is properly served and meets other formalities, it requires compliance. Refusing to comply with a valid subpoena can subject you to sanctions, including being found in contempt of court or being responsible for the issuing party's attorney fees, neither a particularly pleasant outcome.

Subpoenas Requesting Documents and Records

A special type of subpoena, known as a *subpoena duces tecum* from the Latin "bring it with you," requires the recipient to bring records, reports, documents, or other evidence to a deposition or court. Sometimes the subpoena or accompanying letter indicates

that a person need not appear in person to testify so long as documents are produced within a specified period. Sometimes a party seeking documents will direct a subpoena to a person who has possession of the documents rather than the person who owns the documents. An example of this could be a subpoena to your bank directing it to produce your financial records.

As a general rule, when a formal request for documents has been made, the documents may not be altered or destroyed while the request is pending. To destroy records under such circumstances is referred to as "spoliation." Upon receipt of a subpoena for documents, an effort must be made to determine the specific documents that are within the scope of the request and then ensure that they are maintained and not disposed of until you and your attorney determine the particular form of response to be made.

Subpoenas from the FAA and Other Legal Orders

The FAA may subpoena witnesses and records in connection with an investigation. The FAA subpoena power is broad, and an FAA subpoena is valid and enforceable so long as the FAA is acting in its authority and the information sought is "reasonably relevant" to the inquiry.

A subpoena for testimony or documents of the sort discussed in this article is not the same as a letter of investigation from the FAA. A letter of investigation is a formal document that notifies an alleged violator of a regulation of the activity being investigated. It specifies the time for reply and may include a request of documents to be retained or made available for inspection and copying. A subpoena is also different from

other legal instruments that compel disclosure, testimony, or document production, such as a search warrant, national security letter (which the FBI and some other federal agencies can order in connection with international terrorism and counter intelligence investigations), or a court order. A discussion of the letter-of-investigation process, search warrants, national security letters, and the like is outside the scope of this article, and the recipient of any such instrument should not delay in seeking legal advice.

Somebody Just Served Me; What Do I Do Next?

As a subpoena recipient, your objectives include protecting your legitimate business and privacy interests, fulfilling your obligations to comply with a valid legal order, and avoiding undue time, burden, and expense, including sanctions for failure to comply as required. Accomplishing each of these goals at the same time can present a challenge, which is why enlisting the help of a qualified attorney is important.

One of the first things to consider is what your interest is in the case or investigation that prompted the subpoena. If it was issued in a commercial dispute among two private litigants, you may have no interest in the matter but merely be in possession of some information or documents relevant to the dispute. On the other hand, you could be the target of a potential lawsuit yourself. Similar considerations apply if you receive an investigative subpoena from the FAA. You could be a bystander or a potential investigation target.

It is critical that you do not delay taking action when you receive a subpoena. Don't "file" it

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where you consign other chores you wish to avoid. Often, a response or objection must be made within a certain time frame or else you could face sanctions or waive some of your rights. If the subpoena seeks documents, you will have to take steps to notify employees who have access to the documents sought and to find, identify, and preserve the documents.

What Are My Options?

As a general rule (specific options available vary by jurisdiction), upon receiving a subpoena in a civil case you may respond by objecting to it, respond without objections (i.e., comply in all respects), or file a formal request called a "motion" with the issuing court asking it to modify the subpoena or rule that it is unenforceable (to "quash" the subpoena in lawyer-speak). Another possibility is to not respond and then face the potential penalties. You should talk over all of your options with your lawyer and jointly decide upon the best way to proceed.

If you make a timely written objection, the party serving the subpoena is generally not entitled to enforce it without obtaining an order from the issuing court. If the recipient chooses to file a motion, the motion typically must be filed before the time set for compliance with the subpoena. If such a motion is filed, the witness generally may refuse to comply until a court rules on the motion.

At some point, the attorney seeking your testimony or documents may contact you to touch base. Sometimes the deadline set forth in the subpoena is merely a "placeholder," and the issuing attorney will work with you to establish a deadline that is compatible with your schedule. If you do not hear from the attorney

identified on the subpoena, it may be a good idea for your attorney to contact the requesting attorney to find out what he or she is really after and discuss a time frame for responding. You will often be able to negotiate a deal in which you produce a subset of the range of documents requested and/or reach an agreement that deposition testimony is not required if certain materials are produced. Always memorialize such agreements in writing.

Potential Objections

When you receive a subpoena, you should discuss with your lawyer possible objections, including the following.

Procedural defects. A subpoena is not legally enforceable against the recipient unless the issuing court or agency has jurisdiction over it. Typically the means of service of a subpoena determines whether the court has jurisdiction. Various requirements exist as to what must be contained or included with the subpoena and how it must be served. Grounds for objection include defects in service and procedural mistakes, as well as if the subpoena fails to provide a reasonable time to respond or requires a person to travel an unreasonable distance to provide testimony.

Relevance. In civil litigation parties may obtain discovery regarding any matter that is non-privileged and relevant to any party's claim or defense. Therefore, if a subpoena seeks information or documents that are not relevant to a claim or defense, the request is objectionable.

Undue burden and expense. You may object to a subpoena if responding to it will cause undue burden and expense. Courts are often willing to alleviate burdens of producing information on non-

parties. If the subpoena is unclear or its scope cannot be worked out through negotiation, going to court to obtain an order defining your obligations may be a wise move. A court may impose sanctions on a party that served an oppressive subpoena by ordering it to reimburse the respondent for lost earnings and attorney fees.

Documents not in your possession, custody, or control. If you do not have a document, you cannot be called upon to produce it. You may, however, have control over a document you do not physically possess if, for example, it is in the hands of a third party under your control or acting as your agent. If a third party acting as your agent has a responsive document, you may be required to instruct them to produce it.

Confidentiality and privilege. A subpoena may also be objectionable because it seeks information that is confidential, a trade secret, or subject to various privileges. A company typically does not want its trade secrets and other sensitive information to be disclosed in court where its competitors or the general public may have access to it. In instances where such information is of great importance to a lawsuit, a court may ultimately order disclosure but issue an order requiring documents or deposition transcripts to be protected from the prying eyes of the public.

Various legal privileges that protect against compulsory disclosure of information and documents exist, and you and your attorney should carefully think through whether any of them apply. The attorney-client privilege governs communications between attorney and client in connection with legal advice. Such exchanges are usually inviolable. In this way, an attorney can be like a spiritual advisor you confess to, with the

obvious difference being that they never took a vow of poverty.

A related concept, the work product doctrine, protects from disclosure an attorney's thoughts, mental impressions, and notes. Other privileges include the accountant-client privilege, the Fifth Amendment privilege against self-incrimination, the critical analysis privilege, which protects against the disclosure of documents reflecting potentially damaging self-criticism, and the patient-physician and spousal communication privileges. The results of an internal investigation of fraud or other activity conducted in accordance with the Sarbanes-Oxley Act or otherwise may also be protected.

In addition, federal and state laws govern the disclosure of personnel records. Although such statutes do not generally protect such records from disclosure in response to a compulsory legal request, they may impose notice or other procedural requirements.

Responding to an FAA Investigative Subpoena

Options available on receiving an FAA investigative subpoena vary somewhat compared to subpoenas in civil cases discussed above. For example, a person receiving an FAA investigative subpoena may not file a motion in court to stop its enforcement. Instead, if the person chooses not to comply, then the FAA must go to court to enforce the subpoena on a petition for an order directing the respondent to "show cause" why the subpoena should not be obeyed. When the FAA brings such a motion, the receiving person bears a high burden of showing that the subpoena is unreasonable, was issued for an improper purpose, or that compliance would be unnecessarily burdensome. A reviewing

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A Subpoena Checklist

There seems to be a checklist for almost everything in aviation. For example, the checklist for turning on the coffeemaker in a Boeing 737 can contain more than 50 items. Here is a shorter list of things to consider in consultation with your attorney when you receive a subpoena.

1. What is the deadline?
2. Does the subpoena command testimony, the production of documents, or both?
3. What is my connection with the dispute or investigation underlying the subpoena?
4. Is this a matter that I should inform my insurance company about?
5. Who will the company designate as a witness, if one is called for?
6. Where are all the responsive documents?
7. Where are the rest of the responsive documents?
8. Who is responsible for keeping them?
9. What electronic records, of any kind, do I have that are responsive to the requests?
10. What steps do I have to go through to gather all responsive documents?
11. Are any objections available on grounds such as:
 - a. Procedural defects with the subpoena or service,
 - b. Relevance,
 - c. Undue burden or expense, or
 - d. It seeks confidential or privileged documents, communications, or information?
12. If I'm going to respond with written objections or file a motion, what are the deadlines for doing so?
13. If I'm going to produce documents or appear for a deposition, will I need an extension of time?

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court must defer to the FAA's determination that the information sought by the subpoena is relevant unless the determination is "obviously wrong." In this context, it should come as a profound relief that, unlike every other government agency, the FAA is never "obviously wrong" about anything, right?

Deposition Testimony

A deposition involves questioning in which a witness testifies under oath, and everything he or she says is transcribed by a court reporter. A subpoena in a civil case to an organization like a corporation may be accompanied by a notice advising the organization of its duty to designate someone to testify for it at a deposition about specific topics. Because an organization cannot physically testify, it will be obliged to provide a spokesperson who can. Failure to designate a spokesperson may cause the organization to be punished for contempt of court. If you receive such a request, you should consult with your lawyer about who the lucky testifying "designee" will be.

A deposition is serious business. You must budget sufficient time to prepare and then prepare some more. Planning to appear at a deposition and bark, "I object!" in response to every question may sound like a good idea now, but wait until you have to explain yourself to a judge. A complete discussion of depositions is beyond the scope of this article. However, always bear in mind that, like your mother always told you, honesty is the only policy when testifying under oath.

Gathering Responsive Documents

Before you ever receive a subpoena, it is generally a good

practice to designate a person with responsibility for managing your documents and records and coordinating responses to requests for information. Establishing a specific document management protocol will, as a general matter, help your business run smoothly and give you a head start when and if you receive a subpoena for documents.

The following are things to consider when you receive a subpoena for documents:

Identify each specific entity from which the subpoena seeks information. The subpoena may be directed at some members of your corporate family and not others. You want to make sure that the correct entity responds.

Determine the location and format of responsive information and who may keep it. Responsive documents can be kept both as hard copies and as electronic data. Responsive information can be anywhere: at the bottom of an old filing cabinet in a warehouse, on a hard drive in a computer that used to belong to a manager but now resides in the maintenance shop, etc. If a company does not have a systematic procedure for storing, indexing, and retrieving documents, finding what you need can present a challenge. Early on in the process, it is important to clearly define, in specific terms, the universe of places where responsive information may be kept.

Establish which person at the company is going to direct document gathering. Ideally, this would be the person your company already charges with responsibility for managing documents. A point person who can deal directly with staff at all levels in the company as well as with outside counsel is an asset that will drive the process forward as efficiently as possible.

Determine the extent to which the company requires the assistance of outside counsel. {For purposes of full disclosure, in my experience as an attorney...} It usually is best for outside counsel to become involved in the document-gathering process at the earliest possible stage. Clients typically "forget" about the existence of places where potentially responsive documents may be kept. In addition to offering legal advice about substantive issues, a lawyer experienced in document production can ask specific, often annoyingly persistent questions to ensure that your search is complete.

Issue a hold on the destruction of documents as appropriate. You do not want to be accused of purposely or inadvertently destroying evidence. Make a plan in consultation with your attorney to find and preserve every conceivable responsive document, including electronically stored data. The need to preserve must be communicated to people at all levels and all locations of the organization who are likely to possess relevant material.

Carefully consider all potential privileges against disclosure that may apply. Communications with attorneys obviously fall within this category, but do not forget that you may have confidential or proprietary data as well as personnel records subject to various disclosure rules.

Determine the most sensible way to capture responsive documents and data. Options include copying documents yourself, calling in a vendor to make copies, and scanning all hard copies to create an image database. This latter approach is often more cost effective than old-fashioned photocopying because once a document is imaged, it can be printed

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out again cheaply. In contrast, photocopying involves paying to both scan and print the document every time you want a copy.

Once the documents are gathered, conduct a review for responsiveness and privilege. Depending on the size of your document collection, this could take some time. On the other hand, do you really want to cut corners and risk mistakenly producing a privileged document? Doing so could result in waiver of your privilege in all communications relating to the subject matter of the document.

Prepare written responses and objections as appropriate. These could take the form of a letter to counsel or a pleading. A records custodian may also have to sign a declaration attesting to his or her search for responsive material.

Electronically Stored Information

ESI is a popular buzzword in the law right now, not the title of a TV series. Information stored in electronic formats is kept in all sorts of places, including personal computers, servers running scheduling programs, camera-phones, PDAs, voicemail, and video surveillance tapes. Under the federal civil procedure rules, a person responding to a subpoena need not provide electronically stored information from sources that are not "reasonably accessible" because of "undo burden." For example, some electronically stored data may exist on systems so old that it cannot easily be converted into readable or usable form. However, a number of companies these days specialize in retrieving electronic data from media that has been corrupted or even "deleted" on purpose. Therefore, what a court will consider to be "reasonably accessible" ESI is a

question that will depend on the facts of your specific case.

The first important point to remember is to not take electronically stored information lightly. If you do not preserve discoverable electronic documents and data after receiving a subpoena, you may be found in contempt of court or liable for spoliation of evidence. Therefore, the second important point to remember is to develop a good data housekeeping plan before you receive a subpoena. Know what you have and where you have it. Designate someone who can provide information about where records are maintained, when they are destroyed, how they can be preserved, the formats used, past and present operating systems and software used, file-naming conventions, voicemail system usage, etc.

Here is an example of the type of situation where specialized knowledge about ESI can help you comply with a court order. You realize that some documents responsive to a subpoena include old emails that you sent or received from your home computer back in the heyday of AOL mail. You cannot find the emails, but a computer whiz may be able to retrieve copies of them. So far, so good. In reading through the retrieved messages you see references to email attachments like documents created in a word processor. Of course, the attachments are not "attached" anymore and, as luck would have it, constitute the very documents that the person who issued the subpoena is seeking. Could the attachments some day be found? Perhaps. Will they be readily accessible, or will retrieving them constitute an undue burden? The answers depend on the specifics involved. Will a court sanction you if you don't produce them? I'll have to plead the Fifth on this without additional infor-

mation!

For a profession that seems to be all about bright-line rules and precise language, lawyers can sound awfully mushy, right? Maybe.

Postscript

As we spoke, the airport owner seemed to relax a bit as it became obvious that subpoenas are not so daunting and mysterious after all. Responding to one presents challenges, but like other challenges in business and aviation, they can be managed with thoughtful advance preparation, a professional approach, and diligence. Hopefully the day will never come when you are served with a subpoena. If it does, don't panic. Contact a professional, work out the problem, and then move on. 

Disclaimer: This article is intended to help you understand the nature of a subpoena and how to respond to one. It is a general reference guide only and does not constitute legal advice. Because applicable law varies among jurisdictions and every case is unique, it is important to consult with an attorney knowledgeable about litigation who can help you protect your rights.

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