

## I. Introduction

In many ways, a subpoena in a criminal case operates very similarly to a civil subpoena. Chapter 24 of the Texas Code of Criminal Procedure and Rule 17 of the Federal Rules of Criminal Procedure govern the issuance of subpoenas in criminal matters. A criminal subpoena may include a subpoena for witness testimony, a “subpoena duces tecum” for documents or other tangible evidence, or a combination of both.

The circumstances surrounding a criminal subpoena, however, are often quite different from that of a civil case. A person receiving a criminal subpoena is commonly a victim or a witness to a crime and may be nervous about facing the accused in court. In a domestic violence case, the accused may even be a close friend or family member.<sup>1</sup> It is also common for a witness to be subpoenaed to testify before a grand jury as part of a criminal investigation. In these instances, it is not uncommon for an attorney to be approached by a current or former client seeking guidance on how to respond after being served with a criminal subpoena.<sup>2</sup>

## II. Trial Subpoenas

A trial subpoena compels your client to appear at a trial or hearing. The subpoena must include basic information surrounding the case, including the name of the case, the cause number, the summoning court, and the date they are summoned to appear. If a subpoena is requesting the production of documents or other tangible evidence, it is required to identify those items with reasonable specificity.

The attorneys for the prosecution and the defendant are both entitled to request the issuance of a subpoena and are generally responsible for having the witnesses properly served. Once your client receives the subpoena, the attorney that is seeking their testimony will typically provide them with instructions as well as the attorney’s contact information. You should contact<sup>3</sup>

or encourage your client to contact the lawyer who has subpoenaed them as early as possible for several reasons:

First, it is common for a witness to receive a subpoena and not know why they are being summoned. If the name of the case appears unfamiliar to your client, then the lawyer who issued the subpoena should be able to tell them how and why your client’s testimony relates to the case. If they receive a subpoena *duces tecum*, contacting the attorney can help you and your client specify which documents or items are being requested. In many cases, supplying those items in advance of trial with a business records affidavit may satisfy the subpoena and save them a trip to court.

Next, from a scheduling standpoint, criminal trials are often rescheduled to a later date because of legal or docketing issues. Often the lawyer issuing the subpoena will know of the rescheduling in advance and contacting them may save them an unnecessary trip to the courthouse. Additionally, most witnesses are not needed for the duration of the entire trial and the issuing lawyer can give your client an estimate of the length of their testimony and when they will be called as a witness. You should also advise your client to notify the issuing attorney of any scheduling conflicts they may have with the trial date. In some instances, the unavailability of a witness to testify will be grounds for rescheduling the case.

Once a witness appears before the court and is ready to testify, the court will then administer the oath of witnesses. Over the duration of the trial, court rules will usually prohibit a witness from being present within the courtroom while other witnesses are giving testimony. The court will also instruct the witness not to discuss the case or their testimony with anyone other than the lawyers trying the case. Even if your client has fully testified and is no longer needed as a witness, both of these rules will continue to apply to them until the evidence portion of the trial has concluded.

The amount of time your client spends on the witness stand entirely depends on their involvement with the criminal case. Most witnesses are not needed more than a few hours and usually both parties will agree to release the witness from the subpoena once their testimony is complete. If the court agrees to release them then they will be free to return to their normal daily activities, subject only to the rules mentioned above.

## III. No Obligation To Discuss Case Or Testimony With Anyone Outside Of The Courtroom

Many times an attorney who has subpoenaed a witness for a criminal trial or hearing will want to meet with them prior to trial in order to review the case and to

prepare the witness to testify at trial. Such meetings are proper and quite common. Likewise, an attorney or investigator from the opposing party may also try to make contact with the witness and discuss the case. While a witness is required to be present in court to give testimony, the law does not require or obligate them to discuss their testimony with anyone prior to trial (including the party who has subpoenaed their testimony).

## IV. Grand Jury Subpoenas

The grand jury is a key component of both the federal and Texas criminal justice systems and possesses unique investigatory and subpoena powers for the purpose of determining whether a crime has been committed. Chapter 20 of the Texas Code of Criminal Procedure and Rule 17 of the Federal Rules of Criminal Procedure govern the issuance of grand jury subpoenas. Similar to a trial court, the grand jury may also issue subpoenas for witness testimony and a subpoena *duces tecum* for documents. However, there are several key distinctions between a trial subpoena and a grand jury subpoena.

First, a grand jury witness is not permitted to have an attorney present while testifying. Texas Code of Criminal Procedure 20.011 and Federal Rule of Criminal Procedure 6(d) both strictly limit who may be present in the grand jury room while testimony is being given and does not permit private counsel to be present during questioning. A witness, however, is permitted to consult with an attorney prior to his or her grand jury testimony.

Next, there is a secrecy element to a grand jury subpoena that does not typically apply to a trial subpoena. Texas Code of Criminal Procedure 20.02(h) states that “a subpoena or summons relating to a grand jury proceeding or investigation must be kept secret to the extent and for as long as necessary to prevent the unauthorized disclosure of a matter before the grand jury.” Grand juries commonly conduct investigations of suspected criminal conduct, with the targets having no knowledge of the investigation. The theory being that a suspect may change his or her behavior or try and conceal evidence upon learning they are being investigated. For example, a grand jury will commonly issue a subpoena *duces tecum* to a bank for bank records when investigating an individual for suspected financial crimes. If the bank were to subsequently notify that individual that a grand jury has subpoenaed the records, then the investigation could be compromised through disclosure of the subpoena. This rule appears to also apply to testimony presented to the grand jury, although the United States Supreme Court has previously ruled that a witness has a First Amendment right to truthfully recount his or her grand jury testimony. *Butterworth v. Smith*, 494 U.S. 425 (1990).

Federal Rule of Criminal Procedure 6(e) differs from the Texas rule by not imposing an obligation of secrecy on witnesses who have testified before a federal grand jury. However, a witness could potentially face criminal liability for obstruction of justice if they were deemed to have deliberately disclosed information for the purpose of interfering with the federal grand jury proceedings or with the intent to compromise a grand jury investigation. *See* 18 U.S.C. §§ 1510 & 1512(c). Generally, it is prudent to advise a client to be discreet and exercise appropriate caution when disclosing information regarding any grand jury subpoena.

## V. Subpoena Range

Texas courts generally have a broad subpoena range in criminal matters. With a few exceptions, Texas courts have statewide subpoena range. For witnesses located outside the State of Texas, Texas has adopted the “Uniform Act to Secure Attendance of Witnesses from Without State.” TEX. CODE CRIM. P. 24.28. With the exception of North Dakota, the Uniform Act has been adopted by every state as well as Washington D.C. and the U.S. Virgin Islands. Federal courts, naturally, have nationwide jurisdiction.

## VI. Juvenile Witnesses

The procedure to subpoena a juvenile is different than that of other witnesses because, by law, a juvenile is not capable of receiving service of a subpoena. Therefore the court or the grand jury will issue a subpoena *duces tecum* to a parent or legal guardian ordering them to physically bring the juvenile to the courthouse for testimony on the day of the trial or hearing. If the juvenile does not appear, then the parent or legal guardian may be held accountable for the juvenile’s noncompliance with the subpoena. TEX. CODE CRIM. P. 24.011

## VII. Reimbursement for Costs and Expenses

Under Texas law, witnesses who live outside the state or the county in which the prosecution is pending are entitled to have their reasonable and necessary transportation, meal, and lodging expenses reimbursed by the state (regardless of whether they were subpoenaed to testify by the prosecution or the defense). TEX. CODE CRIM. P. 35.27. In federal court, witnesses are likewise permitted reimbursement for reasonable travel expenses as well as compensation of a daily witness fee. 28 U.S.C. § 1821.

## VIII. Non-Compliance

If a witness refuses to comply with a subpoena issued by a Texas court, the judge has the discretion to fine a witness in an amount not to exceed \$500 in a felony case and \$100 in a misdemeanor case. However at the request of either party, the court is also *required*

<sup>1</sup> It is not uncommon for victims and witnesses in criminal cases to also be involved in parallel civil proceedings with the accused, such as a divorce proceeding following an incident of domestic violence or a wrongful death lawsuit following an intoxication manslaughter charge. In these instances, your client may be subpoenaed to testify in separate proceedings regarding the same set of facts. An attorney should always be cognizant of when their client faces this situation because it creates the possibility of conflicting sworn testimony.

Civil lawyers approached by clients seeking advice related to a criminal subpoena should take time to evaluate whether to represent the client in the criminal proceeding. Advising the client to take an action in the criminal proceeding that is beneficial to a civil action could have unintended consequences. So too should criminal attorneys make informed decisions about advising a client facing a civil subpoena. It’s certainly not uncommon for lawyers to take both civil and criminal cases, but all representation decisions deserve careful thought. And as always, document your declination of a case in writing, and formalize your representation with an engagement letter.

<sup>2</sup> A table listing the applicable rules and statutes to Texas state and federal criminal subpoenas is located at the end of this pamphlet.

<sup>3</sup> Often a prosecutor or a criminal defense attorney may be reluctant to discuss the facts of the case with anyone other than the witness, but this typically varies on a case-by-case basis.

to issue an “attachment” for a non-complying witness. TEX. CODE CRIM. P. 24.12. An attachment is essentially an arrest warrant directing any peace officer to take a witness into custody and bring them before the court in order to provide their testimony. The court then has the discretion to hold the witness in custody until the trial has concluded, regardless of whether the witness has completed his or her testimony. Likewise in federal court, a judge also has the authority to hold a witness in criminal contempt for noncompliance with a subpoena, which may include detention of up to six months. *See* 18 U.S.C. § 401; FED. R. CRIM. P. 42.

#### IX. Contesting a Subpoena

There are numerous grounds in which a witness may contest a subpoena, many of which are narrowly tailored to very specific circumstances. Therefore you should always thoroughly research your client’s unique circumstances before attempting to challenge a subpoena. However, the most common grounds in which a witness can seek relief are:

##### A. Improper Service

The law requires that a witness must be properly “served” with the court’s subpoena. This legal principle is based upon the idea that a witness is entitled to receive proper notice of the hearing or trial. The requirements for service vary depending on whether the subpoena is issued by a state or federal court. TEX. CODE CRIM. P. 24.04; FED. R. CRIM. P. 17(e). It is generally not productive to raise this legal objection to the court, however, as either party may simply serve the witness with a new subpoena at the hearing.

##### B. Scope of Request is Too Broad or Too Vague

If the subpoena requests documents, information, or material that would be overly burdensome or difficult to gather, then a witness may be entitled to relief from the court. FED. R. CRIM. P. 17(c)(2). Typically the court will limit the scope of the request rather than nullifying the entire subpoena. The court also has the authority to grant additional time to provide the materials and/or reasonable reimbursement of expenses in producing the requested material. If the witness does not have possession or access to any of the requested materials then it is not necessary to raise an objection to the court. The witness only needs to inform the requesting party in writing that they do not have the materials requested.

##### C. Privileged or Confidential Material

If the subpoena requires a witness to turn over confidential documents or give testimony regarding

privileged or confidential matters such as trade secrets or proprietary information, then the witness should raise the issue with the court as early as possible. TEX. R. EVID. 507. Certain communications are recognized as being privileged communications, including communications between a spouse, clergy, attorney/client conversations, and certain physician/patient conversations. *See* generally TEX. R. EVID. Art. V. Additionally, Texas courts have given journalists extra protection under the law in certain criminal cases. *Coleman v. State*, 966 S.W.2d 525 (Tex. Crim. App. 2002) (op’n on reh’g)(In response to motion to quash, party must make a plausible showing to the trial court that a reporter’s testimony would be both material and favorable). Generally the provisions relating to privilege are more limited in a criminal case than in a civil case, and cannot be applied if the communications were made to aid a crime. *See* TEX. R. EVID. 503(d)(1) & 504(a)(4)(A). Further, the existence of a privilege will not prevent a witness from being called to testify if they are able to testify to other matters outside of the privileged communication(s). TEX. R. EVID. 501(1).

##### D. Self-Incrimination

In a criminal case, a witness may be concerned that an honest and complete response to a question during their testimony would subject themselves to criminal liability. In such a situation, individuals have a Fifth Amendment constitutional right to not answer any such questions.

#### X. Conclusion

No matter the circumstances, a criminal subpoena should not be taken lightly and should *never* be ignored. Read the instructions carefully and be sure to contact the attorney issuing the subpoena as early as possible. Open dialogue with the party (or parties) involved is the best method for a witness to ensure minimal disruptions with work commitments, business trips, or family vacations. Always thoroughly discuss with your client their concerns as well as any possible ramifications associated with answering the subpoena. Most importantly, never hesitate to ask the court for appropriate protection or relief on behalf of your client.

	TEXAS COURT	FEDERAL COURT
Trial Subpoena	Chapter 24 Texas Code of Criminal Procedure	Federal Rule of Criminal Procedure 17
Grand Jury Subpoena	Chapter 20 Texas Code of Criminal Procedure	Federal Rule of Criminal Procedure 17
Witness Reimbursement	Texas Code of Criminal Procedure Art. 35.27	28 U.S.C. § 1821

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# ANSWERING THE CALL: RESPONDING TO A TEXAS CRIMINAL SUBPOENA

