

How to Respond to Subpoenas

By Mark Aubrey

CPA firms are often uncertain about whether or how to respond to a subpoena, as they also need to comply with a number of rules and regulations that are intended to protect client confidentiality. The following Q&A focuses on understanding the nature of subpoenas and how CPA firms can minimize their professional liability exposures when responding to them.

What is a subpoena?

A subpoena is usually a formal request for documents and/or appearance, typically requested by an attorney in the course of litigation, or by a government agency in the course of a criminal or civil investigation.

What should CPAs do when they receive a subpoena?

CPAs in receipt of a subpoena should consider the information in their client files, along with any recent communications with the client or any parties involved, and then contact the CPA's professional liability risk adviser or attorney before responding to the subpoena. In evaluating the appropriate course of action for CPAs to take, their adviser may consider the following information:

- What is the underlying litigation about? Does the CPA have direct or other knowledge about what the issues are in the litigation?
- What is the subpoena asking the CPA to do? Is it requesting that the CPA provide testimony, documents or both? Does the subpoena excuse the CPA from testifying if the CPA provides the documents in advance?
- Is the CPA in possession of the information listed? The CPA should review the subpoena and consider whether the firm is in possession of the information. If the information is confidential, such as tax documents, it may be subject to claims of privilege by the client and/or an accountant-client privilege.
- Does the subpoena provide a deadline for complying? If the deadline is quickly approaching, or if the subpoenaing party did not provide sufficient time to comply, has the CPA received any communications to suggest the opposing party will grant an extension of time?
- What communications has the CPA had with the client? Has the CPA had any contact with the client, the attorneys on the case or the governmental agency? Does that contact suggest whether the CPA is a target or merely a person in possession of information? Is the client taking specific measures to formally object to the subpoena?

Why is the CPA receiving a subpoena?

Typically, an attorney or other party will issue a subpoena because he or she believes that the CPA is in possession of information and documents that will establish facts that are relevant to the underlying case. However, sometimes a subpoena may indicate that the CPA is a target in the underlying case by seeking information that could implicate the CPA as possibly liable for the matter being investigated or litigated.

Is the CPA required to comply with a subpoena? Is a subpoena a court order?

If the CPA has received an order signed by a judge, or a subpoena from a government agency, in most cases the CPA must comply. Government subpoenas generally require compliance, even without client consent or a court order.

However, most subpoenas are preprinted forms that attorneys or other parties fill out to request information. In these cases, accountants are bound by a number of rules and regulations that are intended to protect clients, including Internal Revenue Code section 7216. Under most circumstances, these rules and regulations prohibit the accountant from complying with the subpoena, unless the accountant has undertaken specific measures to protect client confidentiality, including obtaining the client's consent.

Again, CPAs should contact their risk adviser regarding *all* subpoenas to evaluate the underlying litigation and the obligation to comply.

Should the CPA report a subpoena to the CPA's professional liability agent or carrier?

Yes. Regardless of how much or how little information a CPA may have pertaining to the client or former client, it is always important to promptly report the matter.

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