

1 **HOUSE OF REPRESENTATIVES - FLOOR VERSION**

2 STATE OF OKLAHOMA

3 2nd Session of the 57th Legislature (2020)

4 HOUSE BILL 2789

 By: Walke

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6
7 AS INTRODUCED

8 An Act relating to civil procedure; amending 12 O.S.
9 2011, Section 2004.1, which relates to subpoenas;
10 providing for electronic service of subpoenas in
11 criminal cases; and providing an effective date.

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13 BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

14 SECTION 1. AMENDATORY 12 O.S. 2011, Section 2004.1, is
15 amended to read as follows:

16 SUBPOENA

17 Section 2004.1 A. SUBPOENA; FORM; ISSUANCE.

18 1. Every subpoena shall:

- 19 a. state the name of the court from which it is issued
20 and the title of the action, and
- 21 b. command each person to whom it is directed to attend
22 and give testimony or to produce and permit
23 inspection, copying, testing or sampling of designated
24 books, documents, electronically stored information or

1 tangible things in the possession, custody or control
2 of that person, or to permit inspection of premises,
3 at a time and place therein specified. A subpoena may
4 specify the form or forms in which electronically
5 stored information is to be produced.

6 2. A subpoena shall issue from the court where the action is
7 pending, and it may be served at any place within the state.

8 a. Deposition in Action Pending Outside of This State.

9 If the action is pending outside of this state, the
10 district court for the county in which the deposition
11 is to be taken shall issue the subpoena and, upon
12 application, any other order or process that may be
13 appropriate in aid of discovery in that action. Proof
14 of service of a notice to take deposition constitutes
15 a sufficient authorization for the issuance of
16 subpoenas for the persons named or described therein.

17 b. Subpoena for Production or Inspection in Action

18 Pending Outside of This State.

19 If the action is pending outside of this state, the
20 district court for the county in which the production
21 or inspection is to be made shall issue a subpoena for
22 production or inspection as provided in subparagraph b
23 of paragraph 1 of subsection A of this section, if
24 separate from a subpoena commanding the attendance of

1 a person, and upon application, any other order or
2 process that may be appropriate in aid of discovery in
3 that action. Proof of service of a notice of request
4 for production of documents without a deposition
5 constitutes a sufficient authorization for the
6 issuance of a subpoena for production or inspection,
7 and.

8 c. Judicial Assistance or Review Available.

9 Any person seeking an order or process in aid of
10 discovery or any person aggrieved by the issuance or
11 enforcement of a subpoena issued in aid of discovery
12 for an action pending outside of this state may obtain
13 judicial assistance or review upon the filing of a
14 civil action and payment of required fees.

15 3. A witness shall be obligated upon service of a subpoena to
16 attend a trial or hearing at any place within the state and to
17 attend a deposition or produce or allow inspection of documents at a
18 location that is authorized by subsection B of Section 3230 of this
19 title.

20 4. The clerk shall issue a subpoena, or a subpoena for the
21 production of documentary evidence, signed and sealed but otherwise
22 in blank, to a party requesting it, who shall fill it in before
23 service. As an officer of the court, an attorney authorized to
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1 practice law in this state may also issue and sign a subpoena on
2 behalf of a court of this state.

3 5. Leave of court for issuance of a subpoena for the production
4 of documentary evidence shall be required if the plaintiff seeks to
5 serve a subpoena for the production of documentary evidence on any
6 person who is not a party prior to the expiration of thirty (30)
7 days after service of the summons and petition upon any defendant.

8 6. Notwithstanding any other provision of law, a court clerk of
9 this state shall not be subject to a subpoena in matters relating to
10 court records unless the court makes a specific finding that the
11 appearance and testimony of the court clerk are both material and
12 necessary because of a written objection to the introduction of the
13 court records made by a party prior to trial.

14 B. 1. SERVICE. Service of a subpoena upon a person named
15 therein shall be made by delivering or mailing a copy thereof to
16 such person and, if the person's attendance is demanded, by
17 tendering to that person the fees for one (1) day's attendance and
18 the mileage allowed by law. Service of a subpoena may be
19 accomplished by any person who is eighteen (18) years of age or
20 older. A copy of any subpoena that commands production of documents
21 and things or inspection of premises before trial shall be served on
22 each party in the manner prescribed by subsection B of Section 2005
23 of this title. If the subpoena commands production of documents and
24 things or inspection of premises from a nonparty before trial but

1 does not require attendance of a witness, the subpoena shall specify
2 a date for the production or inspection that is at least seven (7)
3 days after the date that the subpoena and copies of the subpoena are
4 served on the witness and all parties, and the subpoena shall
5 include the following language: "In order to allow objections to
6 the production of documents and things to be filed, you should not
7 produce them until the date specified in this subpoena, and if an
8 objection is filed, until the court rules on the objection."

9 2. Service of a subpoena by mail may be accomplished by mailing
10 a copy thereof by certified mail with return receipt requested and
11 delivery restricted to the person named in the subpoena. The person
12 serving the subpoena shall make proof of service thereof to the
13 court promptly and, in any event, before the witness is required to
14 testify at the hearing or trial. If service is made by a person
15 other than a sheriff or deputy sheriff, such person shall make
16 affidavit thereof. If service is by mail, the person serving the
17 subpoena shall show in the proof of service the date and place of
18 mailing and attach a copy of the return receipt showing that the
19 mailing was accepted. Failure to make proof of service does not
20 affect the validity of the service, but service of a subpoena by
21 mail shall not be effective if the mailing was not accepted by the
22 person named in the subpoena. Costs of service shall be allowed
23 whether service is made by the sheriff, the sheriff's deputy, or any
24 other person. When the subpoena is issued on behalf of a state

1 department, board, commission, or legislative committee, fees and
2 mileage shall be paid to the witness at the conclusion of the
3 testimony out of funds appropriated to the state department, board,
4 commission, or legislative committee.

5 3. For purposes of criminal procedure, service may also be
6 accomplished by electronically transmitting a copy of the subpoena,
7 acknowledgment of receipt requested, to the person's last-known
8 electronic address via text or email. Service shall be effected
9 when the witness acknowledges receipt of the subpoena to the sender
10 by telephone, email, completion of the sender's online form, or in
11 person. Verification of identity may occur by reference to date of
12 birth or other identifying information, such as driver license or
13 social security number. Failure to comply with a subpoena issued
14 and acknowledged pursuant to this section may be punished as a
15 contempt and the subpoena may so state; provided, that a warrant of
16 arrest shall not be issued based on failure to appear on a subpoena
17 electronically issued pursuant to this subsection.

18 C. PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

19 1. A party or an attorney responsible for the issuance and
20 service of a subpoena shall take reasonable steps to avoid imposing
21 undue burden or expense on a person subject to that subpoena. The
22 court on behalf of which the subpoena was issued shall enforce this
23 duty and impose upon the party or attorney, or both, in breach of
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1 this duty an appropriate sanction, which may include, but is not
2 limited to, lost earnings and a reasonable attorney fee.

3 2. a. A person commanded to produce and permit inspection,
4 copying, testing or sampling of designated books,
5 papers, documents, electronically stored information
6 or tangible things, or inspection of premises need not
7 appear in person at the place of production or
8 inspection unless commanded to appear for deposition,
9 hearing or trial.

10 b. Subject to paragraph 2 of subsection D of this
11 section, a person commanded to produce and permit
12 inspection, copying, testing or sampling or any party
13 may, within fourteen (14) days after service of the
14 subpoena or before the time specified for compliance
15 if such time is less than fourteen (14) days after
16 service, serve written objection to inspection,
17 copying, testing or sampling of any or all of the
18 designated materials or of the premises, or to
19 producing electronically stored information in the
20 form or forms requested. An objection that all or a
21 portion of the requested material will or should be
22 withheld on a claim that it is privileged or subject
23 to protection as trial preparation materials shall be
24 made within this time period and in accordance with

1 subsection D of this section. If the objection is
2 made by the witness, the witness shall serve the
3 objection on all parties; if objection is made by a
4 party, the party shall serve the objection on the
5 witness and all other parties. If objection is made,
6 the party serving the subpoena shall not be entitled
7 to inspect, copy, test or sample the materials or
8 inspect the premises except pursuant to an order of
9 the court by which the subpoena was issued. For
10 failure to object in a timely fashion, the court may
11 assess reasonable costs and attorney fees or take any
12 other action it deems proper; however, a privilege or
13 the protection for trial preparation materials shall
14 not be waived solely for a failure to timely object
15 under this section. If objection has been made, the
16 party serving the subpoena may, upon notice to the
17 person commanded to produce, move at any time for an
18 order to compel the production. Such an order to
19 compel production shall protect any person who is not
20 a party or an officer of a party from significant
21 expense resulting from the inspection and copying
22 commanded.

- 23 3. a. On timely motion, the court by which a subpoena was
24 issued shall quash or modify the subpoena if it:

- 1 (1) fails to allow reasonable time for compliance,
- 2 (2) requires a person to travel to a place beyond the
- 3 limits allowed under paragraph 3 of subsection A
- 4 of this section,
- 5 (3) requires disclosure of privileged or other
- 6 protected matter and no exception or waiver
- 7 applies,
- 8 (4) subjects a person to undue burden, or
- 9 (5) requires production of books, papers, documents
- 10 or tangible things that fall outside the scope of
- 11 discovery permitted by Section 3226 of this
- 12 title.

13 b. If a subpoena:

- 14 (1) requires disclosure of a trade secret or other
- 15 confidential research, development, or commercial
- 16 information, or
- 17 (2) requires disclosure of an unretained expert's
- 18 opinion or information not describing specific
- 19 events or occurrences in dispute and resulting
- 20 from the expert's study made not at the request
- 21 of any party,
- 22 the court may, to protect a person subject to or
- 23 affected by the subpoena, quash or modify the
- 24 subpoena. However, if the party in whose behalf the

1 subpoena is issued shows a substantial need for the
2 testimony or material that cannot be otherwise met
3 without undue hardship and assures that the person to
4 whom the subpoena is addressed will be reasonably
5 compensated, the court may order appearance or
6 production only upon specified conditions.

7 D. DUTIES IN RESPONDING TO SUBPOENA.

- 8 1. a. A person responding to a subpoena to produce documents
9 shall produce them as they are kept in the usual
10 course of business or shall organize and label them to
11 correspond with the categories in the demand.
- 12 b. If a subpoena does not specify the form or forms for
13 producing electronically stored information, a person
14 responding to a subpoena shall produce the information
15 in a form or forms in which the person ordinarily
16 maintains it or in a form or forms that are reasonably
17 usable.
- 18 c. A person responding to a subpoena is not required to
19 produce the same electronically stored information in
20 more than one form.
- 21 d. A person responding to a subpoena is not required to
22 provide discovery of electronically stored information
23 from sources that the person identifies as not
24 reasonably accessible because of undue burden or cost.

1 If such showing is made, the court may order discovery
2 from such sources if the requesting party shows good
3 cause, considering the limitations of subparagraph c
4 of paragraph 2 of subsection B of Section 3226 of this
5 title. The court may specify conditions for the
6 discovery.

7 2. a. When information subject to a subpoena is withheld on
8 a claim that it is privileged or subject to protection
9 as trial preparation materials, the claim shall be
10 made expressly and shall be supported by a description
11 of the nature of the documents, communications, or
12 things not produced that is sufficient to enable the
13 demanding party to contest the claim.

14 b. If information is produced in response to a subpoena
15 that is subject to a claim or privilege or of
16 protection as trial preparation material, the person
17 making the claim may notify any party that received
18 the information of the claim and the basis for such
19 claim. After being notified, a party shall promptly
20 return, sequester, or destroy the specified
21 information and any copies the party has and may not
22 use or disclose the information until the claim is
23 resolved. A receiving party may promptly present the
24 information to the court under seal for a

1 determination of the claim. If the receiving party
2 disclosed the information before being notified, such
3 shall take reasonable steps to retrieve the
4 information. The person who produced the information
5 shall preserve the information until the claim is
6 resolved. This mechanism is procedural only and does
7 not alter the standards governing whether the
8 information is privileged or subject to protection as
9 trial preparation material or whether such privilege
10 or protection has been waived.

11 E. CONTEMPT.

12 Failure by any person without adequate excuse to obey a subpoena
13 served upon him or her may be deemed a contempt of the court from
14 which the subpoena issued.

15 SECTION 2. This act shall become effective November 1, 2020.

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17 COMMITTEE REPORT BY: COMMITTEE ON JUDICIARY, dated 02/06/2020 - DO
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