Title Companies Should Be Careful When Responding to Subpoenas for Documents

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Title companies are by nature customer-service oriented. Thus, the natural inclination upon receiving a subpoena from an attorney in a lawsuit – especially a lawsuit involving a good customer! – can be to provide an entire guaranty file without consulting legal counsel. But consider the following cases where a title company's urge to be helpful and forgo the expense of hiring a lawyer ended up causing the title company more harm than good.

Case 1

In *Goughnour v. Patterson, Tr. of Deborah Patterson Howard Tr.*, No. 12-17-00234-CV, 2019 WL 1031575, at *21 (Tex. App.—Tyler Mar. 5, 2019, pet. denied), an attorney for one of the parties sent an email to a title company attaching a "Subpoena to Appear and Produce Documents" for the records from a recent closing. The subpoena included a trial date and requested that the title company produce a witness to give testimony and to permit the inspection and copying of the records or sign a business records affidavit authenticating the documents. The title company accommodated the request and delivered the records to the attorney who sent the email but did not sign the business records affidavit.

When the opposing counsel learned of the email subpoena, he moved for sanctions against the opposing counsel for non-compliance with the Texas Rules of Civil Procedure. The subpoena was improper because it did not give **ten days' notice of the subpoena** to the opposing party before the "subpoena" was actually issued, as required by **Texas Rule of Civil Procedure 205.2**. That ten-day period prior to the issuance of the subpoena provides notice to opposing parties and the subpoena recipient so they can assert objections.

Instead of hiring counsel to review the subpoena and advise it of its rights and obligations, the title company responded to the subpoena and provided numerous personal documents of one of the parties that were not relevant to the litigation. Had notice been given then an objection could have been filed and the title company could have produced only relevant documents and protected its customer's privacy. But the damage had already been done because neither the title company nor the attorney issuing the subpoena were familiar with the ten-day notice requirement.

There were other defects in the subpoena. The most obvious was that the subpoena was not actually served on the title company and there was no witness fee included. The subpoena also included a false date for a trial – in fact, there was no trial date set at the time the attorney emailed the subpoena, but he put a date in the subpoena to give it a sense of urgency. The attorney even admitted he was not familiar with the rules for production of evidence from third parties.

While the trial court ultimately imposed a $14,000 sanction on the attorney for his unscrupulous behavior, the title company also paid a price. It may have irretrievably damaged its relationship with its customer, and a representative of the title company had to spend valuable time at three court hearings to explain why it had responded to the email "subpoena" in the first place. Without counsel, the title company unwittingly stepped into the middle of a serious litigation case.

Case 2

In a real estate foreclosure trial, one of the parties served a trial subpoena on the title company to appear at the injunction hearing with a closing file that involved a prior attempted closing that did not go forward. The attorney defending the case was curious about the prior closing and why the transaction did not close. A title company representative appeared in court prior to the injunction hearing and delivered the closing file to the attorney who subpoenaed it. The attorney examined the file and gave it back to the title company representative prior to the hearing. The opposing counsel were not aware that this went on prior to the hearing. The injunction hearing was continued and no testimony was taken that day.

After the hearing a return showing the subpoena served on the title company was electronically filed with the court and provided the first notice to the opposing counsel of the subpoena. When the opposing counsel learned of the subpoena, they filed a motion to quash but the documents were already delivered. In an attempt to make things right, at the subsequent injunction hearing, the title company appeared voluntarily, without a subpoena, and the same counsel who subpoenaed the records authenticated the file to try to make it available to the other litigants. The defendant's attorney made numerous objections to the file being offered, and it was not admitted by the court.

Like Case 1, the attorney who issued the subpoena was not familiar with the ten-day notice rule. Moreover, the attorney used a subpoena to conduct non-relevant discovery, which is not permitted. For its part, the title company gave up confidential files, not realizing there was a required notice period, and then tried to rectify the mistake by looking for a way to produce the file legitimately. If the title company had hired its own attorney, that lawyer could have moved for a protective order, made a motion to quash the subpoena, and appeared at the hearing and objected on the record. Once the attorney raised the issues with the subpoena at the hearing, the court would have protected all of the litigants and the title company from unwarranted discovery.

Case 3

A party served a subpoena without providing ten days-notice. After the return on the subpoena was filed, the opposing party learned of the subpoena and filed a motion to quash. The party then served a request for production on the title company. Without consulting counsel, the title company responded by producing all documents related to the transaction, including its closing file, the chain of title documents, *and emails with the claims attorney after a claim had been made on the title policy.* The title company also helpfully authenticated all of these records by a signing a business records affidavit.

As in Case 1 and 2, the attorney was not familiar with the ten-day rule, but found a way to cure the ten-day notice issue by serving a request for production of documents. Again, the title company did not discuss the request with its lawyer but instead produced its filed by a business records affidavit that included internal emails years after the closing, even without subpoena. The affidavit provided a sweeping authentication to everything in the title company's possession. An attorney could have filed a protective order to protect the title company's emails related to the handling of the title insurance claim.

The Takeaway: A Subpoena May Warrant Hiring Legal Counesl

Because compliance with subpoena requests can be time consuming and expensive, many title companies try to do right by complying with the subpoena themselves. But oftentimes, they inadvertently provide too much information that may harm their customers or tip the balance in favor of one party to the litigation.

What was needed in each of the above cases was an attorney representing the title company to: (1) move to quash a subpoena that was: (a) not served after ten-days-notice, (b) not hand delivered and (c) not served with the required witness fee; (2) analyze the requests and produce only those documents responsive to the requests; (3) object to requests that could be burdensome; (4) seek reimbursement for reasonable costs of production; (5) alert others whose records are being requested so they may take appropriate action to move to quash confidential and personal records; and (6) authenticate only their business records pursuant to the affidavit. While attorneys' fees are expensive and there is no mechanism to recover those fees when responding to a subpoena, the cost may be far less than the harm from endless court battles and ruined customer relationships.

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