

1 STATE OF OKLAHOMA

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

3 HOUSE BILL 2789

By: Walke

4  
5  
6 AS INTRODUCED

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

11  
12 BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

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

15 SUBPOENA

16 Section 2004.1 A. SUBPOENA; FORM; ISSUANCE.

17 1. Every subpoena shall:

18 a. state the name of the court from which it is issued  
19 and the title of the action, and

20 b. command each person to whom it is directed to attend  
21 and give testimony or to produce and permit  
22 inspection, copying, testing or sampling of designated  
23 books, documents, electronically stored information or  
24 tangible things in the possession, custody or control

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

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

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

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

16 b. Subpoena for Production or Inspection in Action  
17 Pending Outside of This State.

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

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

7 c. Judicial Assistance or Review Available.

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

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

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

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

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

12           B. 1. SERVICE. Service of a subpoena upon a person named  
13 therein shall be made by delivering or mailing a copy thereof to  
14 such person and, if the person's attendance is demanded, by  
15 tendering to that person the fees for one (1) day's attendance and  
16 the mileage allowed by law. Service of a subpoena may be  
17 accomplished by any person who is eighteen (18) years of age or  
18 older. A copy of any subpoena that commands production of documents  
19 and things or inspection of premises before trial shall be served on  
20 each party in the manner prescribed by subsection B of Section 2005  
21 of this title. If the subpoena commands production of documents and  
22 things or inspection of premises from a nonparty before trial but  
23 does not require attendance of a witness, the subpoena shall specify  
24 a date for the production or inspection that is at least seven (7)

1 days after the date that the subpoena and copies of the subpoena are  
2 served on the witness and all parties, and the subpoena shall  
3 include the following language: "In order to allow objections to  
4 the production of documents and things to be filed, you should not  
5 produce them until the date specified in this subpoena, and if an  
6 objection is filed, until the court rules on the objection."

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

1 testimony out of funds appropriated to the state department, board,  
2 commission, or legislative committee.

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

16 C. PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

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

24

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

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

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

- 21 3. a. On timely motion, the court by which a subpoena was  
22 issued shall quash or modify the subpoena if it:  
23 (1) fails to allow reasonable time for compliance,  
24



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

12 b. If a subpoena:

- 13 (1) requires disclosure of a trade secret or other  
14 confidential research, development, or commercial  
15 information, or  
16 (2) requires disclosure of an unretained expert's  
17 opinion or information not describing specific  
18 events or occurrences in dispute and resulting  
19 from the expert's study made not at the request  
20 of any party,

21 the court may, to protect a person subject to or  
22 affected by the subpoena, quash or modify the  
23 subpoena. However, if the party in whose behalf the  
24 subpoena is issued shows a substantial need for the

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

6 D. DUTIES IN RESPONDING TO SUBPOENA.

7 1. a. A person responding to a subpoena to produce documents  
8 shall produce them as they are kept in the usual  
9 course of business or shall organize and label them to  
10 correspond with the categories in the demand.

11 b. If a subpoena does not specify the form or forms for  
12 producing electronically stored information, a person  
13 responding to a subpoena shall produce the information  
14 in a form or forms in which the person ordinarily  
15 maintains it or in a form or forms that are reasonably  
16 usable.

17 c. A person responding to a subpoena is not required to  
18 produce the same electronically stored information in  
19 more than one form.

20 d. A person responding to a subpoena is not required to  
21 provide discovery of electronically stored information  
22 from sources that the person identifies as not  
23 reasonably accessible because of undue burden or cost.  
24 If such showing is made, the court may order discovery

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

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

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

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

10 E. CONTEMPT.

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

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

15  
16 57-2-10312 AB 01/05/20  
17  
18  
19  
20  
21  
22  
23  
24