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Responding to a Subpoena

Terrific. I just received a subpoena. Am I in trouble? How much is this going to cost? Having heard these questions from clients more than once, I thought it might be helpful to explain what a subpoena response entails and the range of potential costs.

Responding to a subpoena requires diligence, but it does not have to break the bank. The following discussion is intended to provide an overview of relevant considerations to individuals and businesses that might not have confronted this situation and are trying to understand what to expect.

This discussion also focuses on federal grand jury investigations, although many of the same principles apply to other types of demands for testimony and/or documents, such as state-level investigations, government civil and administrative investigations, congressional investigations, and private-party civil litigation.

The bottom line is that complying with a subpoena needs to be handled carefully, but the level of effort and expense is not one-size-fits-all and should be managed properly to avoid risk and undue cost.

What is the nature of the demand?

There are several types of demands for information:

Criminal grand jury subpoenas are issued by the government in the context of a criminal investigation. Their issuance is governed by Federal Rule of Criminal Procedure 17, and Rule 6(e) requires the government to maintain the secrecy of the information it obtains during the investigation. Grand jury subpoenas can require the production of documents, sworn testimony before a grand jury, or both. DOJ's Justice Manual section 9-11provides guidance to prosecutors about the proper use of grand jury subpoenas and their limitations.

Various government agencies have their own civil and administrative demands for information, such as **Civil Investigative Demands (CIDs)** issued by DOJ in False Claims Act cases or the SEC in securities investigations, and **"Information Requests"** issued by EPA pursuant to environmental statutes.

In **civil cases**, demands for depositions, interrogatories, or the production of documents between the parties to the litigation are governed by the Federal Rules of Civil Procedure 30-31 (depositions), 33 (interrogatories), and 34 (documents). Rule 45 applies to subpoenas issued to third parties that are not parties to the litigation, and Rule 45(d) provides protections to prevent undue burden and harassment on non-parties.

Subpoenas issued by **congressional committees** can also require testimony at a deposition or public hearing, and/or the production of documents. The authority for the issuance of these subpoenas comes from the rules of the House or Senate and from the relevant committee's own

rules, which can change from session to session. Congressional subpoenas typically involve a level of politics and public relations that are different from those found in judicial matters.

While all of these situations differ in many respects, they are similar in that there is potential jeopardy in failing to comply, there are opportunities to negotiate the terms of the response, and there are options for protecting clients from unreasonable demands.

Where do you fit in the picture?

Your response should be informed by situational awareness. Are you simply a third-party witness from whom information is being sought? Are you the "subject" of a grand jury investigation – i.e., does your conduct fall within the scope of the investigation? Are you a "target" of the investigation or likely to become one? Some preliminary due diligence, such as searching the docket on the court's PACER system and performing public information searches, can help you understand where you stand.

Document Preservation and Collection

One of the first tasks after receiving a subpoena is to identify and preserve all information – paper and electronic – that might be responsive to a document demand. The level of effort here will vary depending on the situation. It should involve identifying which individuals within the organization might have responsive information, taking steps to preserve it, and documenting your efforts.
The first step is usually to issue a litigation hold notice to the IT department and copy electronic information, including email and documents, from the relevant custodians on company servers. This should be done in a forensically sound manner (often with the aid of outside vendors hired by counsel) and before making individuals (who might have reason to delete information) aware of the demand.
Next, litigation hold notices should be issued to personnel who might have responsive information asking them to help identify that information (e.g., specific files, relevant email addresses and phone numbers, etc.). If the individuals are using company-issued phones, tablets, and computers, those devices should be imaged to preserve text messages, photos, and other information that might not be contained on company servers.

Failure to preserve responsive information can result in allegations of obstruction of justice in criminal investigations (and spoliation arguments in civil cases). Preservation also acts as an insurance policy and can reduce cost. If you properly preserve information, you might be able to search for responsive information yourself - and avoid some of the review cost discussed below – with the peace of mind that a full set of forensically sound data is available if needed.

There is obviously a significant difference between a grand jury subpoena issued to a large company involving a complex investigation versus one issued to a small company or an individual. What matters is that you are able to articulate the reasonable steps you took to meet the preservation obligation that comes with a subpoena or other demand for information.

Internal Investigations

If an organization receives a grand jury subpoena that suggests criminal activity by its employees, it should conduct an internal investigation to understand the relevant facts, consider whether to disclose information to the government, potentially discipline employees, and adjust compliance policies and procedures. Counsel well-versed in these situations should be engaged in order to conduct the investigation within the confidentiality of the attorney-client privilege. Internal investigations usually involve both a review of documents (which will need to be conducted in order to comply with the demand, anyway) and interviews of individuals with relevant knowledge. There is balancing to do here between the need to obtain information quickly and the need to know as much as possible before conducting interviews. There are also issues to be considered in advance of employee interviews, such as what the organization will do if an employee refuses to cooperate or demands to speak with an attorney or have counsel present during an interview. Companies are often at an advantage over government investigators, who often lack a detailed understanding of the organization and its operations, and who are constrained by constitutional considerations.

Document Review and Production

As with preservation, the manner by which documents are reviewed and produced is critical and can involve a sliding scale of sophistication and cost depending on the circumstances. It is also important here to document and be able to articulate the reasonable steps taken to produce responsive information.

It is important to have discussions with the government about the scope of the subpoena and your production. Subpoenas are often overly broad because the government does not necessarily know what it is looking for and because it wants to avoid an argument that relevant information falls outside the scope of the subpoena. Subpoena recipients are not without recourse. They can seek to have a subpoena quashed if it is unduly burdensome, unreasonable, or requires the production of privileged information. On the other hand, the government can seek to enforce its subpoena and have the recipient held in contempt for failing to comply. Both parties are incentivized to come to some rational agreement about how to proceed. It is important to document your discussions and the steps taken to comply.

It is often helpful to ask the government to prioritize its demands, and to propose a plan that will get the government what it wants quickly while minimizing your cost. For example, negotiate an initial list of search terms that will be run against the data from several key individuals, while explaining that the universe of potentially responsive data has been properly preserved in the meantime. Run those searches and obtain hit counts for the individual terms. See if any are wildly over-inclusive (like the term "confidential" or other terms that might appear in email footers or a term that might be used pervasively in the organization). Try to narrow the search results to a manageable number that can be reviewed fairly quickly.

In any review and production involving all but the smallest sets of information, a document review platform, like Relativity, is essential. It allows you to track what has been reviewed, what is responsive, what is privileged, what needs to be redacted, what has been produced, and it allows

you to perform additional searches within the database. Subpoenas typically also require that information be produced in an electronic format that can be loaded into a similar system used by the government. Review platforms also provide options that can make a review more efficient, such as AI or machine learning that elevates relevant documents to the top of the review queue, or searching texts and emails between certain individuals. Using a review platform has a cost, but it is usually far outweighed by its efficiency.

Documents are then produced electronically with redactions and a log explaining the basis for redacting or withholding documents on the basis of attorney-client privilege, attorney work product, or any of the other available privileges. They are stamped in sequential order and with any applicable endorsements, like "Confidential Proprietary Business Information", "Attorneys Eyes Only", or "Subject to Protective Order."

So, What Does All of This Cost?

It depends (naturally). The variables will include:

- The amount of information being sought;
- The size of the organization and number of potentially relevant custodians;
- The amount of raw data in question;
- Whether the subpoena also seeks testimony (which requires preparation);
- The number of lawyers involved and their rates; and
- The rates charged by eDiscovery vendors for collecting, processing (decompressing data, applying search terms, setting up the review), hosting (usually per gigabyte), and producing documents. There is usually a relatively significant cost at the beginning of this process, and then costs stabilize during the review period.

At the high end, large-scale reviews involving a worldwide organization, dozens of data custodians and multiple review attorneys (perhaps with multiple language skills) can cost well over $100,000 per month. At the lowest extreme, an individual might be able to accomplish the task for a few thousand dollars without engaging an eDiscovery vendor and using one reasonably priced attorney.

As an example of eDiscovery vendor fees in a relatively small (by volume) recent matter involving the collection of data from an iPhone. Processing of a little over 5 GB of compressed data resulted in around 15,000 documents being hosted on Relativity, and several document productions were made. The initial phase (forensics, processing, project manager time, and production) cost around $18,000, and the monthly hosting fees averaged around $700 per month. Once a matter appears to be concluded, the vendor can significantly reduce monthly hosting fees by moving the data to "nearline" or "cold" storage and by removing Relativity licenses.

In terms of trying to ballpark legal fees, several recent matters involving individuals making document productions and testifying before grand juries averaged around $20,000 in total fees. That is at an hourly rate of about half of what large law firms charge. Costs increase quickly when multiple

employees are involved at different sites (requiring travel) with multiple devices and with internal investigation interviews and reports.

Other Considerations

There are additional considerations that are briefly mentioned here, although each could be its own full discussion.

- **Privileges.** There are several privileges and protections that might apply to both the production of documents and to testimony: attorney-client privilege, attorney work product protection, marital privilege, priest-penitent privilege, doctor patient privilege, executive privilege, Speech or Debate privilege, and the Fifth Amendment privilege. These need to be carefully considered and asserted with specificity, and they can be waived if not asserted properly.
- **Press strategy.** Is the situation likely to evolve into one that can damage your reputation? Engaging a press consultant can help to develop holding statements, ensure consistent messaging, and involve different media outlets.
- **Publicly held corporations.** If your company is publicly traded, you need to consider investor relations and required SEC reporting. Statements made in these contexts need to be consistent with statements being made to investigators and to the public.
- **In-house counsel.** Plenty of in-house attorneys are experienced in these kinds of matters, but they often have both a legal and a business title (e.g., Vice President and General Counsel). Engaging outside counsel can help to protect attorney-client privilege and avoid questions about whether the in-house attorney was acting as an attorney or as a business advisor.
- **D&O Insurance.** Do corporate officers have D&O insurance that can pay legal fees in the event that their conduct becomes the subject of an investigation?
- **Conflicts of interest and joint representations.** Attorneys are prohibited from sharing client confidences with non-clients and from keeping secrets from their clients. That poses a problem where an attorney jointly represents more than one client, and it can result in the attorney having to withdraw from both representations if a conflict arises. It is common for one attorney to act as "pool counsel" for truly uninvolved employee witnesses, but separate counsel should be engaged for anyone whose interests might not completely align with those of others.
- **Who is the client?** It is not uncommon for a small business owner to essentially be the company itself, but there is a distinction to be made. What if the company ends up in bankruptcy with a trustee? Is the attorney required to share the individual's confidential information with the trustee? What if interested family members take control of the company? Make sure that the engagement agreement clearly identifies the client.
- **Avoid obstruction of justice.** Be very careful what you communicate to employees after receiving a subpoena (or having search warrant executed – yet another conversation). Telling employees not to speak with investigators, for example, can result in allegations of obstruction of justice.

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After nearly 30 years as a Washington, D.C., attorney, John Irving has broad experience with white collar criminal matters, government investigations, and corporate internal investigations. Mr. Irving has held senior positions in the U.S. Department of Justice and the EPA, worked on Capitol Hill and for an Independent Counsel, and spent more than a decade at private-sector law firms.