



Always Innovating

# Are Third-Party Subpoenas (and their kin) Giving you Headaches? Here are some things to help

*This presentation is intended for the general information of individuals and organizations on matters of current interest. It is not legal advice. Participants should not act on the information in this presentation without professional counsel. Participating in or viewing this presentation is not intended to establish and does not establish an attorney/client relationship with Thompson Hine LLP.*

October 18, 2022

# What We Will Cover

- Rule 45 Subpoenas
- Agency subpoenas, CIDs, and informal requests
- Grand Jury Subpoenas
  - *What is required of you?*
  - *How do you protect your company or organization?*
  - *How can you reduce the burden of compliance?*

# Rule 45 Subpoenas

- If directed to the organization, almost always a request for documents
  - Service must be where organization is based, or does substantial business
  - Can require production or attendance within the state or within 100 miles
  - Can command inspection of premises at the premises (FRCP 45(c)(2)(B))
  - Rule does not prescribe a standard time for compliance (but see (d)(1))
- If to an officer or employee for documents or testimony—
  - Can company counsel represent him/her?
  - What about for a former employee?
    - Service OK?
    - Rule 30(b)(6) deposition
  - Are the documents sought personal or business?
  - Is the subpoena valid?



# A Checklist Upon Receipt

- Are the form of the subpoena and the method of service proper?
  - Is it worth challenging? Defects can be easily corrected but there may be reasons to require compliance to the letter
- Calendar a response—objections must be served within 14 days of service
- Is a document hold notice or other preservation step required?

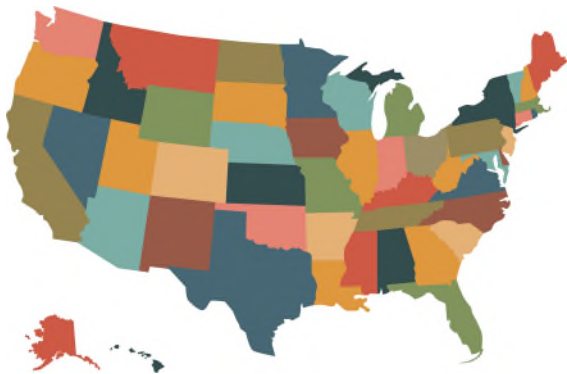
# A Checklist Upon Receipt

- Does the subpoena seek material protected by privilege, confidentiality or privacy considerations?
- Are you required to provide notice to anyone (e.g., due to contract)?
- What is the lawsuit about?
  - Review docket if available
  - Contact counsel for parties



# State Court Subpoenas

Many of the same principles apply as to Rule 45, but each state is different



- Consult state court rules in the jurisdiction from where the subpoena issued
  - Many state court subpoenas require clerk of the court signature
  - Did the party go through the procedure to arrange a subpoena in your jurisdiction?
  - If not, subpoena may be invalid, but do you want to ignore or challenge it?
  - Was service properly achieved, both with process and timing?
  - Is the place for production within the court's jurisdiction?
  - If valid, do you need to consult with counsel in another jurisdiction?
  - Deadlines, grounds for challenge, local practices vary by state

# Making Objections

- Must be done within 14 days of service
- Should follow discussions with subpoenaing counsel on scope
  - Serving counsel is required to “take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena.” Rule 45(d)(1)
- Objections available include all those available under Rule 26
  - Relevance
  - Burden
  - Availability from parties
  - Privilege or other confidentiality
- Consider carefully whether subpoena is a fishing expedition to develop material that could lead to a claim against your organization

# Motion to Quash or Modify (Rule 45(d)(3))

- Made to the district court where compliance is required
- Rarely used unless subpoenaing party is unreasonable or threatens motion to compel
- Grounds for the motion
  - Unreasonable time to comply
  - Requires compliance outside Rule 45(c) geography
  - Requires disclosure of privileged or other protected matter
  - Subjects recipient to undue burden
- Courts hate these kinds of motions



# Complying With the Subpoena

- Document in writing agreements on limitations of scope or timing
- Is there a protective order in the case that can cover the documents?
  - Get a copy and consider producing under its terms to limit risk of being drawn into this or other litigation
- Negotiate form of production
  - As kept in the ordinary course or labeled to correspond to requests (45(e)(1)(A))
  - For electronic material, as ordinarily maintained or in reasonably usable form

# Complying With the Subpoena

- Not required to produce inaccessible electronically stored information
  - Consider a declaration to support this assertion
- Privilege log may be required



# Agency Subpoenas, CIDs, Informal Requests

- Details on procedures and deadlines vary by agency, but general principles apply.
  - There will be a deadline (usually negotiable)
  - Requests will be broad, often vague, and highly burdensome
  - Generally, no rules that provide for an opportunity to object to breadth, burden, relevance
- If an “informal request,” should you ask for a subpoena?

# Agency Subpoenas, CIDs, Informal Requests

- Immediately contact the agency investigator or attorney immediately to establish a rapport and show you take it seriously
  - Especially important if you are regulated by the agency
  - Server needs to believe you respect his/her authority
- Treat “informal requests” with the same care as a subpoena unless other considerations warrant asking for a subpoena

# Next Steps for an Agency Inquiry

- Immediately secure potentially responsive documents
- Investigate internally to understand what may be at issue
  - Could the company have exposure, or is this about something else?
  - Does outside counsel need to be consulted for expertise or insight?
    - Is the inquiry part of an industry sweep?
    - Does counsel know of (or could find out about) others who might have received inquiries?

# Next Steps for an Agency Inquiry

- Who within the organization needs to know?

Generally, want to keep control over how many are aware

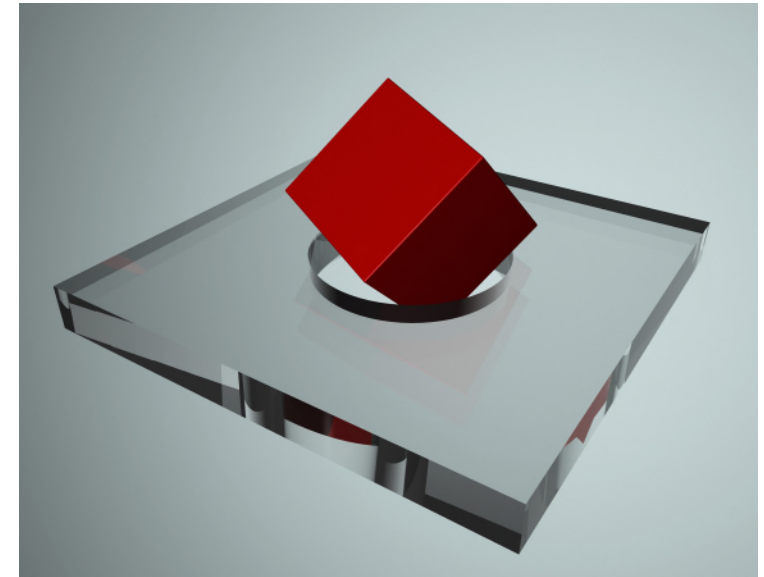
Advise those who are aware to maintain confidentiality

Government may be sympathetic to limiting scope of custodians

- Are there documents in a foreign jurisdiction?

# Negotiating with the Agency

- No “one size fits all” approach—depends on the person
  - Tone, level of experience, personality of agency lawyer
- Flexibility can tell you where your organization fits into the investigation



# Negotiating with the Agency

## What can be negotiated:

Timing for production (rolling usually OK)

Scope and breadth of requests

- Try to get agency lawyer to articulate priorities of what he/she is looking for

Custodians whose documents to search

Search terms for e-documents

Form of production



# Negotiating with the Agency (cont'd)

- Memorialize all agreements in writing using neutral language
- Unless you fully understand the facts, do not take positions on the merits
  - Credibility with the agency must be cultivated and maintained
  - No harm in saying you need time to understand the facts and what you have to produce
- Be careful about going over the head of the principal lawyer you are dealing with
- If at an impasse on scope or timing, usually must go to court

# Producing Documents to the Agency

- Pay attention to the prescribed format and where documents should go
  - E.g., SEC has a central repository where all documents are received
- Agencies usually not sympathetic to confidentiality concerns
  - Can you produce subject to a FOIA or State open records law exception?

# Producing Documents to the Agency

- Check whether agency requires a log for privileged documents withheld
- Certification of completeness may be required
  - Even if not required, inform the agency when you think you have fully complied
  - Leave some wiggle room—”to the best of our knowledge . . .”

# Grand Jury or Other Criminal Subpoenas

- **Many of the same principles apply as for agency subpoenas**
  - Promptly contact the prosecutor to discuss scope and timing
  - Immediately secure potentially responsive documents
  - Limit dissemination of information within the organization
  - Consider involving outside counsel for expertise, intelligence on the investigation
  - Beware “obstruction of justice” considerations
- **Dealing with the prosecutor**
  - Treat prosecutor with respect and deference
  - Immediately determine whether witness/subject/target
  - Solicit information on the investigation
  - Do not advocate on the merits until you fully understand the issues and the facts

# Steps to Promote Efficiency and Limit Expense

- Do not delay in contacting serving party, securing documents for production
- Consider preparing checklists for handling different types of subpoenas
- If involving outside counsel, do so quickly
- Consider fixed fee outsourcing for routine subpoenas

# Questions?

- **Brie Jackson**, Deputy General Counsel, SoundExchange.
  - [bjackson@soundexchange.com](mailto:bjackson@soundexchange.com)
- **Ryan Spiegel**, Partner, Thompson Hine LLP
  - [Ryan.Spiegel@ThompsonHine.com](mailto:Ryan.Spiegel@ThompsonHine.com)
- **David Wilson**, Partner, Thompson Hine LLP
  - [David.Wilson@ThompsonHine.com](mailto:David.Wilson@ThompsonHine.com)