



What to Do When the Investigator Comes Knocking: Dealing With Subpoenas

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About PilieroMazza

PilieroMazza PLLC is a full-service law firm with offices in Washington, DC and Boulder, CO. We are most well known as a government contracting firm and for 25 years we have helped our clients navigate the complexities of doing business with the federal government. We also provide a full range of legal services including advice on corporate, labor and employment, SBA procurement programs, and litigation matters. Our clients value the diverse array of legal guidance they receive from us and our responsiveness as we guide their growth and secure their success.

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Why is this topic relevant today?

CURRENT TRENDS

- Sexual Harassment
- Employment Discrimination
- Department of Labor Investigations
- False Claims Act
- Public Corruption
- Special Internal Agency Investigations

Subpoenas arise out of many different types of legal situations – not just when a company is the target of a government investigation, although the number of investigations initiated by federal and state governments are increasing consistently year over year. And, they can arise even when your company has crossed every T and dotted every I along the way. Subpoenas simply are a part of doing business; it is important for all companies to be ready when a subpoena lands on your desk.

Why might a subpoena be issued?

- Government Investigations
 - U.S. Department of Justice
 - Federal Agency/Inspector General
 - State Attorney General
 - Congress or a State Legislative Body
- Direct Litigant/Government
 - Sexual Harassment
 - Wage Violations
 - False Claims Act
 - Industry-Specific Topics
- Third Parties
 - Divorce Proceedings
 - Employment Matters
 - Prime, Sub, or Team Member Litigation

Who can issue a subpoena?

The authority to issue a subpoena varies from state to state, but there are some generally-accepted truths:

- State and Federal Officers
 - Attorney General or state or district attorney related to an existing investigation
 - Office of Inspector General related to an existing investigation
 - Department of Justice where a grand jury has been empaneled
- An officer of a court, such as a judge, court clerk, or, in most state and federal courts, an attorney in active litigation (with limited exceptions)
- A legislative body, such as a state legislature or U.S. Congress

What type of subpoena might we receive?

There are 3 primary types of Subpoenas:

- Subpoena for the production of documents or tangible things (Duces Tecum)
 - Permits testing, examination, review, copying, etc.
 - “Documents” means more than paper
 - Electronically-stored information
 - Sometimes accompanied by a deposition for authentication
- Subpoena for personal appearance or testimony (Ad Testificandum)
- Subpoena to allow someone to enter into a specific place

And, there are 2 primary ways Subpoenas will be delivered:

- Delivery by Mail or In Person in Advance of Production
- Department of Justice Will Seize Documents (Warrant)

How much information can a subpoena request?

Fundamentally, a subpoena can ask for anything “relevant” to the specific task for which the subpoena was issued. But, what is “relevant” varies on a case-by-case basis.

- Government entities have broader authority and can request more information from a subpoena recipient
- Third-party litigation is likely to be much more limited in scope

Types of Information Sought:

- Hard-copy documents
- Digital copies of documents
- Employment files
- E-mail correspondence
- Internal Memoranda
- Hard drives, laptops, digital stores media

What can we do to protect ourselves?

What can you do now, before the subpoena arrives?

- Create a document retention policy and follow it!
 - 6 years is best practice for government contractors
- Create an internal communications policy and follow it!
- Train your trainers and manage your managers
- Make sure your resident agent is aware of his or her responsibility
- Develop a relationship with an attorney in advance – time is of the essence once the subpoena has been issued

What can we do to protect ourselves?

Once you have received a subpoena:

- Act quickly
- Cooperate with the investigator
- Negotiate an extension of time to respond
- Ensure the subpoena is valid and enforceable under existing law
- Negotiate a reduction in the volume of information requested
- Seek a protective order, object, or file a motion to quash – must be timely!
- Negotiate to avoid a personal appearance and/or personal testimony

Almost any subpoena you receive from a government investigator will require confidentiality, especially if the subpoena relates to a criminal investigation of a third party. Violations of this confidentiality requirement can result in criminal penalties.

- Prime Contractor/Subcontractor dynamic

What should we do first?

First and foremost:

CALL YOUR ATTORNEY, OF COURSE!!

- Attorneys with experience handling subpoena responses and government investigations are best equipped to protect your rights
- Attorneys are equipped to spot invalid or otherwise objectionable subpoenas and know when subpoenas have been issued or served incorrectly
- Attorneys will know whether a protective order, objection, or motion to quash is appropriate
- Practically speaking, a government investigator or attorney issuing the subpoena is less likely to try to take advantage of another attorney and is more likely to offer professional courtesies, such as extensions of time

What should we do second?

Almost as important:

KEEP THE EXISTENCE AND/OR SCOPE OF THE SUBPOENA NEED-TO-KNOW!

- One of the most important strategies for any company is to ensure communications related to a subpoena are covered by the attorney-client privilege (important for the present – i.e., the subpoena itself – and the future – i.e., any trouble spots identified during document review)
- Who is covered by the attorney-client privilege?
 - Generally, communications between counsel and employees with information necessary for the attorney to provide legal advice
- Limit the people who have access to information

What are the most important things to do when we receive a subpoena?

In addition to contacting and retaining counsel for the subpoena . . .

- Cease all document destruction procedures pending resolution of the subpoena
 - Investigators and courts may draw an adverse inference after destruction
 - Paper shredding and automatic deletion of electronic archives
- Assemble your internal and external (if appropriate) team
 - for purposes of the attorney-client privilege
- Cooperate with service, investigator, etc.
 - A happy investigator is more likely to provide accommodations
- Identify the scope of the subpoena and the number of documents at issue
- Help your attorney determine the subject of the investigation or subpoena
- Help your attorney identify areas of potential privilege

What if this is going to break our bank?

Responding to a subpoena can be an expensive and time-consuming endeavor, particularly if you received a subpoena as part of a government investigation by the Department of Justice or Office of the Inspector General. Your attorneys and your employees will need to put in hours, which will increase your costs and lower your productivity. But, there are solutions!

- Negotiate a limited scope for your response (if possible)
- Weigh costs and risks to determine attorney scope of work, including whether some or all of the production can be handled in-house
- Rolling productions spread the costs out over time

What next?

Subpoenas are usually the first step in a government investigation

- Subsequent subpoenas for additional records
- Recorded in-person interviews
- Audits
- Depositions
- Presentations to the Government
- In-court testimony

Therefore, it is critical to take subpoenas seriously from the moment they are received in order to prepare for or prevent further impact to your company's bottom line.

- Debrief with your attorneys to locate areas of concern
- Maintain the attorney-client privilege
- Supplementation requirements in some subpoenas

Thank You. If you have questions, or if you have received a subpoena and need assistance, PilieroMazza is here to help.

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