

The Friday Afternoon Subpoena

Avoiding Litigation, Minimizing Disruption,
Reducing Expenses

By Steven Popelsky and Todd Haemmerle

Imagine a Friday afternoon. You are tired from a long and stressful week and looking forward to a relaxing weekend. You hit most of your weekly list of goals and objectives. You turn around and see that somebody has dropped a subpoena directed to the organization on your desk. You realize your list now has a new item for handling and the week is not quite over yet.

Information is the lifeblood of every organization. Though sharing information with others may advance an organization's goals, few people are very comfortable parting with it. From policyholders to attorneys, agents and regulatory agencies, it seems everyone is demanding information. So, when

that subpoena hits the handler's desk on Friday afternoon, why is it any different than any other information demand? What does this handler need to know about these intimidating, irritating and pervasive documents?

Subpoena Handling

Although often inconvenient, subpoenas requesting a wide variety of documents and information are a reality in the contentious world within which we live and work. The subpoena process is a method to promote information transfer with minimal disruption. Every claims organization, regardless of size, should have some process in place to streamline the efficient and competent response to subpoenas.

The first step, of course, is to make sure that the subpoena is routed to the proper department or individual, since it may arrive in an organization's mail department, scanning department, call center, or be personally served on an individual. Perhaps the most obvious, but nonetheless important advice for organizational intake of a subpoena is to have a process in place to assure that the subpoena is not lost, misplaced, or simply left sitting idly on somebody's desk. The potential unpleasantness of ignoring a subpoena (whether innocently or intentionally) include the imposition of a contempt of court order against the offending party, along with possible sanctions and attorney fees.

Individuals need to recognize the subpoena as a legal document and



assure that it gets routed to the proper party. While no two claims organizations are identical, the most likely destination within an organization for a subpoena would be an internal legal department or a designated individual within the claims department.

Responding

Once the subpoena is in the possession of the designated individual tasked with assuring that a proper response is made, that person must determine:

- ◆ To whom further inquiries need to be made relative to the information requested
- ◆ The parties to the litigation from which the subpoena is issued
- ◆ The nature and breadth of the documentation/information requested

If the parties in the underlying litigation relate to a current or historical claim, then a starting point for acquiring information will be the claims handler. From there, the information sought may come from a variety of departments, including the claims department, accounting, sales/marketing, underwriting, and potentially the organization's records custodian.

Once a plan is in place for gathering responsive documents from the appropriate departments, the next step is to determine whether there are objections to the subpoena, either in general or to specific documents requested. Before deciding whether to object to the subpoena, or how strongly to object, the handler should consider whether the or-

ganization, its policyholders, or its stakeholders have an interest at risk. The answer to that question may affect the strategy for responding or objecting to the subpoena.

Responding to the subpoena may be overly burdensome. Undue burden is usually a function of the scope of the subpoena, related to the number of documents requested or the time period covered for the requested documents. Undue burden may also relate to the cost incurred by an organization to retrieve and produce the requested documents. General objections may also be made based upon the adequacy of the subpoena's description of the documents sought, and the reasonableness of the time stated in the subpoena within which to comply.

Motion to Quash

Before a motion to quash is filed on the basis of undue burden or some other general objection, be mindful that the subpoenaed party must demonstrate and persuade the court that the requirement of responding to the subpoena is truly unreasonable and overly burdensome, as opposed to merely inconvenient. Many jurisdictions require that before a party objects to a subpoena on the grounds of undue burden or otherwise, attempts must be made with the party issuing the subpoena to resolve such disputes, and communication must be made to the court confirming that resolution attempts have been made.

If you believe that the subpoena is too broad, covers too large of a time period, and/or provides insufficient time to respond/comply, the best initial strategy is to contact the attorney who issued the subpoena, to determine if at least some of these issues can be resolved. Any such agreement or compromise reached with the issuing attorney should always be confirmed in writing, and will at least narrow the issues for which court intervention may be required. Finally, be aware that general objections to a subpoena are left to the whims of the court, which will have broad discretion in issuing a discovery order, often compelling the production of the requested documents. If you object to a subpoena and seek court intervention, the matter will be taken out of your hands, and you may not always like the outcome.

Objectionable Grounds

Beyond the general objections to a subpoena, the requested information may be objectionable on other grounds, because the subpoena seeks:

- ◆ Medical information protected by HIPAA and other jurisdictional medical-privilege statutes.
- ◆ Information protected by attorney/client privilege and work-product privilege. This concern extends

well beyond written communications between the organization and its counsel. Requests for any document that contains, memorializes, or refers to the mental impressions of a party's attorney, or the attorney's conclusions, opinions, etc. are objectionable. Further, any request for a document that contains, memorializes, or refers to a claim professional's mental impressions, conclusions, opinions, or evaluation of the value or merits of a claim are also objectionable. Documents include log notes.

- ◆ Consulting expert opinions. A request for any document that contains, memorializes, or refers to the opinions of an expert who has been consulted in anticipation of litigation or preparation for trial, is generally objectionable.
- ◆ Confidential settlement agreements. Subpoenas often request settlement agreements and releases. Be sure that these documents do not contain confidentiality provisions that prohibit disclosure.
- ◆ Confidential and proprietary business records. A subpoena will often request confidential and proprietary business records either of the organization to which the subpoena is issued, or its policyholders. If the latter, it is advisable to consult with the policyholder to assure there is no objection to the information being produced. If there is any doubt as to whether the policyholder may have some objection or concern, then it is advisable to involve the policyholder in the process of responding to the subpoena.
- ◆ Personal and confidential information, including Social Security numbers, personal account identifiers and other such information that can be used malevolently if disseminated, should be redacted from production.

Once responsive documents are gathered, and objections are considered, it is advisable to have legal or claims

review of the organization's final response to the subpoena to assure that there are no deficiencies or concerns relative to the documents produced.

Resolving

The handler who finds the Friday afternoon subpoena knows that the litigation process can become vague, cumbersome, and adversarial. There are many rules relating to the demand for and production of documents. While subpoenas present the potential to cause significant disruption and costs to business operations, the subpoena process is generally intended to reduce the cost and disruption associated with dispute resolution. The claims handler should be aware that perhaps the most effective way to make sense of a subpoena may be to simply pick up the phone and call the issuing party.

The goal of the subpoena often presents no risk to the organization or its stakeholders beyond the disruption caused by finding and producing the documents. A call to the issuing attorney often results in an agreement that may dramatically reduce the search terms for requested documents, or time frame of the request. Many times the issuing attorney does not even know how to define what he or she is requesting. Thus, communication with the issuing attorney often helps reduce the time and cost associated with responding to a subpoena. You will seldom find an attorney who refuses to give the organization additional time to respond to a subpoena. If communication with the issuing attorney fails, you may always resort to objecting to the subpoena, redacting or removing information, or moving to quash a subpoena in its entirety. That Friday afternoon subpoena does not need to spoil anyone's weekend! [LM](#)

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