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*The following memo is part of a series on risk-management topics for organizational leaders. This is an informational memo only, meant as organizational advice, not legal advice, and not the final word on your legal protections and risk-management options. There is no substitute for maintaining 100-percent in-house legal compliance and discussing these matters with your own private legal counsel, board of directors, accountant, and other trusted advisors. We encourage you to review the full series of memos to ensure all aspects of risk management are being addressed at your organization.*

***The most important thing to note from this entire memo is that if you or your organization has been subpoenaed, you must not ignore it.*** *Even, and especially, if you have a legitimate objection to a subpoena, ignoring the subpoena may cause you or your organization to be found in contempt of court. The penalties for this can range from modest fees to jail time and other legally binding sanctions.*

## Overview

We know you are busy every day working to advance your organization's mission—whether that's responding to urgent requests or planning a long-term strategy. It can be difficult to find the time to pause and make sure your organization has processes in place for the unlikely but potentially business-altering ramifications of an agency such as the FBI showing up at your office with a demand for all kinds of records. Are you ready?

This memo explains the basics:

- What is a subpoena
- What are potential responses to one
- What considerations you may want to weigh
- What can you do today to be ready
- Where can you get help

Our goal is to spur your thinking ahead of the knock on the door because if that comes, it will be too late to develop a process to respond effectively.

## Is this really something SPN affiliates need to prepare for?

While the threat of a subpoena can be scaremongering, think-tanks, public-interest organizations, public-policy organizations, and advocacy organizations in general have a higher-than-average risk of being subpoenaed. The following examples show the range of individuals and organizations that have been subpoenaed and summarize the subpoena response:

[Conservative Groups Defend Eagle Forum from DOJ's 'Chilling' Subpoena:](#) In this case, the Justice Department subpoenaed the Eagle Forum for five years' worth of documents related to interactions with lawmakers and other advocacy work. This subpoena was related to the Biden administration's pending legislation against the state of Alabama. A number of organizations signed on to an amicus brief defending the Eagle Forum and decrying the invasive and punitive nature of the subpoena.

[Federal Subpoenas Target Records of Missouri Nonprofits Involved in Child Nutrition Program](#): This series of subpoenas targeted everything from correspondence to bank records of Missouri nonprofits involved in a partially government-funded nutrition program, in a matter related to oversight of government funds.

[FBI Subpoena Shows Investigators Sought Records Related to Non-Profits Connected to Ex-Cleveland Councilman Basheer Jones](#): In this matter, the FBI subpoenaed various nonprofits with ties to the ex-councilmember. It appears that the nonprofits turned over the requested records, and that ended their engagement on the matter.

[ICE is Grabbing Data from Schools and Abortion Clinics](#): In an example of broad overreach, verging on oppressive tactics, it has been recently revealed that US Immigrations and Customs Enforcement has been issuing subpoenas completely unrelated to that agency's work and mission, and it appears those who have been served have not been contesting the subpoenas.

### What is a subpoena?

In general, a subpoena is an order from the government or from a recognized government agency requiring a person or business entity to provide information in a civil or criminal case that the person or business entity is not a direct party to. Subpoenas are issued during the process of litigation to gain factual information relevant to the case at hand. A subpoena will be either for written information (documents, generally) or for testimony, and will be issued under the authority of a court, at the request of one of the litigants.

It is important to note that being subpoenaed does not necessarily mean you or your organization will become party to the litigation, or that you have done anything wrong; you may not even fully know why you are being subpoenaed.

Subpoenas can be issued by the federal government, state government, local government, federal courts, state courts, a recognized government agency (like the FTC, EEOC, SEC, IRS, etc.), or by Congress. Any jurisdiction may *issue subpoenas* for anyone or any entity anywhere in the country, even if the person or organization served is outside of the issuing court's jurisdiction. It is worth noting though that *subpoena compliance* occurs in the state where the individual or organization is located, or within 100 miles.

In general, a valid subpoena must include the following information:

- The court from which the subpoena is issued (issuing jurisdiction)
- The name and case number of the case your subpoena is related to
- Who is being subpoenaed (a person, a business entity)
- What is being subpoenaed (a document, testimony, inspection of a property)
- The purpose of the subpoena (This can be more broad, but what is the court looking for: financial records, electronically stored information, employment records?)
- Why the subpoenaed material is relevant (usually a short statement)
- Why you (or your organization) are being subpoenaed (usually a statement that the requested information is in your possession or control)
- The timeline is for your response (whether complying with the demands of the subpoena or contesting it)

The timeline for response to a subpoena can be as short as a week or can stretch for months or years into the future. *Because there is a possibility of a very short turnaround time, being prepared for a subpoena is essential.*

### What is the difference between a witness subpoena and a document subpoena?

There are two kinds of subpoenas: document subpoenas (*duces tecum*) and witness subpoenas (*ad testificandum*). This memo will focus on document subpoenas, though information and recommendations about document subpoenas can apply to witness subpoenas as well. A document subpoena can be relatively broad. In general, any document related to an individual or business entity is subject to subpoena. Here are examples of the kinds of documents that could possibly be subpoenaed:

- Business records
- Financial and/or tax records
- Employment information and employment records
- Donor correspondence and records
- Correspondence generally (emails, texts, call records, social media)
- Meeting minutes, schedule records, and building logs
- Computer files, logs, and downloaded materials
- Photographs and/or video
- Insurance documents
- Property records

Although it depends on the specific facts of the subpoena, the jurisdiction, and the case at hand, document subpoenas often ask for a copy of the documents or for the opportunity for the court to review the documents requested. You can request reimbursement for the reasonable cost of copying or producing the required documents. It may or may not require a personal appearance in the issuing court.

A witness subpoena will generally require an in-person testimony or deposition under oath regarding a specific matter that the subpoena states.

### My organization was served with a subpoena. What do I need to do?

*If you or your organization are served a subpoena it will be important to do two things right away: Take the subpoena seriously and take a deep breath.* Reacting out of fear, frustration, stress, or confusion will only set you and your organization up for failure. Ignoring a subpoena will achieve the same result. Here are several specific actions to take immediately:

1. **Do not ignore the subpoena.** This may seem obvious, but a subpoena will not go away or disappear if it is ignored. In many instances, if you or your organization does not respond to the subpoena within 7 or 14 days, you may forever waive the right to contest the subpoena or object to the specifics contained within it or limit your ability to keep the material referenced in the subpoena confidential.
2. **Contact the right attorney.** Contact your general counsel and share a copy of the subpoena. If your general counsel is not experienced in the matters referenced in the

subpoena or is not able to practice in the jurisdiction that issued the subpoena, ask your general counsel for a referral to a more appropriate attorney. Once counsel is engaged regarding the subpoena, they may:

- a. contact the issuing jurisdiction for more information,
- b. investigate the matter the subpoena is in relation to,
- c. inform you and your organizations of your rights and risks related to the subpoena, and
- d. advise you on immediate next steps.

*Please see the memo on attorney selection for more information.*

3. **Maintain confidentiality.** You should not speak to anyone about the subpoena, except on a need-to-know basis. Anything you say, communicate, or write about or related to the subpoena can be fair game if you or someone at your organization is deposed because of the subpoena. This includes your family, friends, colleagues, and your board of directors. Conversations with your attorneys are privileged, and generally are off-limits in depositions or court proceedings, so your attorneys are your safest conversation partners in this matter.
4. **Inform your board of directors.** Regardless of whether the subpoena affects an individual within your organization, or the organization as a whole, your board of directors' fiduciary duty to the organization will require they are informed generally of a legal action like a subpoena. Your first contact with your board about a matter like this should be vague to maintain confidentiality (e.g., "I am writing to inform the board that we have been served a subpoena related to XYZ matter by ABC jurisdiction. We are receiving legal advice on how best to respond to this subpoena from our counselors. As I am able to I will share more information with you; in the meantime your discretion regarding this information is appreciated."). Failure to notify your board can cause internal and external problems for you and your organization later.
5. **Consider the obligations of the subpoena and act accordingly.** Regardless of how you and your organization respond to a subpoena (object, request modifications, or comply), you have an obligation to consider the specifics of the subpoena, as it is originally served. For example, if the subpoena is requesting documents, you must not destroy the documents, and you must make reasonable efforts to retain documents that may be accidentally deleted. This includes turning off automatic delete settings (in Dropbox, on email servers, or on cell phones), archiving your network file system and email system, and/or instructing your IT provider to archive the contents of your employees' computers. If the subpoena requests records not kept by you or your organization, you must make a reasonable effort to protect those records from destruction. If you or your organization objects to a subpoena but is also found to have destroyed (or attempted to destroy or been willfully negligent in the care of) the records requested by the subpoena, you and your organization may face serious legal consequences.
6. **Prepare a proper and timely response to the subpoena.** Your response to the subpoena should preserve your rights but must also comply with the rules of the jurisdiction issuing

the subpoena. An incomplete, sloppy, or irrelevant response to a subpoena may be treated the same as no response at all, resulting in your organization being held in contempt of court. This is why it is so important to have seasoned counsel that is familiar with the kind of subpoena and jurisdiction that issued it.

7. **Object to the subpoena when appropriate.** Objections will be covered in detail below. It is important to note that there are many instances where objections to a subpoena are perfectly reasonable and perhaps even necessary. However, there must be a valid legal ground for an objection. It is also worth noting that objecting to a subpoena often extends the timeline of resolving the matter and so should be considered carefully.

### What should I consider as I respond to a subpoena?

There are a number of considerations for you and your organization to discuss with your legal team as you prepare your response to being served.

**What are you reacting to?** It can be very easy (and justified) to be frustrated, angry, or even embarrassed when served with a subpoena. It can feel like an intrusion on your privacy and an overstepping of your freedom as an individual and as an organization. It is worth the time and discomfort to investigate what you are reacting to when you are reacting to a subpoena so that your legal response is as strong as possible. Consider the following questions:

- Are your rights being threatened?
- Is your intellectual property threatened?
- Does the subpoena endanger your current or future business?
- Does responding to the subpoena implicate you in a crime?
- Is there a legitimate reason for the subpoena?
- Was the subpoena served correctly?

**Are your or your organization's rights being impinged upon?** While some subpoenas are legitimate attempts to gain information in a legal proceeding, there are many instances of government or agency overreach that manifest in broad and nonspecific subpoenas. If your rights are being threatened or jeopardized as a direct result of the subpoena, you may feel you have a moral obligation to object to it.

**Do you have an insurance policy that can help?** Depending on the nature of the subpoena and what it seeks, one or more of your insurance policies may be able to be triggered to assist you in responding to the subpoena. Insurance coverage can lower the cost of responding to a subpoena and potentially increase the quality of legal services and advice you receive when responding to a subpoena, though you may have less of a say in how the matter is resolved.

*Stay Tuned: We will be releasing a memo on insurance coverage in September 2023 with further information.*

**What resources will be consumed fighting versus complying with the subpoena?** Fighting a subpoena can be resource intensive, costing time and effort from you and your employees as well as legal fees. Conversely, complying with a sprawling document request can be equally draining of

time and financial resources. Does one route preserve your organization's ability to achieve your mission?

**How will this affect the other work of your organization?** Is the subpoena going to interfere with your programs, fundraising, and external communications? Are there other resources you can deploy to limit the impact of the subpoena? Or, will objecting to the subpoena help your organization in some way, such as with fundraising? How can you best keep the subpoena and its proceedings confidential while also maintaining integrity in internal communications? These kinds of questions will be essential to consider, even after your initial response to the subpoena.

**Are you about to face additional scrutiny?** Sometimes being served a subpoena can indicate you or your organization has been or is about to be under additional regulatory or governmental scrutiny. Will fighting the subpoena make your organization more of a target? Will complying with the subpoena reduce the risk of future subpoenas or scrutiny?

**Does the subpoena change the risk calculation for your organization?** There are many reasons a subpoena could change how your organization thinks about risk management. If you believe the subpoena is a sign of increased government oversight or surveillance, regulatory or IRS risks might be increased. If you plan to fight the subpoena, how will this affect other activities? If you intend to publicly share information about this subpoena, are there long-term, unintended consequences for public relations or reputation management that need to be considered?

**Who are your close confidants and how can they help?** Do you have a colleague or mentor who has been through this kind of situation before? Do you have a board member who gives thoughtful, level-headed advice in stressful situations? Do you have a close personal friend that you can discuss your personal reactions to this subpoena with? Is there a trusted colleague or employee you can brainstorm and strategize with? Knowing who to turn to in a situation like this can not only make it seem more manageable but also increase the quality of the response.

**Who was served: an individual or your organization?** It is possible for a subpoena served upon an individual at your organization to be unrelated to their professional responsibilities at your organization. If this is the case, your organization may still want to monitor (or even be involved in the response to) the subpoena matter, in the event the subpoena causes a public relations crisis that gets tied to your organization.

### How can I fight a subpoena?

There are several reasons to object to or fight a subpoena. In general, objections must happen promptly and be grounded in the nature or contents of the subpoena. The main categories of objections are detailed below, but your legal team is in the best position to advise you on how and what to object to in a subpoena you are facing. It is also worth noting that even with the most egregious subpoena, there is such a thing as fighting it too much.

**Objections related to how the subpoena was issued:** If the subpoena was served improperly, contains incomplete information, or you believe the issuing body does not have jurisdiction over the matter, the subpoena can be contested outright.

**Subject matter objections:** An objection may be warranted if the subpoena requests information that in good faith you do not believe you have, that contains intellectual property or business

secrets, that is confidential or personal, that if released publicly would damage you or your organization, or if complying with the subpoena would damage your professional relationships. Likely, these kinds of objections will be negotiated with the issuing court, and a subpoena may still be enforced but for a narrower scope.

**Fifth Amendment objections:** If complying with the subpoena would require you or your organization to incriminate yourself, either to a crime related to the subpoena or something unrelated, you can invoke your Fifth Amendment rights and object to the subpoena outright. This may result in a negotiation with the issuing court, leading to a narrower scope for the subpoena.

**First Amendment objections.** If complying with the subpoena would require you or your organization to reveal sensitive information that could expose your organization or its members to retaliation, discourage individuals from associating with your organization, or hinder your organization's ability to engage in advocacy or political activity that is central to its purpose, you can invoke your First Amendment rights and object to the subpoena either outright or in part. This may result in a negotiation with the requesting party resulting in a narrower scope for the subpoena. Courts have handled First Amendment objections to subpoenas in divergent ways, but these objections are becoming increasingly common with the rise in subpoenas seeking sensitive information from advocacy groups as a "lawfare" tactic.

**Capacity-related or undue-burden-related objections:** An objection based on capacity might be the right choice for you and your organization, especially if the subpoena is broadly worded and complying with the subpoena would be unduly burdensome to you or your organization. It is generally accepted by state and federal courts that the litigants must take reasonable steps to avoid imposing an undue burden or expense on a person or business entity subject to the subpoena, as they are not party to the litigation themselves. This kind of objection may result in a limiting of the subpoena's scope, an extension of deadlines, or other measures to address capacity concerns.

**Relevance-related objections:** You can raise an objection of this nature if you believe the subpoena is asking for information that is not conceivably related to the litigation listed on the subpoena. Relevance-related objections may be challenging to make, however, as you are likely not privy to all the facts of the litigation that is prompting the subpoena.

**Professional restrictions:** If your professional code of ethics (e.g., lawyers, doctors, therapists, etc.) prevents the disclosure of information the subpoena requests, you must object to the subpoena. The issuing court may still force you to comply, but the scope may be limited, or the court may take steps to otherwise mitigate your professional conflicts. If your employment contract prevents you from sharing the information requested, you may also object to the subpoena on these grounds.

**Unreasonable or oppressive objections:** All parties have an obligation of reasonableness: the court, the litigants, and the subject of the subpoena. If you believe the court or the litigants are being unreasonable, an objection is warranted. However, this goes both ways: You and your organization must also be reasonable. There are [notable examples](#) of the court reacting strongly when a subpoenaed organization or individual argues reasonableness, and then goes on to act in an unreasonable manner. Additionally, if the subpoena represents government overreach or excessive use of authority, an objection can be argued that the subpoena is oppressive.

**Safety objections:** If you believe complying with a subpoena will jeopardize your safety, an objection is warranted. This can include safety concerns based on the litigants or safety concerns arising from the court of public opinion.

### Other ways to respond to a subpoena

Depending on your organization's mission and the specific facts of the subpoena, total confidentiality around the subpoena may not be the best strategic action when responding. It is critical to discuss this with your legal team and to have their advice at every step of a nonconfidential response to a subpoena— you would never want to jeopardize your rights. In some cases, fighting or complying with a subpoena very publicly—through a targeted public relations, marketing, and/or fundraising campaign—may be the right choice for your organization. The subpoena may even motivate existing or new donors to support your organization and mission. You will need to carefully weigh all the risks involved before attempting a more public response.

### Proactive things you and your organization can do to be ready in the event you are subpoenaed

**Document and electronic record retention policy:** The inadvertent (and especially willfully ignorant) destruction of documents or records (physical or digital) can carry grave consequences. Inefficient document hunting and poorly organized files can make compliance expensive and time intensive. Knowing how your files and documents are saved, having a general overview of your file structure, knowing where physical records are kept, being aware of automatic save/delete processes, and knowing generally who in your organization has access to what can be a game changer when facing a subpoena. If you do not already have a document and electronic record retention policy, adding one to your employee handbook can be an efficient and effective way to address this.

**General counsel:** If your organization does not already have a general counsel or legal team in place, there's no time like the present to retain one. It can take time for new counsel to understand your organization, programs and mission, priorities, values, and tone and positionality. Immediately after being served a subpoena is not the time to begin building a new relationship with a lawyer.

**Insurance coverage:** While this is the subject of another memo in this series, it is worth noting that some insurance coverage can be triggered depending on the nature and specific facts of the subpoena. Knowing the kinds of policies you carry, what they cover, and how to trigger them can be incredibly helpful during the initial time-sensitive response period of being served with a subpoena.

**Employee handbook and standard operating procedures:** A thoughtfully written employee handbook can protect your organization and your employees. For example, policies for handling incoming legal notices can expedite a response to a subpoena. Policies for separating personal and professional emails and communications can protect your organization from becoming embroiled in an employee's personal situation regarding a subpoena. Policies around media relations or external communications can protect your organization from leaks or confidentiality breaches. Policies related to lines of reporting and communication can make it easier for your organization to respond to subpoenas by sharing information internally with confidence that the information will stay on a need-to-know basis.

## Other resources available to you and your organization

**SPN Legal Advisory Group:** SPN has assembled a group of experienced legal advisors who are standing by to consult with you and your attorneys, especially in time-sensitive cases.

**Heritage Legal Strategy Group:** The Heritage Foundation has an active group of public-interest lawyers who meet regularly to stay abreast of judicial and practice trends. SPN is happy to connect you with their team in the right situations.

**American Juris Link:** The organization American Juris Link connects public-interest litigators with clients and cases who would benefit from their experience in advancing freedom under the rule of law. Whether your organization is seeking resources, advice, or a legal team, American Juris Link could be a helpful resource to you. [Learn more here.](#)

**Goldwater Institute's American Freedom Network:** The Goldwater Institute's American Freedom Network initiative matches pro-bono attorneys to clients and casework that generally relate to liberty, individual rights, and government transparency. [Learn more here.](#)