

## Best Practices for Responding to Subpoenas

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Lisa Nicole Umans, Agustin D. Orozco, Stephen M. Byers, John E. Davis



#### **Introductions**



Stephen M. Byers Partner Government Contracts; White Collar & Regulatory Enforcement Washington, D.C. +1 202-624-2878 | SByers@crowell.com



John E. Davis **Senior Counsel** Litigation **New York** +1 212-895-4204 | JDavis@crowell.com



Agustin D. Orozco Partner Government Contracts; White Collar & Regulatory Enforcement Los Angeles +1 213-443-5580 | AOrozco@crowell.com



Lisa Nicole Umans Counsel White Collar & Regulatory Enforcement New York +1 212-895-4319 | LUmans@crowell.com



#### **Topics**

- Common Types of Subpoenas
- The Duty to Preserve and Preservation Best Practices
- Negotiation of Scope of Production
- Challenging Types of ESI
- Technology Assisted Review

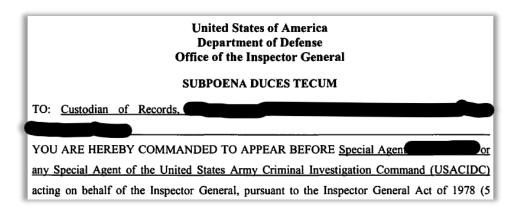


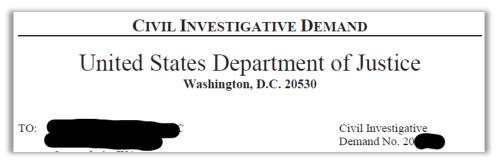
## Common Types of Subpoenas

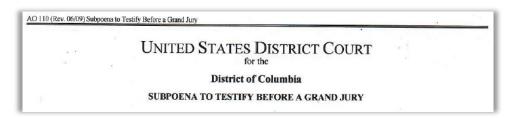


#### Common Types of Subpoenas in Gov Con Investigations

- OIG Subpoena
  - Inspector General Act of 1978 (5 U.S.C. app. 3 § 6)
  - Used in civil and criminal investigations
  - Documents
- Civil Investigative Demand
  - Civil False Claims Act (31 U.S.C. § 3733)
  - Used exclusively in civil investigations
  - Documents, interrogatories, testimony
- Grand Jury Subpoena
  - Fed. R. Crim. P. 17
  - Used exclusively in criminal investigations
  - Documents or testimony









# The Duty to Preserve and Preservation Best Practices



#### The Duty to Preserve

- Triggered by reasonable anticipation of litigation or investigation
  - Remember this is also a requirement for attorney work product protection
- Potential consequences of failure to preserve relevant evidence.
  - Evidentiary sanctions (e.g., adverse inferences)
  - Prosecutor's view of credibility, cooperation, culpability
  - Collateral investigation of obstruction of justice



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#### Document Preservation – First Basic Steps

- Review subpoena with knowledgeable personnel
- Identify relevant custodians and data sources
  - Consider using custodian tiers
- Understand relevant IT infrastructure, policies and practices
  - Include technical expert who can ask the right questions
- Issue document preservation instructions
  - Relevant custodians, IT personnel, third parties
- ESI preservation preserve in place or collect
  - Email, DMS, shared server repositories, structured data, local storage
- Challenging categories of ESI . . .
- Carefully document steps taken
  - Goal is a well-documented and defensible process that will withstand scrutiny



#### Document Preservation Memoranda – Pitfalls and Pointers

- Use a defined distribution list do not "cascade" the memo
  - Ask recipients if anyone is missing from the distribution list
- Use plain English and a user-friendly format, not dense legalese
- Include a stern warning regarding adverse consequences to emphasize importance of compliance
- Require confirmation of receipt and commitment to comply
- Add custodians and adjust scope as matter evolves
- Send periodic reminders
- Include IT staff, or send them a separate preservation memo
  - Establish a written protocol for preserving departing employees' ESI



#### Document Preservation – Working with Custodians

- Begin with low-hanging fruit: core documents for immediate use
- Conduct custodian interviews or incorporate document collection into initial witness interviews
  - Locations of relevant material
  - Personal document storage practices
  - Mobile devices and other emerging sources
- Don't forget about paper files
- Beware the pitfalls of self-collection
  - Rarely a good idea in investigation setting: risk of withholding or spoliation
  - Lack of defensibility even if undertaken in good faith
  - Potential alteration of metadata





- Key Concepts
  - Who issues
  - Evidence needed to issue
  - No statutory deadline
  - Target/Subject/Witness
    - Target requires United States Attorney approval
  - No 5<sup>th</sup> Amendment Protection for Corporations
  - All non-privileged responsive documents must be produced
    - This includes responsive documents kept in employees' "personal files" at home and personal devices





- Perspective of government lawyers and agents
  - Move investigation along
  - Corroborate information provided by informants/witnesses
  - Subpoena v. Search Warrant
  - One broad subpoena v. multiple narrow subpoenas
    - Interested in an efficient process
  - Deadlines
    - Statute of limitations
    - Internal



- Common areas for negotiation
  - Production deadline and rolling productions
  - Prioritization
  - Custodians
  - Date ranges
  - Search terms
  - Other issues
- Protective Order
- Motion to Quash





## **Challenging Types of ESI**

The Future is Now



#### More complex data created and stored outside of company servers

- Mobile Data: increasing use of personal smart devices by work force
  - Call logs, email, SMS/MMS texts, GPS information, photos, video files, voicemail, web history, contacts, calendars, location
- Messaging applications e.g., Skype, Whats App, WeChat, Discord
  - Includes ephemeral (Telegram, Wickr, Snapchat)
- Growing use of cloud-based business applications
  - E.g., document sharing, messaging, and collaboration tools like Teams, Slack, Dropbox, Google Drive, Yammer
- Social media engagement surged with pandemic (Twitter, LinkedIn, Facebook, Instagram, Tiktok – often combine posting and messaging)
- Video conferencing: Zoom, teams, GoToMeetings, Skype -- recordings
- Data Storage Systems e.g., automated billing and reporting systems
- Coming soon: metaverse?



### Al and Technology Assisted Review

What to Expect When You are Expecting (Lots of Data)



#### Often Right for Mid/Large Data Subpoena Response

- Technology Assisted Review (TAR)
  - Al that "uses software that can be trained by a human being to distinguish between relevant and non-relevant documents." Progressive, (D. Nev. 2014)
  - Cull, prioritize, categorize and QC document
- TAR 1.0, TAR 2.0 (CAL)
  - Not all e-discovery vendors are capable
- Transparency and defensibility
- Use with other techniques
- Limited re new data sources, privilege





#### **Questions?**



Stephen M. Byers

Partner

Government Contracts; White Collar

& Regulatory Enforcement

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