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WHAT TO DO WHEN THE SUBPOENA IS SERVED?

Many ombuds have never been served with a subpoena and, therefore, have never experienced a certain sinking feeling that usually accompanies the event. Inevitably the next thought is "What do I do now?" While I am compelled to say that this article is not intended to provide blanket legal advice, and the facts and circumstances of each situation need to be considered, I would like to offer some general guidelines that should be of assistance to you when first faced with this situation.

Let's start with the subpoena. It is a legal paper, usually signed by a lawyer, that compels the recipient to appear at a specified time and place to testify (either in court or at a deposition, an examination under oath frequently held at a lawyer's office) in connection with a lawsuit. Administrative agencies can sometimes issue subpoenas, but usually the case is in either the federal or the state court. In addition, the subpoena often requires that documents be produced at the time of testimony. Since the rules governing subpoenas, and especially those relating to the timeframes for action, vary depending on the jurisdiction and the court, one of the first things for an ombuds to notice is the court in which the lawsuit is pending and the date he or she is required to appear or produce documents.

As a general rule, a subpoena must be complied with unless a court grants a motion that excuses compliance. This means that usually there is a need for speed. In federal court, for example, a written objection to a subpoena compelling the production of documents must be made within 14 days of the service of the subpoena, or before the date of compliance if that date is less than 14 days from the date of service. Thus, an ombuds needs to decide quickly how to respond.

After being served with the subpoena, the ombuds should notify the organization as soon as possible and seek legal assistance. Since not all ombuds have access to independent outside legal counsel, the next steps can vary, depending on whether one does or does not have access to independent counsel. In some cases, the lawyers representing the organization in the lawsuit have filed motions for a protective order on behalf of their client's ombuds office, but having the organization's lawyers file such a motion also has been challenged as demonstrating that the office is not really independent. Regardless of whether independent counsel is retained, however, the ombuds needs to decide almost immediately whether to comply with the subpoena or to file a motion with the court for a protective order to excuse compliance with it.

In making this decision, ombuds will need to consult with a lawyer. Since most ombuds consider their conversations and documents to be confidential, they will need to discuss with counsel whether the courts in the jurisdiction involved recognize or might recognize an ombuds privilege or grant a protective order on some other ground (such as implied contract). While the

Eighth Circuit (federal) Court of Appeals refused to recognize a privilege in *Carman v. McDonnell Douglas*, federal district courts have granted protective orders since that decision upon a proper showing. But, a few points must be emphasized.

First, if the ombuds wants to assert a claim of privilege on the grounds that the ombuds office is confidential, neutral and independent, the ombuds must be careful what information is revealed to the management of his or her organization and their lawyers (including both the inside lawyers as well as the law firm that represents the organization in the case). These lawyers will naturally want to know what was said and what documents there are, but the claim of privilege and confidentiality may well be lost if the ombuds reveals this information. How can the ombuds assert that its communications must be kept confidential if this information is disclosed to the managers or lawyers for one side of the lawsuit? Remember that these lawyers represent the organization, and the organization's interests may not be the same as those of the ombuds office. A better approach—but one that requires the commitment of the organization—is one in which the company's lawyers don't ask and the ombuds doesn't tell what discussions occurred or what documents exist. This is especially important if independent outside counsel is not available to represent the ombuds.

Second, it may be possible to resolve the subpoena informally. If the lawyer acting for the ombuds explains the nature of the ombuds office to the lawyer issuing the subpoena, the lawyer issuing the subpoena may decide not to insist on compliance. Although the chances are not great that the lawyer will just back off, it is still almost always worth trying. At the very least, it will provide the lawyer with a better understanding of the basis for the motion for a protective order once it is ruled.

If a motion for a protective order is going to be filed, the ombuds and his or her lawyers must remember that they must provide the court with facts to show entitlement to the protective order. The burden of proof is on the ombuds, not on the party issuing the subpoena. To provide these facts, it will almost always be necessary to provide sworn statements (affidavits) and documents about the general operations of the office to prove that it is, in fact, confidential, neutral and independent. This is why it is always helpful for ombuds to keep a current file of all brochures, newsletters, articles, posters, etc., about the office and to make sure that the themes of confidentiality, neutrality and independence are always emphasized in these documents. In addition, it is a good idea to try to provide the court with information, while not revealing confidential communications, to demonstrate that the office is successful in resolving disputes

And finally, the ombuds and all of the lawyers (whether inside counsel, outside counsel for the organization, or outside counsel for the ombuds) need to work cooperatively to make sure that the positions taken on the motion for a protective order are consistent with how the rest of the case is handled. It can be disastrous for a claim of ombuds privilege for the organization's lawyer to cross examine other witnesses in the case to compel them to disclose communications that the ombuds is claiming are privileged. While this principle is simple, it is often difficult to implement. It is thus a good idea for the ombuds or his or her lawyer to discuss these issues with

the outside counsel representing the organization to iron out any questions or misunderstandings before the damage is done.

Once the motion is filed, it is, of course, up to the court. Yet, armed with these guidelines, an ombuds should be able to develop an action plan to deal with that sinking feeling that is served with the subpoena.

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