



## Proceed Carefully If You Receive A Subpoena

By Mark Shackelford, Senior Underwriter, Vice President  
Swiss Re Corporate Solutions

Over the past few years, we have seen an increase in the number of subpoenas served on insurance agents even if they are not a party to the litigation. How those subpoenas are handled can mean the difference between whether or not they develop into E&O lawsuits. The purpose of this article is to instruct and inform you as to how to proceed should you ever be served with a subpoena in litigation wherein you are not a party to the lawsuit.

Any agency receiving a subpoena should proceed with caution. Though the caption on the subpoena does not list the agency as a party to the litigation, the fact remains that a legal proceeding is pending and it is not difficult for the lawsuit to be amended to add the agency as a party. Sophisticated attorneys will often serve subpoenas in order to try and obtain documents or testimony that could help support a claim against your agency. For this reason, we suggest every agency should have procedures in effect as to exactly what must be done if it receives a non-party subpoena.

An agency that receives a subpoena is legally obligated to comply with that subpoena, or it runs the risk of possibly being held in contempt of court, even if the subpoena is somehow defective. A subpoena cannot simply be ignored or disregarded. For this reason, Swiss Re Corporate Solutions always suggests that an attorney be involved to assist the agency in responding to any subpoena received. Often, a subpoena is defective because it fails to comply with the statutory requirements for service, or it requests information that is beyond what is permissible. If your agency responds without the assistance of counsel, it is possible that it will be complying with an improper subpoena and, thus, disclosing information that it is not required to be disclosed pursuant to state law. In fact, responding to a defective or improper subpoena may result in an agency disclosing information that may be protected by state insurance regulations or Federal laws. Therefore, an agency that responds to a defective or improper subpoena puts itself at risk of facing a possible E&O claim, lawsuit, or possible regulatory action.

There are three types of subpoenas that an insurance agency and insurance agent might receive when the agent and agency are not parties to a lawsuit. One, a subpoena that demands documents and electronically stored information (“ESI”). It is important for you to be represented by a lawyer when you produce the documents and ESI. For example, the documents and ESI might contain financial information about the insured that is confidential and might not otherwise be something to which the party issuing the subpoena has a right to obtain. The documents and ESI should be reviewed by your lawyer to ensure the proper documents and ESI are disclosed.

The second type of subpoena requires someone to appear at a deposition or trial to testify. Usually it is a deposition for a lawsuit involving one of your insurance customers. Again, it is important for an agent to be represented by a lawyer. The lawyer will review

the pertinent materials with you and help prepare you for your testimony at the deposition. It is preferable to be prepared when you testify. It diminishes the chance the agency will be brought into the lawsuit as a party. Moreover, a lawyer will attend the deposition with you to ensure the rules of court are followed and that your rights are protected. For example, the rules of court, depending upon the state, usually require the agency to be compensated for the work it performs producing the documents and compensation for an agent's professional time spent attending a deposition. Your lawyer will negotiate the compensation with the attorney who served the subpoena on your agency.

The third type of subpoena is a combination: a subpoena that commands your agency to produce documents and commands a person from the agency to testify at a deposition. You should immediately contact Swiss Re Corporate Solutions. We will assign an experienced lawyer to review the materials, prepare you for testifying, and to ensure the rules of court are followed.

Many E&O policies contain language that defines a "claim" or "potential claim" against the agency as including the receipt of a subpoena. For this reason, it is a good practice for every agency to review the language contained in its E&O policy related to subpoenas so that it understands the policy terms and provisions related thereto. Our recommendation has always been that when an agency receives a subpoena it should immediately advise Swiss Re Corporate Solutions of the subpoena. For example, the language contained in the Swiss Re Corporate Solutions E&O policy, issued to MIIAB members through Agents Assistance Corporation, defines a claim as including the receipt of "a summons, a subpoena, or any other notice of legal process." As such, an agency that receives a subpoena and responds to it on its own without notifying its E&O insurer runs the risk that it failed to report a claim in compliance with the terms of its E&O policy. This failure to provide notice to the insurer could potentially result in a disclaimer of coverage by Swiss Re Corporate Solutions for any claim or lawsuit that may arise in connection with it.

An additional reason why an insurance agency should advise its E&O insurer of a subpoena that it receives is because many E&O policies provide coverage to help assist the agency in complying with the subpoena. As an example, your current Swiss Re Corporate Solutions E&O policy provides subpoena coverage of \$10,000 per policy year, which is not subject to a deductible, to have counsel assigned to help the agency respond to subpoenas. In our experience, an agency with an attorney involved in responding to a subpoena is less likely to be dragged into litigation. It is for this reason E&O insurers provide this type of subpoena coverage.

Every insurance agency should make certain that it has an established procedure in effect concerning how it will deal with any subpoena it receives. It should also ensure the procedure is known and followed by all employees. As part of that procedure, there should be a method for notifying the E&O insurer for the agency about a subpoena it receives. If, after being notified about the subpoena, the E&O insurer declines to assign counsel to assist in responding to the subpoena, the agency should then consider whether it may be best to retain counsel on its own. By following these steps, the

prudent insurance agency will be in a better position to avoid becoming a party to litigation related to a subpoena it receives.

*This article is intended to be used for general informational purposes only and is not to be relied upon or used for any particular purpose. Swiss Re shall not be held responsible in any way for, and specifically disclaims any liability arising out of or in any way connected to, reliance on or use of any of the information contained or referenced in this article. The information contained or referenced in this article is not intended to constitute and should not be considered legal, accounting or professional advice, nor shall it serve as a substitute for the recipient obtaining such advice. The views expressed in this article do not necessarily represent the views of the Swiss Re Group ("Swiss Re") and/or its subsidiaries and/or management and/or shareholders.*