

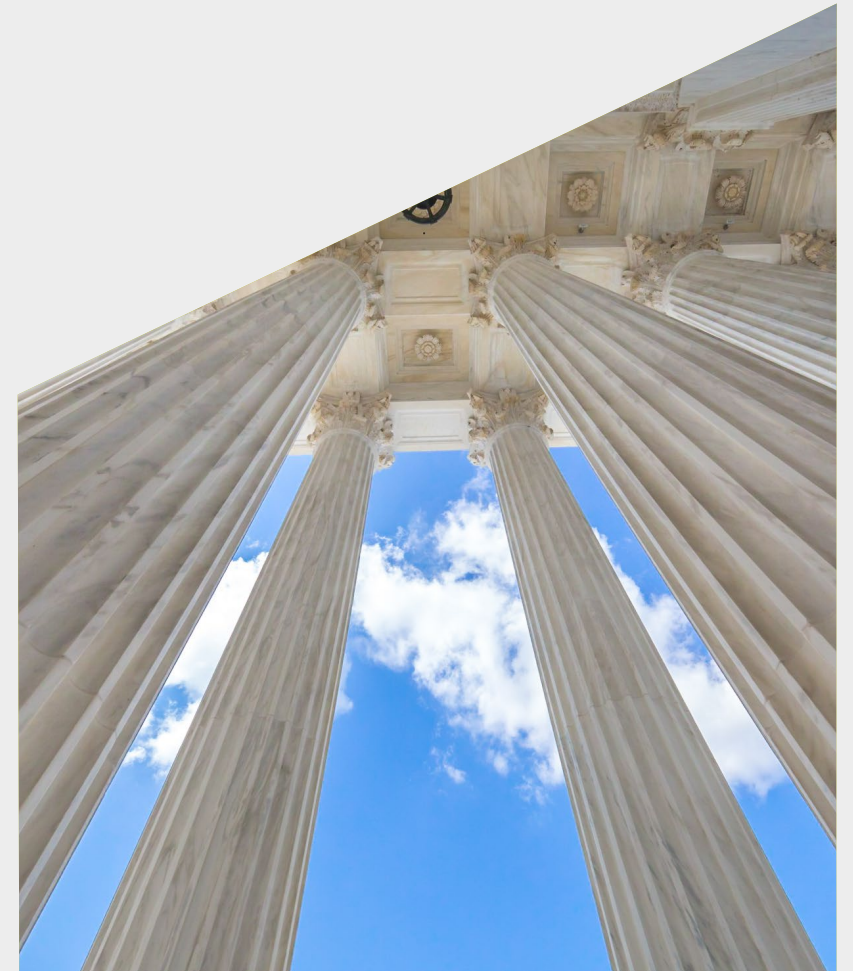


McDermott
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EFFICIENT AND EARLY RESOLUTIONS: BEST PRACTICES TO RESOLVE DISPUTES SOONER RATHER THAN LATER

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AGENDA

- Responding to civil subpoenas and government investigative demands quickly and efficiently.
- I received a complaint or demand. Now what?
- The pros and cons of using alternative dispute resolution.



RESPONDING TO CIVIL
SUBPOENAS AND
GOVERNMENT
INVESTIGATIVE DEMANDS
QUICKLY AND EFFICIENTLY

SUBPOENAS: KEY CONSIDERATIONS



- Timing – lesser of 14 days or date of compliance to
 - “The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served.” Rule 45(d)(2)(B).
- Objection letter versus motion to quash/motion for protective order
 - Affirmative motion versus responding to a motion to compel
- Consider complying with narrowed requests
- Subpoena for deposition: custodial versus corporate representative depositions
 - Use of business records affidavit instead of appearing for a deposition

SUBPOENAS: KEY CONSIDERATIONS

- Coordination with party counsel
 - Status of discovery in the case and limits on discovery
- Avoiding being brought into the lawsuit or investigation
 - Are you being subpoenaed because you are a target of a future case?
- Reimbursable costs
 - “A non-party required to produce documents or materials is protected against significant expense resulting from involuntary assistance to the court. This provision applies, for example, to a non-party required to provide a list of class members. The court is not required to fix the costs in advance of production, although this will often be the most satisfactory accommodation to protect the party seeking discovery from excessive costs. In some instances, it may be preferable to leave uncertain costs to be determined after the materials have been produced, provided that the risk of uncertainty is fully disclosed to the discovering party.”
 - Rule 45 Advisory Committee Notes





I RECEIVED A
COMPLAINT OR DEMAND.
NOW WHAT?

INITIAL STEPS

Demand Letter:

- Initial investigation and litigation holds
 - Identify key custodians to put on litigation hold – understand where data is stored internally
- Investigation into plaintiff and opposing counsel
 - Past experience with opposing counsel/past suits by plaintiff
- Determine settlement value
 - Exposure and cost of defense plus timing
- When to fight
 - Avoid serial settlement shakedowns
 - Protecting the ability of the business to operate in a given space/area

INITIAL STEPS

Complaint:

- Initial investigation and litigation holds
- Investigation into plaintiff and opposing counsel
- Investigation into the judge and any similar cases handled by the judge or in the circuit
- Removal from state court to federal court and deciding when to stay
- Creating leverage with a motion to dismiss
- Determine settlement value
 - Individual resolution of class actions



THE PROS AND CONS OF USING ALTERNATIVE DISPUTE RESOLUTION

INITIAL CONSIDERATIONS

- Arbitration provision checkups
 - What does the contract say?
 - Is the provision enforceable under the applicable law?
 - A special note about California and Illinois biometrics
 - Is the process defined?
- Timing and budget
 - Not always faster or cheaper than litigation
- Dispositive motions
 - Less likely to be entertained/granted in arbitration
- Discovery in ADR
 - Rules of evidence do not strictly apply
 - Third party discovery



ADR PROCESS

- How to choose a good mediator or arbitrator
- Deciding between a single arbitrator or a panel of arbitrators
- Submitting evidence on the briefs versus a hearing
- The arbitrator issued an award – now what?
 - Is the award binding?
 - In what ways can the award be challenged or enforced?

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- ☒ Putting people on litigation hold and document preservation;
 - ☒ Determining response options and deadlines;
 - ☒ Discussing strategies for cost reimbursement (subpoenas);
 - ☒ Identifying experience with opposing counsel, plaintiff(s), and the judge;
 - ☒ Analyzing exposure and settlement value of the case;
 - ☒ Evaluating ADR options to resolve disputes versus litigation; and
 - ☒ Using motion practice to create settlement leverage.

THANK YOU / QUESTIONS?

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