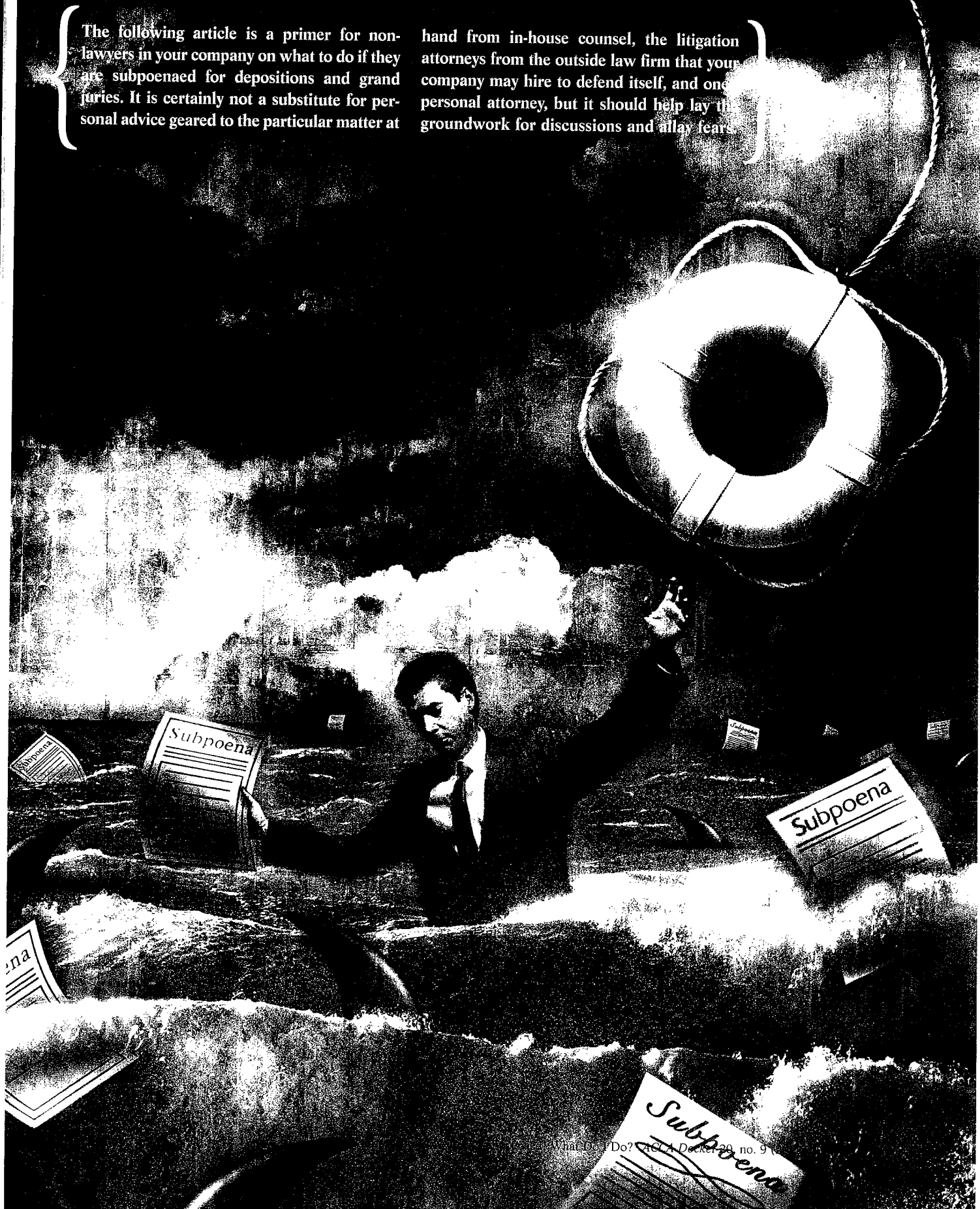


The following article is a primer for non-lawyers in your company on what to do if they are subpoenaed for depositions and grand juries. It is certainly not a substitute for personal advice geared to the particular matter at

hand from in-house counsel, the litigation attorneys from the outside law firm that your company may hire to defend itself, and one's personal attorney, but it should help lay the groundwork for discussions and allay fears.



HELP! I'VE BEEN Subpoenaed! WHAT DO I DO?

By Earle F. Kyle IV and Gerald B. Lefcourt

A subpoena is a court order, so don't ignore it. Courts have the power to make your life really unpleasant if you ignore them. Say, for example, that you have just received an envelope containing a subpoena to produce certain corporate records and appear for a deposition or to appear before a grand jury to testify. You've never been subpoenaed before and wonder what it is that you could have done wrong. How in the world are you supposed to respond to the subpoena? What steps should you take? You feel your pulse quicken and your hands shake. First, relax, take a deep breath, and immediately call one of the lawyers in the legal department. The attorney will likely tell you to keep everything related to what you received and be prepared to promptly deliver to the attorney the subpoena and everything that came with it, including the envelope.



Earle F. Kyle IV is senior legal counsel, litigation, at Medtronic, Inc., in Minneapolis, MN. His practice includes commercial, patent, product, and class action litigation. He is a member of the American Law Institute and has published extensively on topics in his areas of practice. He is available at earle.kyle@medtronic.com.



Gerald B. Lefcourt is a past president of the National Association of Criminal Defense Lawyers and chair of the association's Grand Jury Reform Committee. He practices criminal defense from his offices in New York City and is a frequent lecturer and author on such subjects as legal ethics, criminal trial advocacy, and representation of grand jury witnesses. He is available at lefcourt@lefcourtllaw.com.

How the legal department responds to a subpoena is fairly routine, so the most important thing for you to do is to take this first step: let an attorney in the legal department know right away that you have received a subpoena, and then let the legal department work with you from there.

BE SURE THAT YOU DO NOT INADVERTENTLY OR OTHERWISE DESTROY ANY DOCUMENTS OR OTHER INFORMATION, INCLUDING ANY ELECTRONICALLY STORED DOCUMENTS, DATA, OR OTHER INFORMATION, THAT A SUBPOENA MAY REQUEST.

The first thing that the legal department will do with your subpoena is figure out whether it involves the company or just you personally. If the subpoena has to do with just you personally, the legal department lawyer will likely tell you that you should obtain immediately your own attorney because the legal department will not be able to represent you. The legal department lawyer may also tell you that, even if your subpoena has to do with the company, you may still want to hire your own attorney because the legal department represents the company and not you individually.

This article will discuss subpoenas for depositions in civil matters and for grand juries in crimi-

nal matters that have to do with the company. The discussion will be general and will stick to federal law. You also need to know that states and counties and local federal courts may have other requirements that you will also need to abide by regarding your particular subpoena but that are beyond the scope of this article. Your attorney will explain those rules to you as necessary. The purpose of this article is to help you see that, although the process is complex, there's usually no need for panic.

SUBPOENAS FOR DEPOSITIONS IN CIVIL MATTERS

The kind of case for which you received a subpoena may be a civil action. A civil action is a non-criminal lawsuit. For example, lawsuits involving breach of contract, probate, divorce, negligence, and copyright violations are just a few of the many hundreds of varieties of civil lawsuits, and civil actions usually involve complaining parties seeking money from defendants.

You likely received your subpoena during the discovery part of the litigation. Discovery is the process of formal investigation that both sides in the lawsuit conduct between the time that someone files a complaint to start the lawsuit and the actual trial. During discovery, both sides may ask the judge for permission (1) to question the other parties involved orally under oath at a deposition, (2) to question the other parties involved in writing under oath with interrogatories, (3) to ask the other party to produce documents that would be useful as evidence, or (4) to conduct a site inspection.

What Is a Subpoena?

A subpoena is a court order that informs you that you must appear and provide testimony on a certain date and/or produce documents related to the litigation. Subpoenas come in two kinds: one requires documents; the other, testimony. Sometimes, however, a subpoena requires both.

The first kind of subpoena, called a subpoena duces tecum, requires you to bring to trial or to a deposition certain documents that are identified in the subpoena or an attachment to it. If you are asked to produce documents, you must find, identify, and produce all documents requested in the subpoena that are in your physical possession or

within your control, including documents in storage, documents that someone else is holding or keeping for you at your request, or documents that you can otherwise obtain and have a legal right to access. Be sure that you do not inadvertently or otherwise destroy any documents or other information, including any electronically stored documents, data, or other information, that a subpoena may request. Destroying any such information or having or allowing someone else in your control to do so could result in a judge imposing sanctions, such as a fine, upon you and the company.

The second kind of subpoena requires you to appear and testify at a trial, hearing, or deposition on a date and at a time specified in the subpoena.

**THE LEGAL DEPARTMENT MAY DECIDE
THAT THE BEST RESPONSE IS FOR YOU TO
SHOW UP AT THE DATE AND TIME SPECIFIED
IN THE SUBPOENA AND GIVE YOUR
TESTIMONY IN PERSON.**

Do I Have to Respond to the Subpoena? What Happens If I Don't?

Yes, you have to respond to a valid subpoena. But to be clear, someone from the legal department will respond to the subpoena for you if the subpoena involves the company and is not about you personally. You may have to help with this process by identifying and giving the legal department information or documents responsive to the subpoena, meeting with someone from the legal department, and possibly providing testimony, an affidavit, or sworn answers to written questions (interrogatories). The legal department, however, must decide what the appropriate response will be.

The legal department may decide that the best response is for you to show up at the date and time specified in the subpoena and give your testimony in person. In case that you wonder whether you will receive compensation, the subpoena will include a witness fee for one day's attendance and the mileage allowed by law. Someone in the legal

department will usually work with the lawyer who asked the judge to issue the subpoena to discuss, in advance of any deposition, issuance of an appropriate fee for any testimony that you may have to provide. But don't expect to get rich. The federal statutory fee for attendance at a deposition is \$40 per day. You are also entitled to reimbursement for reasonable travel costs to and from the deposition. You are also entitled by statute to a subsistence allowance for any proceeding that lasts longer than one day when it requires an overnight stay.

I Am a U.S. Citizen Working Abroad. Do I Have to Respond to a Subpoena from a U.S. Court?

Yes. A valid subpoena requires a response. A U.S. court may issue a subpoena requiring a U.S. national or resident in a foreign country to appear for testimony or to produce documents if doing so is "necessary in the interests of justice" and there is no less burdensome alternative.¹ If a U.S. court issues a subpoena for the deposition of a U.S. citizen, the "person serving the subpoena shall tender to the person to whom the subpoena is addressed his estimated necessary travel and attendance expenses, the amount of which shall be determined by the court and stated in the order directing the issuance of the subpoena."² Failure to comply with a subpoena issued by a U.S. court may constitute contempt resulting in the seizure and sale of any property that the witness has in the United States and the imposition of a fine of up to \$100,000.³

If I No Longer Work at the Company, Do I Still Have to Respond to a Subpoena?

Yes. As noted above, unless a subpoena is invalid on its face, the subpoena requires a response. An employer may be compelled to comply with any subpoena that it receives, including a subpoena seeking information regarding one of its current or former employees.⁴

If the Subpoena Requests Only Documents, Do I Still Have to Testify?

It depends. In many instances, all that a party is looking for is copies of documents. A party producing documents pursuant to a subpoena need not appear in person at the place where production is requested unless the subpoena for documents is combined with a command to appear for a deposi-

tion, a trial, or a hearing.⁵ Sometimes, however, the party issuing the subpoena may still want to take the deposition merely to ask the person responsible for collecting the subpoenaed documents whether he or she, in fact, has produced all of the documents requested in the subpoena and, if not, why certain documents were not produced. Sometimes, documents may not be produced in response to a subpoena, and instead, the legal department may object to certain categories on any number of grounds, such as attorney-client privilege or attorney work product protection.

What Is a Deposition?

In a civil case, you will likely give your testimony in the form of a deposition.

Noted above as one of the four kinds of discovery, a deposition is the sworn testimony of a witness that is taken outside of court without a judge present and that is transcribed in a written document. The discovery stage is a time for both sides to ask for a lot of information in hopes that the information will help their case and hurt the other side's case. Knowing this fact ahead of time may help you keep from getting so upset at the sheer volume and kinds of questions that one side or the other may ask you during a deposition. Sometimes, the questions are excruciatingly detailed. You may hear, for example, the same set of 20 questions for each piece of paper that you have been requested to bring with you to the deposition and must therefore explain. Your attorney will explain how this process works so that you won't be surprised. As to fishing expeditions and the like, attorneys may object to a question in case that they need to be able to say later that they had objected to the question, but you will likely have to answer every question that an attorney asks you during a deposition except questions that disclose private information that you talked to your lawyer about. Your attorney will also explain to you what is called your Fifth Amendment right to refuse to answer a particular question if doing so would incriminate you, and please see the second half of this article for a discussion on testifying in criminal grand jury proceedings.

It also helps to know who may be present during your deposition. The following people may be in the room during your deposition: you, your attorney (if you have one other than the in-house counsel who represents your company), the in-house counsel who

represents your company, the attorney who asked the judge to approve the request for the deposition and who will likely be asking most if not all of the questions, the attorney on the other side in the lawsuit who may ask some questions if you are a third party, a court reporter who will record every word that anyone in the room says and later transcribe it into a written transcript of the deposition, and sometimes more attorneys for either or both sides or for your company. The judge will not be there, and neither will a jury or any other witnesses or any spectators or the press.

IMPEACHMENT FOR INCONSISTENT STATEMENTS WILL LIKELY BE THE LEAST OF YOUR WORRIES IF YOU HAVE FAILED TO TELL THE TRUTH SOMEWHERE ALONG THE WAY DURING THE INVESTIGATION, THE DEPOSITION, OR A HEARING OR IN COURT.

Again, the deposition will not occur in open court. It will occur wherever the side in the lawsuit that has requested the deposition asks for it to be held, within reason. Depositions often occur in conference rooms in law offices, corporations, and other places where you and everyone else at the deposition won't be disturbed. Depositions can last for several hours or several days. Various jurisdictions and local rules may limit deposition times. Your in-house counsel will tell you what you need to know in that regard.

Sometimes, it helps to understand why one side or the other wants to take your deposition and what someone would do with the transcript of your deposition. One side or the other or both sides could use the transcript before and during trial. For example, before trial, one side might point to your answers in the transcript of the deposition to show why the other side ought to consider giving up the idea of going to court and make some effort to settle the lawsuit out of court. Or your answers during a deposition may be used to support a motion for summary judgment—that is, a decision without a trial. A judge can grant such a motion in cases in which the facts are not disputed and the law clearly establishes who

should win. During trial, if you become unavailable to testify, such as by becoming too ill to testify, the parties could use your deposition testimony to bring out what you would have said if you could have been called as a witness. Or if you do testify, one side or the other might try to impeach you—that is, try to show that the judge or the jury should not believe your testimony in court because it is different from what you said in answer to the same questions in the deposition.

Impeachment for inconsistent statements will likely be the least of your worries if you have failed to tell the truth somewhere along the way during the investigation, the deposition, or a hearing or in court. During a deposition, for example, you will be under oath, and a court reporter will record every word of every question and every answer. Your answers must be truthful, and failure to testify truthfully can result in the judge finding you in contempt of court. Further, failure to respond to a subpoena—even if you or the company is not a party to the particular case—may also constitute contempt of court. The punishment for contempt can take many forms: fines, jail time, and other sanctions. If the deponent is a corporate officer/named party and refuses to testify or testifies falsely, the court might impose monetary sanctions, strike a complaint or defense, permit the drawing of an adverse inference, and so forth.

If I Am Supposed to Testify, What Do I Do?

One of the legal department attorneys will meet with you, walk you through the process, and prepare you for your deposition. If you are deposed, you may find it helpful to keep the following general guidance in mind:

- **Tell the truth.**
- **Think before you speak.** This practice allows you to make sure that you understand the question and to think through your answer. Further, the time that you take to think gives the lawyer a chance to make any objections.
- **Expect the other side to score some points.** There are two sides to every lawsuit. The other side is going to ask questions that call for answers that may be unhelpful to one side or the other.
- **Answer the question.** The lawyer taking the deposition is entitled to an answer to the question asked, but only to the question asked. This practice takes a little getting used to, because you can usually anticipate the next question and you may want to move right ahead. But slow down. For example, if you can answer affirmatively the question “Do you know who made this decision?” you should answer, “Yes.” Do not offer the name of the person. Wait until the attorney asks the question “Who made this decision?” *The best answer is the shortest truthful answer.*
- **Make sure that you understand the question.** It is up to the lawyer asking the questions to frame intelligible questions. Do not help or explain that the question is incomprehensible because the questioner has misunderstood terms of art in your business, trade, or science. Do not help the questioner by responding to the question with “do you mean such and such?” If, after you have thought about the question, you do not understand it, say so.
- **Do not answer a compound question unless you understand it completely.** Questions involving more than one event—and for which there is more than one answer—are usually too complex and ambiguous. If you are unsure or confused about a complex question, say so.
- **You know only what you have seen or heard.** Questions are often phrased “Do you know . . . ?” A question in a deposition may legitimately call for something that you do not know, but it must be so phrased. There is a difference between a question, that asks “do you know” and a question that asks whether you have any knowledge or information about a particular subject.
- **Do not guess.** If you do not know or cannot recall something, say so.
- **Be as specific (or as vague) as your memory allows.** If you are asked when something occurred and you remember the date, state the date. If on the other hand, you cannot remember the exact date, say so. Do not allow yourself to be put in a position contrary to your true recollection.
- **Unless specifically asked, do not testify as to your state of mind.** If you can answer affirmatively the question “Did you read this document?” say, “Yes.” Do not say, “Yes, and I believe every word of it.” Again, the shortest truthful answer is the best answer. In this case, the examiner has not asked about your belief or state of mind. You need not answer as to your belief unless specifically asked.

- **In testifying about conversations, make clear whether you are paraphrasing or quoting directly.**
- **Summarize extensive conversations and complex series of events whenever possible.** If you indicate that you are summarizing, a good examiner will ask for all the details. The examiner may, however, accept your summary and move on.
- **Do not characterize your own testimony.** Testify clearly; do not say, "in all condor," "honestly," "I'm doing the best I can," and other related characterizations.
- **Avoid absolutes and superlatives.** "Never" and "always" can come back to haunt you.
- **Do not testify as to what other people know.** This deposition is your testimony, so you should testify as to your own knowledge and not someone else's.
- **Do not let the questioner put words into your mouth.** Unless it is completely correct, do not accept the questioner's characterization or summary of your testimony.

THE PAST TWO DECADES HAVE WITNESSED A STEADY RISE IN FEDERAL WHITE COLLAR PROSECUTIONS, BUT MOST EXPERTS BELIEVE THAT THE SHARPEST INCREASE IS YET TO COME.

- **After answering a question completely and truthfully, do not expand upon it.** Do not add to an answer simply because the examiner seems unsatisfied or looks at you expectantly or because silence descends on the room for several seconds or minutes. Let it descend. It's not your job to fill the silence when no one has asked you a question. There are often pauses in a deposition as the lawyers confer, look through documents and notes, and so forth. Do not keep speaking just because it appears that the ball is still in your court. Your part is done as soon as your answer is complete and truthful.
- **Do not offer or agree to help the examiner.** Do not volunteer information.

- **Never express anger or argue with the examiner.** If a deposition becomes unpleasant, let your lawyer take over. Further, you can ask to take a short break at any time.
- **Read any documents that the questioner shows you before you speak.**
- **Watch your language!** Avoid even the mildest obscenity and absolutely avoid ethnic or sexist slurs or any other references that could be considered derogatory.
- **There is no such thing as "off the record."** During a deposition, lawyers often go off the record to clear up objections and procedural matters. Remain quiet during this time, and do not speak unless directly addressed; even then, make sure that your lawyer is paying attention and has a chance to speak first. If you are speaking off the record, understand that you are still in a room with adverse parties, so be careful what you say. Otherwise, you may at best give the opposing lawyers a tip, and at worst, your statement may end up on the record.
- **Everyone makes mistakes.** Every witness makes mistakes in a deposition. If you make a mistake, do not become upset. If you find that you have made a mistake, discuss it with your lawyer at the next break. If you feel that the mistake is serious, ask for a break, and discuss it with your lawyer then and there.
- **Be professional.** Finally, you should always be at your professional best when testifying. Although participating in this process can be disruptive to your work or personal life, it is a legally required process, so it is important to take the process seriously.

SUBPOENAS FOR GRAND JURIES

Although much of the discussion above concerning responding to a subpoena to give testimony at a deposition in a civil matter would also apply to responding to a subpoena to give testimony before a grand jury in a criminal matter, enough differences exist to warrant a separate section on grand jury subpoenas in this primer.

White Collar Prosecution: A Growth Industry

The past two decades have witnessed a steady rise in federal white collar prosecutions, but most

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ONLINE:

- Lisa A. Cahill, "Internal Investigations: You May Be Working for the Government," *Outside Counsel*, Winter 2001 (Zuckerman Spaeder); at 1-2, available on ACCA OnlineSM at www.acca.com/protected/pubs/oc/winter01/Zuckerman.pdf.
- Scott W. MacKay, "A Primer for Lockheed Martin Corporation In-house Counsel: Handling Government and Internal Investigations," conference materials, Corporate Counsel Institute, Mar. 14-15, 2002, available on ACCA OnlineSM at www.acca.com/protected/legres/internal/investigationsprimer.pdf.
- John K. Villa, "Can the Feds Interview Corporate Employees without Your Counsel's Consent?" *ACCA Docket* 20, no. 3 (2002): 100-103, available on ACCA OnlineSM at www.acca.com/protected/pubs/docket/ma02/ethics1.php.
- John K. Villa, "Perils and Privilege of Joint Representation of Corporations and Corporate Employees," *ACCA Docket* 19, no. 8 (2001): 90-95, available on ACCA OnlineSM at www.acca.com/protected/pubs/docket/so01/ethics1.php.
- John K. Villa, "What Can You Tell Your Employees When the Feds Arrive to Question Them?" *ACCA Docket* 20, no. 1 (2002): 90-92, available on ACCA OnlineSM at www.acca.com/protected/pubs/docket/jf02/ethics1.php.
- John K. Villa, "Will Sharing with a Regulatory Agency the Report of an Internal Corporate Investigation Waive Its Protections against Disclosure to Other Potential Adversaries?" *ACCA Docket* 20, no. 7 (2002): 84-87, available on ACCA OnlineSM at www.acca.com/protected/pubs/docket/ja02/ethics1.php.
- www.abanet.org/poladv/congletters/106th/grandjury072800.html.
- www.nacdl.org/grandjury.
- www.udayton.edu/~grandjur.

ON PAPER:

- SARA SUN BEALE ET AL., *GRAND JURY LAW AND PRACTICE* (2d ed. 2001).

experts believe that the sharpest increase is yet to come. The Department of Justice had already vowed to focus on white collar crime after September 11, and then came Enron. Adding to the political pressure, in July of this year, Congress hurriedly passed legislation to increase criminal penalties for business fraud, widen the net of criminal liability, and increase corporate oversight.⁶ Unless federal law enforcement priorities change, grand jury subpoenas to corporate employees and officers will abound.

What Is a Federal Grand Jury?

The grand jury is the principal tool of a federal criminal investigation. Consisting of 16 to 23 individuals drawn from the voter registration rolls, the grand jury hears testimony, reviews documents, and votes on whether probable cause exists to return an indictment (as prepared by the prosecutor). The

Fifth Amendment to the U.S. Constitution requires that all federal felony charges be brought by an indictment approved ("returned") by a grand jury.

Grand jury proceedings are secret and take place in a private room in the federal court house. Exceptions to the laws requiring secrecy permit witnesses to discuss their testimony outside the grand jury room and government officials to share grand jury evidence across agencies. If you receive a grand jury subpoena, you are not required to keep that fact a secret; however, you would be well advised not to discuss the matter with anyone but your attorney.

The Grand Jury Subpoena

In deciding whether to return an indictment, grand juries use subpoenas to gather evidence. As with depositions, the subpoena will call for your

testimony or demand that you produce certain documents or both. Although a grand jury subpoena does not imply any wrongdoing on your part, it should not be taken lightly. Regardless of whether you think that you have done something wrong, legal advice is imperative at this stage—that is, before any grand jury appearance or government interview.

**ALTHOUGH AN APPEARANCE BEFORE
THE GRAND JURY MAY SUBJECT YOU TO
SELF-INCRIMINATION, IMPRISONMENT
FOR CONTEMPT, AND OTHER SERIOUS
CONSEQUENCES, YOUR ATTORNEY
IS NOT PERMITTED INSIDE THE FEDERAL
GRAND JURY ROOM.**

Who Will Represent Me?

Depending on circumstances and corporation policies, you may avail yourself of the corporation's regular outside counsel or counsel of your own choosing. If you are personally at risk for criminal liability, representation by the corporation's regular outside counsel would be inappropriate because of the potential conflict of interest and the appearance of impropriety. On the other hand, one attorney or law firm may represent multiple employees who are mere witnesses and who are unlikely to have conflicting interests.

You will want to acquaint yourself with the state laws and your company's policies respecting reimbursement of legal expenses. It is the policy of some corporations to reimburse officers and employees for certain legal expenses. Concern exists that this important benefit, which is as much a matter of fairness as it is sound corporate policy, may disappear in the face of what some consider unseemly and heavy handed attempts by the Department of Justice to discourage reimbursement.⁷

**How Do I Know Whether I'm Likely
to Be Indicted?**

After having met with you, your lawyer will seek additional information about the investigation and

your exposure by contacting the prosecutor. One purpose of this initial conference is to find out whether the prosecutor considers you to be a "witness," a "subject," or a "target." These terms are loosely defined as follows, to paraphrase the Department of Justice:

- **"Target."** Someone as to whom the prosecutor has incriminating evidence and whom the government is seeking to indict.
- **"Subject."** Someone whom the government is not specifically seeking to indict but whose possibly illegal conduct is within the scope of the grand jury's investigation.
- **"Witness."** Someone who is neither a target nor a subject but who has information that may assist the grand jury in its investigation.⁸

Although every individual subpoenaed by a grand jury falls within one of these three categories, the prosecutor's opinion that you are a mere witness is no guarantee that you will remain so. Today's witness may be tomorrow's target (and vice versa).

What If I Receive a Document Subpoena?

If you received only a document subpoena, you may be able to avoid a personal appearance before the grand jury. Some document subpoenas specify that the recipient may comply by turning over the documents to the agent serving the subpoena. Even if the subpoena omits this language, however, your attorney or the corporation's attorney may be able to obtain the prosecutor's consent to production without a grand jury appearance.

Before you actually produce any documents, the corporation's attorneys will review all of the pertinent documents for any materials not subject to subpoena under the attorney-client privilege or work product protection. If the document subpoena is unreasonable, the lawyers may ask that the prosecutor limit its scope or may file a motion with the court to "quash" (make void) the subpoena.

**The Grand Jury Appearance: Taking the
Fifth and Immunity**

Although an appearance before the grand jury may subject you to self-incrimination, imprisonment for contempt, and other serious consequences, your attorney is not permitted inside the federal grand jury room. Contrary to the law in at least 20 states, all witnesses testifying before the federal grand jury

FEDERAL GRAND JURY BILL OF RIGHTS

In its 2000 report, the Commission to Reform the Federal Grand Jury, a blue-ribbon panel of current and former prosecutors, academics, and others, set forth 10 proposals to reform the federal grand jury. Among the Commissioners are then-private attorney and now Deputy Attorney General Larry Thompson and past president of the National District Attorneys Association William Murphy. The reforms, many of which have been adopted at the state level, would guarantee the following rights:

- The right of all witnesses to have counsel present in the grand jury room.
- The right of grand jurors to hear evidence that exonerates the target or subject.
- The right to grand jury proceedings free of illegal evidence.
- The right of targets or subjects to testify.
- The right of all witnesses to receive a transcript of their testimony.
- The right of uncharged citizens not to be vilified in indictments.
- The right of targets and subjects to receive Miranda warnings before testifying.
- The right of all witnesses to reasonable advance notice of their grand jury appearance.
- The right of federal grand jurors to meaningful jury instructions.
- The right of targets or subjects taking the Fifth to avoid vindictive grand jury subpoenas.

For more information, see *The Federal Grand Jury Reform Report & "Bill of Rights"* at www.naaidl.org/grandjury.

must go through the awkward and time-consuming process of stepping outside the grand jury room to consult with their attorneys.⁹ Still, you would be well advised to take advantage of this process if you have concerns regarding any questions posed inside the grand jury room. If you need to consult with your attorney before or in the course of answering a question, ask permission of the grand jury foreperson,

and normally you will be permitted to leave the grand jury room. Prosecutors have been known to interfere with a grand jury witness's efforts to consult with counsel. If such interference happens to you, you should not answer the problematic question until you have been given an opportunity to consult with your attorney.

If there is any risk that you will be indicted, your attorney will almost certainly advise you to invoke the Fifth Amendment privilege against self-incrimination. Under this constitutional doctrine, a witness may refuse to answer questions if the answers might "furnish a link in a chain of evidence needed to prosecute" the witness for a crime.¹⁰ Usually, taking the Fifth is an all-or-nothing proposition, meaning that you will provide your name and address and nothing else. If advised to take the Fifth, you should ask that your attorney prepare a statement for you to make after you have given your name and address. Although it contravenes the U.S. Attorney's Manual, which is a set of mere guidelines without the force of law, prosecutors often subpoena targets whom they know will take the Fifth in order to harass, intimidate, or embarrass them.

Can the Prosecutor Force Me to Testify?

After you have invoked the Fifth Amendment, the prosecutor may decide that your testimony is important enough to warrant a grant of formal immunity.¹¹ Once the judge has granted formal immunity, you may no longer refuse to testify on the basis of the privilege. Such refusal is punished as civil or criminal contempt and can result in several months' incarceration. Formal immunity means that no information derived directly or indirectly from your testimony can be used against you in a criminal prosecution. This immunity is not, however, a get-out-of-jail-free card because you could still be prosecuted for perjury, false swearing, or contempt committed in answering or failing to answer questions.

Another, less-favored type of immunity, which does not require a judicial order, is informal immunity or "letter immunity." Unlike formal immunity, letter immunity can vary in scope and, in its broadest form, may consist of an agreement not to prosecute you for certain conduct. Also unlike formal immunity, letter immunity often covers nontesti-

mony, such as statements made during a meeting with the government. Despite these advantages, formal immunity generally is preferred over informal immunity because informal immunity is more difficult to enforce and may commit you to extensive cooperation with the government.

The Grand Jury Appearance: Testifying

If you intend to testify, your attorney will help prepare your answers to every anticipated question, much the same way that your attorney would prepare you for a civil deposition. Grand jury witnesses are permitted to take notes regarding the questioning, but your attorney may have reasons for advising against note taking. Once you have been dismissed from the grand jury, your attorney should immediately debrief you about every question and answer. Because you are not entitled to a transcript of your testimony, it is important to memorialize this information while your memory is fresh. This step not only gives your attorney insight into the investigation, but also protects you from a "perjury trap" if you are subpoenaed months or years later and, because of memory lapse, answer a question differently from the way that you had answered it before the grand jury.

Can I Refuse to Answer Certain Questions?

Perhaps most difficult for the employee and officer testifying before the grand jury is determining when information is protected by privileges. Although several privileges may protect you from certain inquiries, such as spousal privilege, clergy-communicant privilege, and so forth, particularly relevant to white collar investigations is the attorney-client privilege. Your attorney or the corporation's attorney or both may request that you assert the attorney-client privilege in response to certain areas of inquiry. As a rule of thumb, any question that concerns communications with your attorney or in any way refers to your attorney is cause for concern. Upon being asked such a question, immediately ask permission to step outside the grand jury room to consult with your attorney.

What Should I Do If Government Agents Show Up at My Home?

During the course of a white collar investigation, it is not uncommon for government agents to show

up at an employee's home in the early morning or late evening, frequently under the guise of serving a grand jury subpoena. Law enforcement agents know that, by catching you off guard, far from the corporation's legal department, you are more likely to submit to questioning without the presence of counsel.

In 1989, the Department of Justice declared its lawyers exempt from the fundamental ethical rule against contacting represented persons outside the presence of the person's lawyer ("no-contact rule"). The Department abused this self-created power to interrogate and in some cases intimidate high-level employees of corporations under criminal or civil (regulatory) investigation. With the support of ACCA, the American Bar Association, and the National Association of Criminal Defense Lawyers, Congress passed in 1998 the McDade-Murtha Law, which requires that federal prosecutors abide by the ethics rules governing all attorneys, including the no-contact rule.¹²

This requirement means that federal law enforcement agents generally may not contact high-level employees whose statements could bind the corporation and who are represented by the corporation's attorneys. The law does not, however, necessarily protect lower-level employees from such visits. But remember that, if the government shows up at your house or elsewhere, you are under no obligation to talk. Before discussing any matter with someone who wields the extensive power of the federal government, you should consult an attorney. Many times, counsel for the corporation will request that employees not communicate with government attorneys (and vice versa) without first having consulted with the appropriate company officials.

The Golden Rule

We hope that this discussion will help alleviate the anxiety and confusion that generally accompany receipt of a grand jury subpoena. But you need to be mindful of two things, a fact and an old saying: (1) the consequences of a federal grand jury investigation can be devastating, and (2) "a good prosecutor could get a grand jury to indict a ham sandwich." The federal grand jury's failure to protect citizens from unwarranted prosecution has fueled several reform proposals, such as allowing witnesses to have counsel in the grand jury room, requiring the prosecutor to introduce evidence that

the target is innocent, and giving witnesses a transcript of their testimony (see the proposed federal grand jury bill of rights in the sidebar on page 32). Without these and other overdue protections, the federal grand jury is a minefield, even for the innocent. Following the golden rule of grand juries will help your attorney secure the best possible result for you: "Do not make a bad situation worse" by communicating with witnesses, attempting to cover your tracks, or misleading your attorney.

CONCLUSION

Now that you know likely more than you have ever wanted to know about subpoenas, depositions, and grand juries, we trust that you will be able to respond to a subpoena in the best possible manner. Good luck. ■

NOTES

1. 28 U.S.C. § 1783(a).
2. 28 U.S.C. § 1783(b).
3. 28 U.S.C. § 1784.
4. See Baker, *We're Not Being Sued: Do We Have to Produce Employee Records?* 8 INDIANA EMPL. LAW LTR. 1 (Aug. 1998).
5. See Fed. R. Civ. P. 45(c)(2)(A).
6. Public Company Accounting Reform and Investor Protection Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (July 30, 2002).
7. Memorandum from Deputy Attorney General Eric H. Holder Jr., U.S. Department of Justice, to Heads of Department Components and all United States Attorneys (June 16, 1999) ("Holder memorandum").
8. U.S. Department of Justice, United States Attorneys' Manual § 9-11.150 (Oct. 1, 1990).
9. SARA SUN BEALE ET AL., GRAND JURY LAW AND PRACTICE § 6:27 (2d ed. 2001).
10. Hoffman v. United States, 341 U.S. 479, 486 (1951).
11. 18 U.S.C. § 6002.
12. 28 U.S.C. § 530A.

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