By Jay A. Brozost and Lawrence S. Goldman

Grand Jury Investigations

A Guide for In-house Counsel

Over the course of its 12-month term, a federal grand jury sitting in Tampa pored over the evidence against Sigma International, a company alleged to have violated various federal laws by importing adulterated shrimp.[1] Rather than extend the grand jury's term so that they could vote on an indictment—as was the standard practice—the government discharged the grand jury and, that same day, impaneled a new grand jury to consider the case.

In order to ensure that the new grand jury approved the indictment, the prosecutor claimed that the only reason that the previous grand jury had failed to indict was that it had run out of time. According to a three-judge panel sitting in the Eleventh Circuit, he also provided misleading summaries of and opinions on the evidence, misrepresented the law, vouched for the credibility of some witnesses and accused others of perjury, and pressured the grand jury to return a lengthy indictment against the company and several of its employees in less than two days.[2] Not until after the defendants had been convicted did these facts come to light.

The extreme—but by no means unprecedented—grand jury abuse in the *Sigma* case serves to illustrate a fundamental point: in the area of domestic law enforcement, the federal grand jury stands alone. It is a secretive domain where prosecutors wield tremendous power over individuals and businesses (increasingly the latter) with virtually no check. Even a properly run grand jury, in the words of New York State's former Chief Judge, "would indict a ham sandwich."[3]

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AN INCREASING THREAT

You may have avoided a grand jury investigation until now, but in-house counsel face a greater likelihood of dealing with a federal grand jury investigation today than they did a year ago, and *ACCA Docket* readers know well the reasons for this upward trend. Highly publicized securities and accounting scandals not only raised the bounty on white collar offenders, but also hastened the shift from civil regulatory to criminal enforcement and led to swift passage of legislation to create new white collar crimes and increase criminal sanctions. Business crime is the crime du jour. Inevitably, as prosecutors vigorously respond to this evolving situation, more businesses will be subject to the types of overreaching and abuse condemned in the *Sigma* case.

Step by step, this article will take you through the most important considerations confronting in-house counsel in a typical grand jury investigation. Because the federal government is the primary enforcer of laws against complex economic crime, the exclusive focus of this article is the federal grand jury. Most states have grand jury systems that resemble the federal system but often differ with respect to important details.[4]

Protecting the company's rights and securing the best outcome requires constant vigilance and painstaking attention to detail. Inadvertent privilege waivers, for example, can lead to ruinous criminal charges and costly civil litigation. Even when outside counsel is employed at an early stage in the proceedings, in-house counsel must be familiar with grand jury practice so as to evaluate management decisions for possible effects on the investigation, monitor the proceedings, and brief and advise management. We hope that this article will give you as in-house counsel facing a grand jury investigation the background necessary to guide your client through what is perhaps the most challenging and perilous crisis that a company can face.

A POWERFUL TOOL IN THE HANDS OF PROSECUTORS

The grand jury is the principal tool of a federal criminal investigation. Consisting of 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 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.[5]

Although the founders viewed the grand jury as a bulwark against government abuse and unfounded accusations, today's federal grand jury is a captive of prosecutors who decide what to investigate, whom to question, whom to indict, what to charge, and how to draft the indictment. This prosecutorial power is essentially unfettered by judicial oversight, adversarial policing, or meaningful protections for those brought within the investigation. Indeed, dismissals of indictments based on grand jury impropriety are exceedingly rare. See the sidebar on page 61 for the proposed federal grand jury bill of rights.

For example, before its obstruction of justice indictment in April 2002, accounting firm Arthur Andersen asked to send witnesses before the federal grand jury; prosecutors refused this request and used only FBI agents to present evidence, often hearsay.[6] In spite of the grand jury's duty to screen unfounded prosecutions, putative defendants have no right to testify or otherwise provide evidence to the grand jury. Even if evidence exists that would exonerate the company or its executives, the prosecutor has no legal obligation to present it.[7]

If your company's officers and employees receive grand jury subpoenas for testimony, they will be questioned outside the presence of their attorneys, and

they may be required to appear for the simple purpose of invoking the Fifth Amendment. Further, if your employer receives a grand jury subpoena for documents, the cost of complying—in terms of consumed administrative resources, disruption of business, and photocopying expenses—will be borne by the company, regardless of its relationship to the investigation.

THE GRAND JURY INVESTIGATION COMES TO LIGHT

Oftentimes, you will first become aware of a federal criminal investigation involving the company through a grand jury subpoena or through law enforcement contacts with company employees or former employees. Regardless of how the investigation comes to light, your first responsibility is to ensure that no relevant evidence is destroyed.

Much has been written in the pages of the *ACCA Docket* about the new laws and penalties applicable to unlawful document destruction and their implications for document retention policies.[8] Through recent prosecutions and policies, the Department of Justice ("DOJ") has sent a strong message that how a company behaves in the face of an investigation may be just as important as the underlying crimes themselves.

These admonitions are not limited to the type of overt and willful paper-shredding alleged to have occurred at Arthur Andersen. In a one-sentence email response, investment banker Frank Quattrone allegedly endorsed a colleague's suggestion that certain employees at Credit Suisse First Boston clean out their files.[9] The government contends that he sent this message days after having been informed by the bank's lead counsel of grand jury and U.S. Securities & Exchange Commission ("SEC") investigations involving the company. Because this alleged conduct took place in 2000, he does not face the 20-year maximum sentences authorized by the Sarbanes-Oxley Act of 2002.[10]

As soon as you become aware of a subpoena or even an investigation, you must ensure that the company suspends any document destruction program at once and send a "freeze letter" to all employees likely to have relevant records, including electronic documents and email, instructing them to maintain all potentially relevant records and not to alter the documents in any way. If the company has received a document subpoena, your freeze letter must clearly describe the types of documents that may be responsive to the subpoena, as discussed in more detail below. Even inadvertent destruction of documents within a subpoena's scope can have serious consequences, such as providing added justification for seeking an indictment against the company.

Another obvious tipoff that an investigation is pending occurs when federal criminal investigators contact your employees. Such contact raises additional thorny issues. Government investigators will

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, sets forth 10 proposals to reform the federal grand jury.[1] 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.

NOTE

1. *See* "The Federal Grand Jury Reform Report & 'Bill of Rights,'" at www.nacdl.org/grandjury.

often appear unannounced at company facilities or at the homes of company employees, a scenario that is likely to rattle the unsuspecting. See the sidebar below for a related disconcerting situation that you may need to monitor.

Your company should consider notifying its employees of these possibilities so as to ensure that employees understand their rights and potential exposure when dealing with government investigators. You should explain that the employee has three choices:

- Talk to investigators and provide truthful information.
- Decline the requested interview.
- Ask to be interviewed by the investigators during normal business hours and in the presence of the corporation's counsel.

This last option helps reduce the risk that investigators will obtain inaccurate statements or misunderstand accurate statements. If an employee consents to a government interview in the presence of corporate counsel, the employee must be advised that counsel represents the company and not the employee individually. See the sidebar on page 63 for a sample rights advice memorandum.

To be sure, this area is a delicate one, and appropriate steps like these may displease investigators and prosecutors. Prepare yourself for this reaction, but do not be discouraged from protecting the corporation's prerogatives. At the same time, you must be careful to avoid the appearance of impeding the government's investigation. The corporation must refrain from either directing or ordering employees not to talk to government investigators. Aside from raising issues about obstruction of justice and witness tampering, inappropriate directions that employees decline to be interviewed will be considered by the government in deciding whether to bring charges against the company. See the sidebar on page 64 for revised DOJ guidelines for charging corporations.

McDade-Murtha Law

In 1989, then Attorney General Richard Thornburgh issued a memorandum (the so-called "Thornburgh Memorandum") that purported to unilaterally exempt Justice Department lawyers from certain state rules of ethics governing all other lawyers. Specifically, the Justice Department declared itself exempt from the fundamental ethical prohibition against interrogating represented persons outside the presence of the person's lawyer (ex parte contact), a rule designed in part to ensure that lawyers do not use their legal knowledge to take advantage of nonlawyers.

The Justice Department abused this self-created power to interrogate and in some cases intimidate employees of corporations and small businesses and individual citizens under criminal or civil investigation. The McDade-Murtha Law was enacted in 1998 to reaffirm the traditional role of the states in this area. Codified at 28 U.S.C. § 530A, this law clarifies that federal prosecutors, like all other lawyers, are subject to state ethical rules governing attorney conduct.

INITIAL CONFERENCE WITH PROSECUTOR

Information gleaned from grand jury subpoenas and employee contacts with investigators will, in most cases, shed some light on the government's investigation. Generally, for a more complete picture of the nature and scope of the criminal investigation, it will be necessary for you to meet with the prosecutor.

One purpose of this meeting is to determine whether the client is a target, subject, or witness—terms used by prosecutors to describe all persons and entities within the purview of the grand jury investigation. Although subject to change, the category in which the client is put will influence how the matter is best handled. A "target" is someone "as to whom the prosecutor or the grand jury has substantial evidence linking him/her to the commission of a crime" and whom the government is seeking to indict; a "subject" is someone whose possibly illegal conduct is within the scope of the investigation; and a "witness" is someone who has information that may assist the investigation.[11] Counsel should ask the prosecutor to outline the facts or assumptions supporting the particular characterization. Even when the prosecutor is tight-lipped about the investigation, he or she may reveal helpful facts, including which agencies are assisting the investigation, such as the Internal Revenue Service, the SEC, the Food and Drug Administration, and so forth.

Sample Rights Advice Memorandum

MEMORANDUM

TO:
FROM:
DATE:
SUBJECT: Employee Rights Regarding Contacts by U.S. Government Agents or Attorneys

Current and former employees of the company have recently been contacted at home by government agents or attorneys asking questions about [issue]. Such questioning should not be construed as an indication by the government that the company or any of its employees has engaged in any wrongdoing or that the government even believes that there has been a violation of the law.

Employees should be aware of their rights, however, if they are contacted by government agents or attorneys and asked to answer questions or provide any other information.

First, an employee has the right to refuse to speak with a government agent or attorney and to refuse to provide any information. Government agents and attorneys do not possess subpoena power or have other legal authority to compel employees to speak with them or to submit to an interview. Although government agents and attorneys may obtain and serve a subpoena compelling attendance by the employee at a grand jury or deposition at a later date, the agent or attorney cannot use that subpoena to compel an employee to consent to an interview. It is improper for agents or attorneys to resort to threats or intimidation, whether expressed or implied, in order to obtain an interview.

Second, if an employee chooses to be interviewed, the employee has the right to have an attorney present. That attorney may be one selected by the employee at the employee's own expense, it may be an attorney from the company legal department, or, under certain circumstances, an attorney selected and provided by the company at its expense.

Third, an employee may speak with the government agent or government attorney without his or her own attorney being present.

If an employee chooses to speak with a government agent or attorney, either with or without an attorney present, the employee has the right to terminate the interview at any time. In addition, speaking to investigators will not prevent or foreclose compulsory grand jury or deposition testimony in the future.

If an employee chooses to speak with a government agent or attorney, the employee should understand the potential consequences of that decision. First, anything that the employee says can and will be used against the employee and/or the company in a criminal, civil, administrative, or contractual proceeding. Second, speaking to a government agent or attorney may be a waiver of an employee's privilege against self-incrimination. Third, without an attorney from the company or the employee's personal attorney present when speaking to a government agent or attorney, the employee will have no third party available to support any future claims that the employee may make that the government agent or attorney has misrepresented or misconstrued the statements that the employee made during the interview. Finally, speaking with a government agent or attorney may expose the employee to criminal prosecution for making a false statement or obstruction of justice, if the government believes that the employee knowingly made a false statement during the interview or otherwise provided false or incomplete information.

Employees must be sensitive to their responsibilities and obligations with respect to proprietary or bid and proposal information and classified information. Employees should not assume that government agents or attorneys have the proper clearance or need to know to discuss classified matters or programs. Any requests for documents pertaining to the company's business should be referred to the legal department because the company's records remain the property and responsibility of the company.

Although the decision whether to speak with a government agent or attorney is solely the employee's, the company recommends that, if an employee is contacted by a government agent or attorney, the employee contact the legal office before speaking with that person.

Finally, if an employee speaks with a government agent or attorney at any time, the employee is free to do so and should always tell the truth.

For further information or assistance, contact _____ of the company legal department at _____.

HOLDER MEMO REDUX: DOJ GUIDELINES FOR CHARGING CORPORATIONS

Federal prosecutors and regulators increasingly rely on counsel for the defense to build the government's case by insisting that the individual or corporate defendant waive the attorney-client privilege and turn over both client-lawyer communications and the work product of the lawyer. The policy of the U.S. Department of Justice ("DOJ"), as expressed in its standards for the federal prosecution of corporations (initially circulated as an internal memorandum by then Deputy Attorney General Eric Holder in June 1999 and known colloquially as the Holder Memo Standards), is to encourage federal prosecutors to seek waivers of the attorney-client privilege and work product privilege, including the results of any internal investigations, as a condition for not being charged with a crime.

The Holder Memo was revised and reissued on January 20, 2003, by Deputy Attorney General Larry Thompson.[1] Significantly, the new memorandum adds the following:

> Another factor to be weighed by the prosecutor is whether the corporation, while purporting to cooperate, has engaged in conduct that impedes the investigation (whether or not rising to the level of criminal obstruction). Examples of such conduct include: overly broad assertions of corporate representation of employees or former employees; inappropriate directions to employees or their counsel, such as directions not to cooperate openly and fully with the investigation including, for example, the direction to decline to be interviewed.

NOTE

1. Memorandum for Larry D. Thompson, Deputy Attorney General, to the Heads of Department Components and United States Attorneys, Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), at www.usdoj.dov/dag/cftf/corporate_guidelines.htm.

As discussed below, the terms of any subpoena for documents will also be discussed at this meeting. Notwithstanding recent DOJ policies, it may be appropriate for outside counsel to request that the prosecutor contact him or her before contacting company employees. Some prosecutors will accept such an offer because it makes it easier for them to interview witnesses.

INTERNAL CORPORATE INVESTIGATION: DOUBLE-EDGED SWORD

An internal investigation may be useful in assessing the corporation's exposure and may serve to convince the government not to pursue its own investigation or to indict the company. On the other hand, an internal investigation makes it more difficult to preserve the attorney-client privilege: the DOJ is increasingly demanding disclosure of the results of internal investigations, including privileged materials, in settlement negotiations with corporations.[12]

The fraud case involving McKesson Corp., a Fortune 500 medical supply and information company, illustrates both the costs and benefits of an internal investigation. After accounting irregularities had surfaced following its purchase of HBO & Co., McKesson ordered that an internal investigation be conducted and entered into confidentiality agreements with the SEC and DOJ.[13] McKesson disclosed to the SEC and DOJ its final report and other documents from the internal investigation. Perhaps as a result of its cooperation and its own efforts to eliminate wrongdoing, McKesson has avoided civil enforcement proceedings and criminal charges. A U.S. District Judge sitting in San Francisco, however, has ordered the company to turn over the results of the investigation to two former company officers who are facing criminal charges. A majority of courts are in accord, holding that voluntary disclosure to a governmental agency of privileged information constitutes a complete waiver of the privilege.[14] The decision, if upheld by the Ninth Circuit, could allow the plaintiffs in 91 fraud suits against McKesson to get copies of the documents.

If an internal investigation is appropriate, you or outside counsel must be the one to direct its conduct and do so in such a manner that it is likely to fall within the attorney-client privilege and the work

product doctrine. Nonattorneys may act as your agents. If you retain experts or investigators to gather, process, and analyze data or conduct an investigation, describe their relationship with you in a letter that clearly states that their work is being done for you, at your direction, and to assist in a matter involving or likely to involve litigation.[15]

You first must decide who will conduct the investigation, in-house or outside counsel. Although in-house counsel may be cheaper—and, in some circumstances, quicker—outside counsel investigations offer distinct advantages. In addition to any expertise that outside counsel may bring to the issues, outside counsel may also be more objective and may have more credibility with the prosecutor when trying to convince the government not to pursue an indictment against the corporation. Generally, the attorney-client privilege also favors outside counsel. If in-house counsel conducts the investigation, the government may argue that counsel was providing unprotected business advice rather than legal advice. If in-house counsel has some role in the matter being investigated, the government may seek to pierce the attorney-client privilege under the crime-fraud exception.

Corporate management should authorize the internal investigation in writing, expressly stating that the purpose is to provide legal advice. This writing is the so-called *Upjohn* letter, which derives from the U.S. Supreme Court decision in *United States v. Upjohn*. See the sidebar on page 67 for a sample *Upjohn* letter. Under the *Upjohn* doctrine, the corporate attorney-client privilege covers advice in the form of internal corporate reports and notes of the investigation, as well as employee interviews.[16] Documents that contain the impressions or thought processes of the attorney and that are prepared in anticipation of litigation may be protected by the work product doctrine. These protections are not inviolate—challenges to the privilege and government requests for waiver have become de rigueur. Thus, you should consider whether a written report is necessary, and distribution of any report should be on a need-to-know basis.

Employee interviews are an integral part of most internal investigations but require special precautions to protect the corporate attorney-client privilege, ensure that employees understand their rights, and avoid the appearance of impropriety. Before starting the interview, counsel must advise the employee that they represent the company and not the employee individually. The importance of this distinction also must be made clear: the conversation is protected by the attorney-client privilege and work product doctrine, but the company may waive the privilege without the employee's consent. If it appears that the employee has personal criminal exposure, you should recommend separate counsel, but you need not terminate the interview.

Think carefully about your note-taking during the interview. Summary notes that contain the attorney's mental processes will receive greater protection under the work product doctrine than verbatim transcriptions. Not only the prosecutor but also the defense counsel for an indicted individual may seek interview notes.

You should advise the employee not to discuss the interview with anyone. But as the *Upjohn* court explained, "The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney."[17] Do not leave the impression that the company prohibits the employee from discussing the underlying facts with the government, because such an act could be construed as obstruction of justice or witness tampering.

DOCUMENT SUBPOENAS

Careful procedures for supervising the production of documents in response to a subpoena are essential. In connection with an antitrust investigation, Wilbur-Ellis Co. was served with a grand jury subpoena that required it to produce documents related to price discussions between agricultural chemical distributors.[18] The company allegedly had failed to properly supervise compliance with the subpoena, and an employee destroyed pertinent documents. The company agreed to plead guilty and pay a fine of $100,000 for criminal contempt. Had this conduct taken place in 2003 instead of 1997, the consequences might have included more serious obstruction of justice charges.

To avoid such agonizing mistakes, you must take pains to ensure that everyone—counsel, employees, and prosecutor—have the same understanding regarding the scope of the subpoena. You or outside counsel may meet with the government attorney to clarify the terms and scope of the subpoena. Find out whether the prosecutor expects full compliance. Prosecutors often will issue overly broad subpoenas

SAMPLE *UPJOHN* LETTER

PRIVILEGED & CONFIDENTIAL
ATTORNEY-CLIENT & WORK PRODUCT PRIVILEGES

MEMORANDUM

TO: Legal Counsel
FROM: Senior Manager
DATE:
SUBJECT: Investigation of [Issue]

It has come to my attention that [describe the issue with sufficient particularity to define, but broad enough to encompass potential offshoots] (hereinafter, the "Issue"). In connection with the Issue, it is possible that the company or its employees may have violated federal or state statutes and regulations and, as a result, may be subject to potential investigation or lawsuits brought by the government or private parties. Accordingly, further inquiry and an assessment of the legal liability, if any, of the company is warranted.

In order for you to provide legal advice to me and to other senior management and to prepare the company for litigation that we anticipate may result from the Issue, you are directed to conduct an internal investigation to determine what, if any, legal liability the company may incur in connection with the Issue. The purpose of this internal investigation is to ascertain the relevant facts and to determine whether violations of any applicable statutory or regulatory provisions may have occurred. In addition, the investigation will be for the purpose of determining the effect that any such violations may have on the legal obligations and duties of the company. Moreover, as litigation may result from the Issue or the company's good faith attempts to resolve it, the investigation will include the collection of data and the exercise of counsel's work product in anticipation of such litigation.

As part of the internal investigation and in order to provide legal advice to me and other senior management, you may interview or request others (including, but not limited to, members of the company legal department or auditors or others working at their direction or on their behalf, including employees of the company and outside law firms or consultants) to interview employees and others to obtain relevant information. All persons interviewed will be advised that the investigation is for the purposes of providing legal advice to the company, that the interview will be confidential except to the extent that the company chooses to waive the attorney-client or work product privileges, and that the results of the interview will be shared with senior management.

As part of the internal investigation and in order to provide legal advice to me and other senior management, you or others acting at your direction or under your supervision may collect, receive, review, and analyze documents and data originating from the company's files or those of service providers used by the company. You will use these documents and data solely for the purpose of supporting the internal investigation and will keep such documents, data, and analysis strictly confidential.

Your legal advice to me and other senior management as a result of this investigation will be kept in strict confidence and will be transmitted directly to me or to other senior management so that it may be shared with those necessary to formulate and to make the appropriate management decisions.

_____
Senior Executive

PRIVILEGED & CONFIDENTIAL
ATTORNEY-CLIENT & WORK PRODUCT PRIVILEGES

to "freeze" documents with the expectation that the subpoena will be modified. If the responsive materials are voluminous, find out whether the prosecutor will allow production in stages. Confirm any limitation or understanding in writing.

For those who have practiced primarily in the civil context, be aware that document subpoenas must be handled differently from subpoenas in civil discovery—that is, it may not be in the corporation's best interests for you to challenge or narrowly interpret the subpoena. Nevertheless, you should raise any relevant and necessary objections before compliance, generally by motion to quash. You may challenge the scope of the subpoena based on reasonableness, specifically:

- Subpoena requires production of things not relevant to the investigation.
- Things to be produced are not specified with reasonable particularity.
- Subpoena is not limited to production of records covering a reasonable period of time—that is, the period of time with which the records deal should have some relation to the subject of the investigation.

You need to keep in mind, however, that, generally, a grand jury is given extremely wide latitude with respect to its subpoenas.

The corporation may want to appoint a custodian or "supervisor of compliance"—generally, an employee who is not involved in the underlying allegations—to conduct a search for the materials and to be prepared to produce the materials and testify before the grand jury. You should prepare a memorandum to employees who may have responsive documents describing the documents that they must search for and produce. Employees producing records should certify in writing that they understand the search memorandum and that they have produced all responsive documents. The place that the documents are kept is not decisive: documents kept at home or in a lawyer's office are in the custody or control of the corporation and thus producible.

Counsel should review all documents before they are submitted to the grand jury or to the prosecutor to ensure that the corporation does not produce privileged or nonresponsive documents. Corporations enjoy no Fifth Amendment privilege, but the attorney-client privilege and work product doctrine may exempt some documents from disclosure, and some papers belonging to corporate officials may be personal. Documents that will be produced should be copied and numbered. Privileged material should be segregated and noted in a privilege log, which you will provide to the prosecutor in lieu of the materials themselves.

Sometimes, subpoenas call for all documents "related" to a transaction. The difficult question is how to treat documents that do not on their face refer to the transaction. In other words, how should you treat a document subpoena that is, in effect, improperly calling for testimony? The corporation may properly produce only those documents that on their face refer to the particular transaction, but the prosecutor may view such a narrow interpretation, however proper, as uncooperative.

With the exception of financial institutions, the company usually will bear the costs of complying with the subpoena. Federal courts have the authority to shift the costs to the government upon a clear showing of oppression or unreasonableness. Only in extreme circumstances, however, have the courts found this standard satisfied. Because compliance costs can be high when the government seeks voluminous records, some observers have proposed lowering the standard to require government reimbursement in cases in which the witness has shown good cause to believe that the expense would constitute an undue burden.[19]

Finally, most document subpoenas will allow the corporation to turn over the documents to the government without the necessity of a grand jury appearance. Even if this option is not indicated on the subpoena, a telephone call to the government attorney may be sufficient to make the arrangements. Just make sure that you also get written confirmation of any such verbal agreements with the government.

SUBPOENA FOR TESTIMONY

In 1989, the government walked away from a decade-long criminal case brought against retail giant Sears, Roebuck, which had been charged with evading customs duties on Japanese televisions. The case fell apart largely because of prosecutorial misconduct before the grand jury, which included egregious treatment of grand jury witnesses. The witnesses in question were Sears employees who, like all federal grand jury witnesses, were not permitted to have counsel present in the grand jury room. The prosecutor harassed the employee witnesses, commanding them to answer

"yes" or "no" to complex, unintelligible, or argumentative questions that were peppered with sarcasm.[20]

Defense counsel's presence, even passive presence, inside the grand jury room would deter such improper questioning and harassment of witnesses. Almost nowhere else in the criminal justice system is a person who wants a lawyer denied that right. The importance of counsel in the grand jury room is particularly compelling because an appearance before the grand jury may subject an individual to self-incrimination, imprisonment for contempt or perjury, or other grave consequences. Still, contrary to the law in at least 21 states, all witnesses testifying before the federal grand jury must go through the awkward and time-consuming process of stepping outside the grand jury room to consult with their attorneys.[21]

You should monitor the grand jury investigation closely, even if you have retained outside counsel. The corporation's outside counsel may jointly represent the corporation and any employees called as witnesses. It may be wise, however, to hire separate counsel for the employee group: in the event that an employee turns out to be culpable, a separate unconflicted attorney may more effectively argue the corporation's case. In addition, if an employee becomes a witness or codefendant, joint counsel might be disqualified from representing the corporation at trial. Subjects and targets should always have their own attorneys.

In some respects, preparation for a grand jury appearance is similar to preparation for a civil deposition—that is, you or your outside counsel will help the witness prepare answers to anticipated questions. In preparing an employee witness for a grand jury appearance, however, you or your outside counsel should advise them of their Fifth Amendment right against self-incrimination and the right to be represented by an attorney of their choice. Federal prosecutors are not required by law to provide these *Miranda*-type warnings, which are, in contrast, mandated by many state statutes.[22]

You or your outside counsel must ensure that employee witnesses understand what matters may be covered by the attorney-client privilege and how to handle questions about such matters. It is not necessary to lecture the witness on the intricacies of the attorney-client privilege. As a rule of thumb, they should be told not to answer any question that references communications with the corporation's attorneys. Upon being asked such a question, the witness immediately should ask permission to step outside the grand jury room and consult with you or your outside counsel.

Unlike other participants in the grand jury system, witnesses are not bound by the rule of grand jury secrecy.[23] Thus, immediately following the grand jury appearance, you or your outside counsel should debrief witnesses whether representing the witnesses or not. Because grand jury witnesses have no right to obtain transcripts of their testimony, immediate interviews are the only way to gain information regarding the grand jury's inquiries. You and your outside counsel should not, however, allow witnesses to review notes or memos of debriefings because such actions may waive the work product privilege that generally protects such documents.

CONCLUSION

Although any company can find itself in the midst of a grand jury investigation, such matters should never be treated as routine. You must treat all such investigative activity as if it carried the potential for criminal indictment and other adverse consequences. Preserve the attorney-client privilege at each step—from the internal investigation to compliance with subpoenas for documents and testimony. Avoid any conduct that could be construed as obstruction of justice, but ensure that employees are aware of their rights when dealing with the government.

Historically a bulwark against government abuse, today's federal grand jury is a captive of prosecutors who decide what to investigate, whom to question, whom to indict and for what, and how to draft the indictment. There are ways in which some balance can be restored to the system without adverse consequences to effective law enforcement. The American Bar Association, the National Association of Criminal Defense Lawyers, the Cato Institute, and the Council for Court Excellence have proposed several reforms, some of which have been in effect in various states for some time.[24]

Recognizing that individuals being questioned by the government should not be denied counsel, 21 states currently permit some witnesses to have counsel present during their grand jury testimony. The reported experience of these states, which allow counsel but limit their participation in the proceedings, is

From this point on . . .
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- ACCA's committees, such as the Litigation Committee and the Corporate and Securities Law Committee, are excellent knowledge networks and have listservs to join and other benefits. Contact information for ACCA committee chairs appears in each issue of the *ACCA Docket*, or you can contact Staff Attorney and Committees Manager Jacqueline Windley at 202.293.4103, ext. 314, or windley@acca.com or visit ACCA Online℠ at www.acca.com/networks/ecommerce.php.

- Lisa A. Cahill, "Internal Investigations: You May Be Working for the Government," *Outside Counsel*, Winter 2001 (Zuckerman Spaeder), at 1–2, available on ACCA Online℠ at www.acca.com/protected/pubs/oc/winter01/Zuckerman.pdf.

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that the presence of counsel has not been disruptive or caused other serious problems. Until the federal government follows the lead of these states, the absence of any check and balance on federal prosecutors armed with grand juries means that in-house counsel must be particularly vigilant.

NOTES

1. The procedural history of United States v. Sigma International is long and tortured. The underlying grand jury proceedings are discussed at length in United States v. Sigma International, Inc., 244 F.3d 841 (11th Cir. 2001), which was vacated by the Eleventh Circuit's decision ordering the appeal reheard *en banc*. A plea agreement made *en banc* consideration unnecessary. *See* United States v. Sigma International, Inc., 300 F.3d 1278 (11th Cir. 2002).
2. United States v. Sigma International, Inc., 244 F.3d 841, 858–874 (11th Cir. 2001); Paula Christian, *Sigma Prosecutor Files for Name-Clearing Hearing*, TAMPA TRIBUNE, June 14, 2002.
3. TOM WOLFE, THE BONFIRE OF THE VANITIES 629 (Bantam Paperback ed.1988) (1987).
4. The Fifth Amendment's grand jury clause does not apply to state prosecutions, and only about half of the states require indictment by a grand jury. For a general survey of state practices, *see* SARA SUN BEALE AT AL., GRAND JURY LAW AND PRACTICE § 8:2 (2d ed., West Group 2001).
5. The defendant may, however, waive grand jury indictment and be prosecuted by information.
6. Tom Fowler & Mary Flood, *The Fall of Enron*, HOUSTON CHRONICLE, Aug. 30, 2002.
7. *See* U.S. Department of Justice, UNITED STATES ATTORNEYS' MANUAL § 9-11.233 (Oct. 1, 1990) (advising that, when a prosecutor is personally aware of "substantial evidence that directly negates the guilt of a subject of the investigation, the prosecution must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such person").
8. Mark J. Fucile, Peter R. Jarvis, and Michael Roster, "Timing Is Everything: When Document Retention Policies and Related In-house Counsel Advice Intersect with Government Investigations and Litigation," *ACCA Docket* 20, no. 5 (May 2002): 18–31, available on ACCA Online℠ at www.acca.com/protected/pubs/docket/mj02/timing1.php.
9. Landon Thomas Jr., *U.S. Accuses a Top Banker of Obstruction*, N.Y. TIMES, Apr. 24, 2003, at C1.
10. July 30, 2002, is the effective date for the increased maximum penalties in 18 U.S.C. §§ 1512 and 1519; increased penalties under the Federal Sentencing Guidelines, which will boost average sentences from 18 months to three years, take effect November 1, 2003.
11. U.S. Department of Justice, UNITED STATES ATTORNEYS' MANUAL § 9-11.150 (Oct. 1, 1990).
12. Vanessa Blum, *U.S. Mounts New Attack on Privilege*, LEGAL TIMES, Mar. 20, 2003; Tamara Loomis, *DOJ Encourages Waiving Attorney-Client Privilege*, N.Y. L. J., Feb. 21, 2003.
13. Sue Reisinger, *Corporate Privilege in Fraud Cases Is at Stake*, NAT'L L. J., Apr. 22, 2003.
14. *But see* Diversified Industries Inc. v. Meredith, 572 F.2d 596 (8th Circ. 1978) (*en banc*) (disclosure of privileged material to SEC during investigation was selective waiver of privilege, preventing discovery of material in subsequent civil litigation); Teachers Insurance & Annuity Association of America v. Shamrock Broadcasting Co., 521 F. Supp. 638 (S.D.N.Y. 1981) (organization may specifically reserve its right to assert the privilege in subsequent proceedings).
15. *See* United States v. Kovel, 296 F.2d 918, 921–23 (2d Cir. 1961) (holding that statements of client to accountant assisting lawyer in providing legal services were privileged).
16. United States v. Upjohn, 449 U.S. 383 (1981).
17. *Id.* at 395.
18. U.S. Department of Justice, Antitrust Division, News Release, Wilbur-Ellis Company Agrees to Plead Guilty to Criminal Contempt, Sept. 30, 1997, available in Westlaw, 1997 WL 1045896 (D.O.J.).
19. Council for Court Excellence, *The Grand Jury of Tomorrow, District of Columbia Grand Jury Study Committee Final Report*, at 73–75 (July 2001), at www.courtexcellence.org/juryreform/grandjuryreform.shtml.
20. United States v. Sears, Roebuck and Company, Inc., 518 F. Supp. 179, 1390 (1981).
21. Council for Court Excellence, *The Grand Jury of Tomorrow, District of Columbia Grand Jury Study Committee Final Report*, at 45–52 (July 2001), at www.courtexcellence.org/juryreform/grandjuryreform.shtml.
22. *See* Minnesota v. Murphy, 465 U.S. 420 (1984) (noting that self-incrimination warnings are not required because the grand jury room is not an inherently coercive setting like a police station). Department of Justice Guidelines require only that limited *Miranda* warnings be given to targets and subjects, not witnesses. U.S. DEPARTMENT OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-11.151 (Sept. 1997).
23. Fed. R. Crim. P. 6(e).
24. W. Thomas Dillard et al., *A Grand Facade, How the Grand Jury Was Captured by Government* (the Cato Institute, May 13, 2003), at www.cato.org/pubs/pas/pa476.pdf; Council for Court Excellence, *The Grand Jury of Tomorrow, District of Columbia Grand Jury Study Committee Final Report*, at 45–52 (July 2001), at www.courtexcellence.org/juryreform/grandjuryreform.shtml; American Bar Association, letter from Robert Evans, Director, Governmental Affairs Office, to U.S. Representative Charles Canady (July 28, 2000), at www.abanet.org/poladv/congletters/106th/grandjury072800.html#31; *The Federal Grand Jury Reform Report & "Bill of Rights,"* at www.nacdl.org/grandjury.