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So...You've Gotten a Government Subpoena?

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Today's Topics

- Types of government subpoenas
- Initial steps
- Internal investigation
- Objections and scope of response
- Advocacy during the investigation
- Looking ahead after the investigation

Today's remarks are the personal views of the panelists. They do not represent legal advice regarding any particular matter or necessarily reflect the views of their employers.

Types of Government Subpoenas

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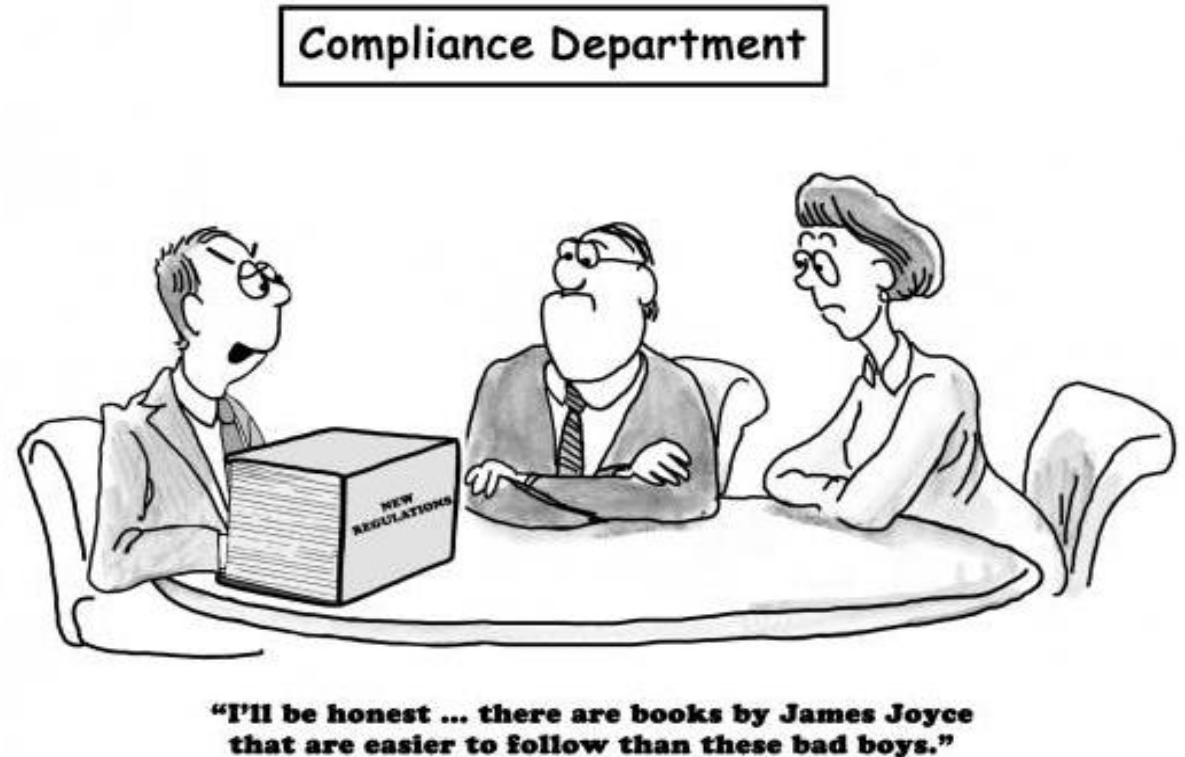
- Prosecutor (AUSA/DOJ)
- State Attorney General
- HHS-OIG
- State Consumer Protection Divisions
- SEC
- FTC
- Many other federal agencies
- Private counsel

Types of subpoenas:

- Grand jury
- Administrative subpoena
- Civil Investigative Demand (CID)
- Attorney General Investigative Demand
- HIPAA subpoena

What Does It Mean?

- Government/regulator-initiated investigation
 - Civil/regulatory
 - Criminal
- False Claims Act case
 - Most often civil, but there can be criminal investigation coordination
- Other whistleblower-initiated investigation
- Consumer protection statute-based investigation



Types of Government Requests

- Requests for production of documents
- Sworn interrogatories (or specifications)
- Testimony or “interviews”

Initial Steps

What Should I not Do First?

- Panic!
- Have someone at the company contact the government before discussing with counsel
- Form hard-and-fast conclusions about compliance based on preliminary analysis



"On advice of counsel I'm going to shut the hell up before I make things worse."

What Should I Do First?

- In-house: who needs to know?
 - Communicate appropriately
- Consider outside counsel
- Note timing for objections and responses
- Document/data preservation
 - Consider multiple potential sources of documents and data



Initial Discussions With the Government

- Whether in-house or outside counsel or both:
- Mine for as much information as they will share
 - Who is under investigation?
 - What is under investigation?
 - Is there a sealed qui tam?
 - Are there internal/court deadlines?
 - What is the relevant time period (be mindful of SOL)?
- Extension requests
- Sequencing of responses
 - Most commonly, but not necessarily: documents → interrogatories → testimony



Do I Have to Respond?

- Understand the subpoenaing entity's authority to issue the subpoena
 - Both jurisdictional and substantive
- Review authorizing statute/regulation
 - Consider the absence of a statute/regulation, e.g., authorizing “corporate representative” testimony on specified topics
- Often sparse case law interpreting scope of agency's authority
- Do the civil rules of procedure govern your response?
 - *E.g.*, federal Civil Investigative Demands, 31 U.S.C. §§ 3733(b), 3373(j)(6) – Fed. R. Civ. P. apply to the extent not inconsistent with other provisions of this section

Internal Investigation

Internal Investigation

- Conducted by counsel (outside or in-house)
 - Privilege
 - “Need to know” basis
- Ahead of substantive government communications, not in parallel
- Memorialize thoughtfully
- Both documents/data and witnesses



Goals of Internal Investigation

- Learn the relevant facts
- Assess credibility
- Evaluate legal risk
- Evaluate reputational risk
- Inform advocacy in subpoena response
- Remediation, policy change?



“True, the coverup is usually worse than the crime.
But you understand they’re still coming after you
for the crime, right?”

Internal Investigation – Documents

Key documents

- What are they?
- Non-custodial sources (e.g., share drives, document repositories, data)
- Custodial sources (emails, but not only emails)



Internal Investigation – Interacting With Witnesses

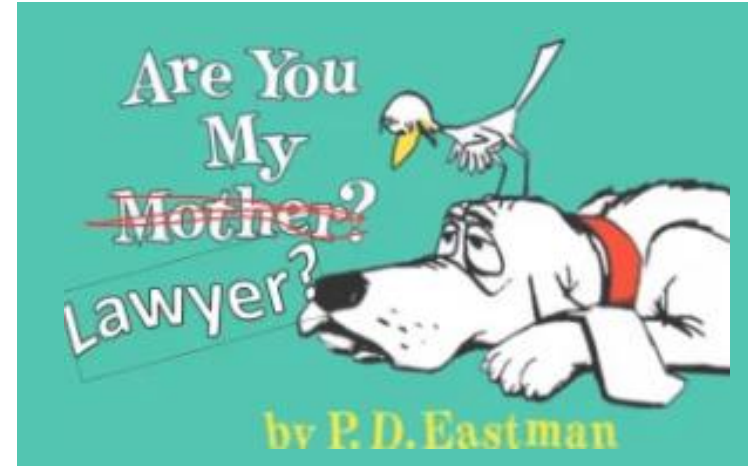
Key witnesses

- Who are they?
- Anyone named in the subpoena
- Start with in-house counsel or high-level managers
- Current employees
- Former employees
- Any relevant third parties



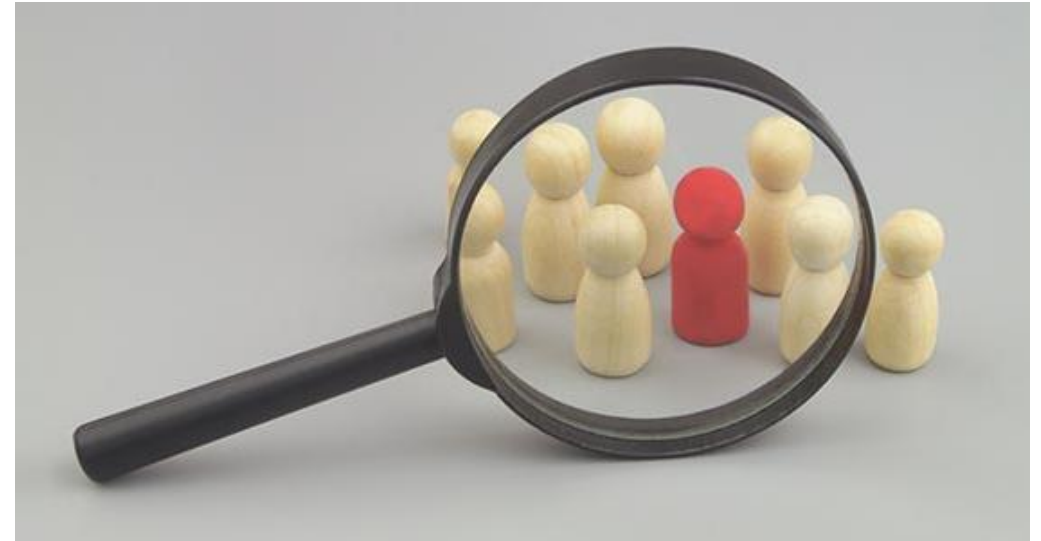
Interviewing Unrepresented Employees – *Upjohn* Warnings

- When to give an *Upjohn* warning
- Key Elements of an *Upjohn* warning
 1. Representation is of the company, not of the individual
 2. Because of employment status, conversation is privileged
 3. Privilege belongs to the company, which can decide whether to hold or waive it
 4. Ask that employee keep conversation confidential to protect the privilege
- Document giving *Upjohn* warning
- Responding to employee questions



Internal Investigation – Other Considerations

- Is there a relator or whistleblower?
 - If so, how to interact with that person?
- No retaliation against any employee raising a concern or thought to be a whistleblower
- Separate counsel for witnesses?
 - Any conflicts of interest?
 - Pool counsel?



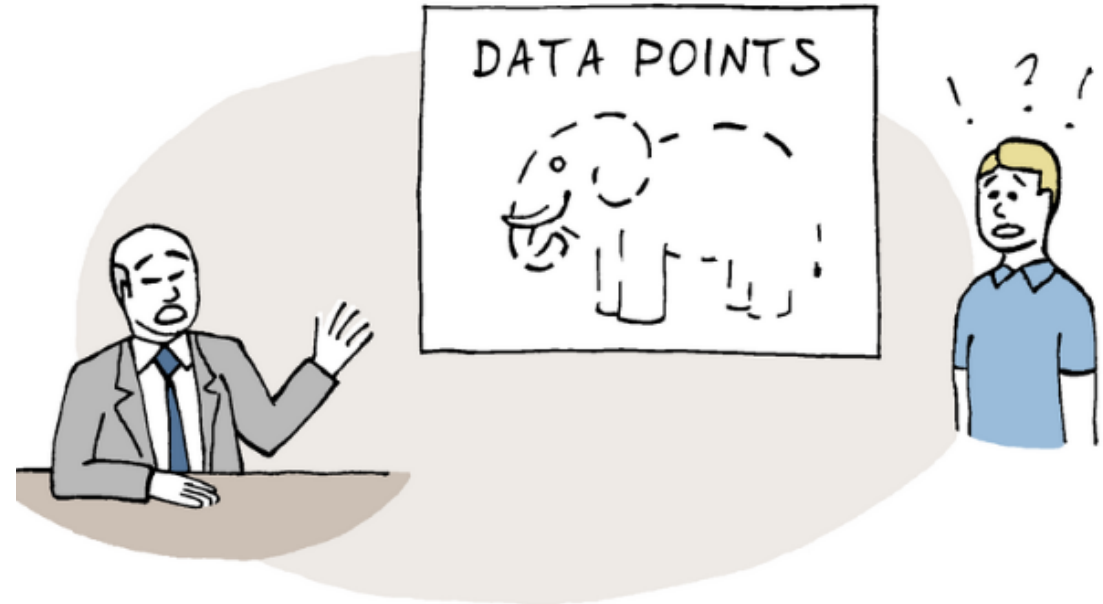
Joint Defense / Common Interest Agreements

- Important when multiple entities are involved in conduct being investigated
- Counsel-to-counsel contact
- Written agreement?
 - Cross-Examination rights
 - Fiduciary duties



Retaining Experts

- Do you need an expert?
 - Could be for internal or external purposes
 - Thinking ahead to potential litigation
- Is there a data analysis to undertake or replicate?
- Do you have time/money for that?
- Considerations regarding doing data analysis in-house



Cautionary Note – Assume Everything Discoverable



- No new bad emails
- Interview memos best practices
- No unforced errors

How to Use What You've Learned

- Potential remedial steps
- Self-disclosure?
- Consult employment counsel

Objections and Scope of Response

Subpoena Objections

- Timing for serving formal objections
 - Consider both document request and interrogatory objections
 - Tolling agreement?
- Types of objections
 - Burden
 - Relevance
 - Time period
 - Privilege
 - Legal defenses



"I'm just saying that maybe instead of objecting all the time counsel try some constructive criticism."

Subpoena Responses

- Scope of response
- Try to limit to non-custodial sources
- Negotiate search terms?
- Memorialize any limitations agreed or implemented
- Sequence the responses in waves
 - Rolling productions
 - Priority requests
- Provide most recent information first
- Provide some initial information and then request a meeting with government

Enforcement

- Consult authorizing statute and regulatory scheme
- Is the subpoena self-executing?
- File a motion to quash?
- Defend an enforcement action?

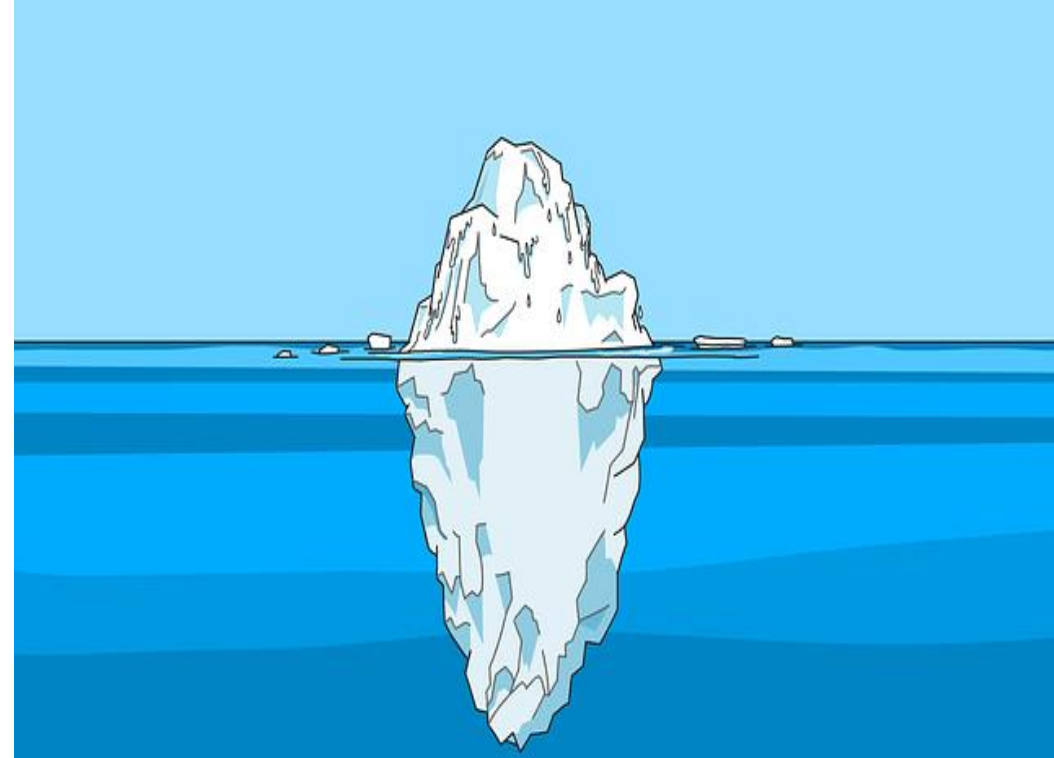


Advocacy During the Investigation

Ongoing Discussions With the Government

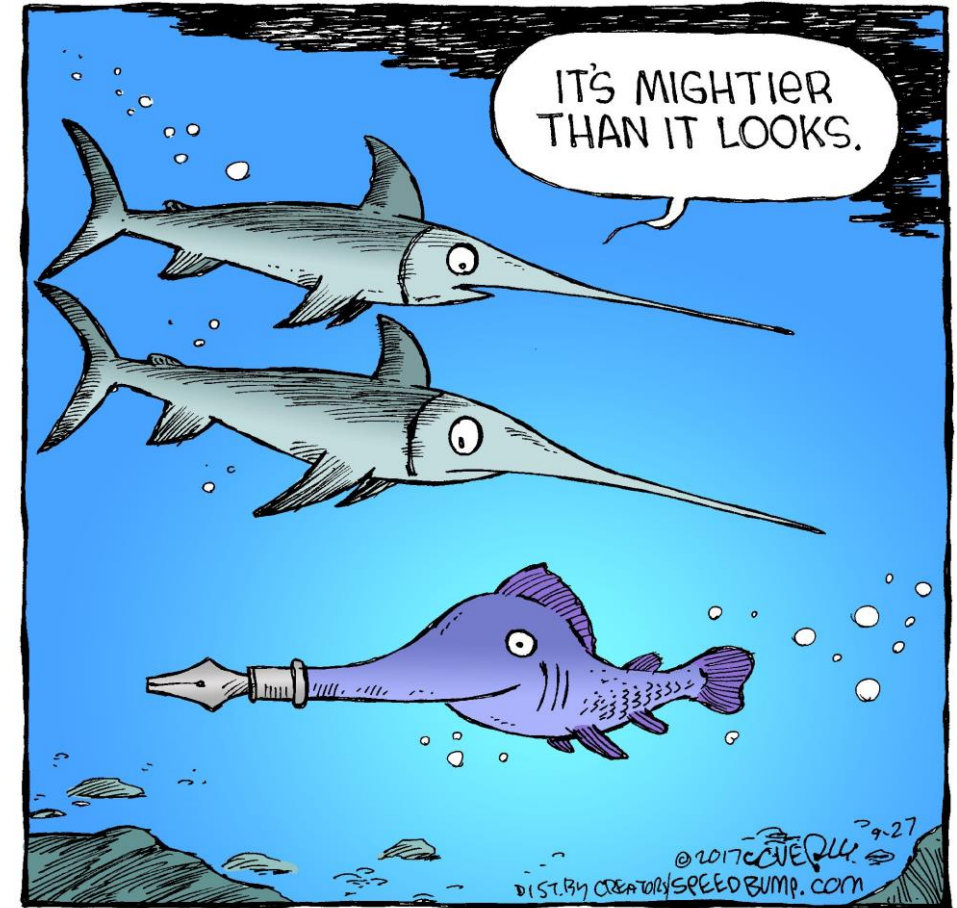
There is more to responding to a subpoena than just responding to the subpoena!

- Routine meet and confers
 - Discussions of relevance
 - Discussions of time frame
 - Explain burdens, sequencing proposals
 - Ask lots of questions
- Production cover letters
 - Explain production
 - Educate on contents
- Using interrogatories and objections for advocacy
- Testimony/interviews



Presentations and Other Submissions

- Who goes first?
- Timing?
 - Usually near beginning and/or end of investigation
- Format?
 - Oral presentation
 - Letter
 - White paper
- Who should attend?
- What to focus on?
 - Education on facts
 - Education on law
 - The “Brand Memo” and/or other DOJ Policies



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Additional Types of Communications

- Involvement of key decision-makers
 - a/k/a “going up the chain”
 - Timing
 - Don’t burn bridges
- “Granston Memo” submissions
- State Attorney General-specific considerations
 - Politics/elections

Next Steps

When Is It Over?

- How long will it last?
- When will it end?
 - Sometimes, you won't know; and that may be okay



Is It Over Now? (Taylor's Version)
Taylor Swift

**Was it over then?
And is it over now?**

Intervention Decisions

- In a qui tam case, the government has to inform the court whether it will take over the case, allow the relator to proceed, or dismiss the case
- Intervention
 - Can be partial
 - Usually a new complaint
- Dismissal by government
 - Standard for government dismissal—intervene and dismiss (even after the seal is lifted) if government has a reasonable argument the burdens outweigh the benefits of the litigation
 - Requesting that the government dismiss
- Declination
 - Government follows the case as “real party in interest”; retains the right to intervene later
 - Relator litigates like any civil plaintiff
 - Additional arguments for dismissal available to defendant

Preparing for Litigation

- Pre-litigation settlement discussions
 - Likely to be offered, so prepare
- Any changes needed to litigation hold?
- Communications/PR assistance?
 - Be aware of privilege issues



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