

FINAL TRANSCRIPT

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****ACC - The government's attempt to change the corporate dress-code from pinstripes to jail stripes**

Event Date/Time: Jan. 26. 2005 / 1:00PM ET

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Association of Corporate Counsel Litigation Committee - Chair

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PRESENTATION

Michael Booden - *Association of Corporate Counsel Litigation Committee - Chair*

My name is Michael Booden, and I am your moderator. And on behalf of ACC and the Litigation Committee, I welcome you to this Web cast of Government Investigations -- Changing the Corporate Dress Code from Pinstripes to Jail Stripes.

As you know, our distinguished speaker today, Bill Michael, is currently Chair of White Collar and Regulatory Defense Practice Group, Lindquist & Vennum. He is a former federal prosecutor and a noted author of several publications on this very topic, including the ACC's Info-Paks on Internal Investigations and Responding to Government Investigations. Both of these publications are quite scholarly and more importantly, for our purposes, they provide extremely helpful advice that you can use when you're faced with the task of conducting an internal investigation or responding to a government inquiry.

Bill is particularly qualified to speak on this topic because he provides advice to corporate counsel on this very topic on a daily basis. Another publication that I recommend as an excellent resource is West publication, Successful Partnering Between Inside and Outside Counsel. Chapter 35 of that publication entitled "Internal Investigations" is an extremely practical guide and contains some really useful forms. This presentation will cover the different types of government investigations, how they interact, different investigative techniques including search warrants and subpoenas, DOJ policies that inform and guide their investigations, U.S. sentencing guidelines, attorney-client privilege, work product doctrine and other issues relating to this topic.

I know that you will have questions, and we want our presentation to be interactive. As such, please e-mail questions -- and some of you already have -- directly to me at michael.r.booden@usps.gov, and that e-mail address is on the Web page for this Web cast. Bill will address as many questions as time allows. Obviously, we could spend a day or more on this topic, let alone an hour. Bill is happy to address questions that are not addressed today. He can be reached at wmmichael@lindquist.com, and his e-mail address and other contact information is also on the Web page for this web cast. I ask that you be kind to him, though, I know that there are -- hundreds of people have signed up for this Web cast and we don't want to crash Bill's server. Without further ado, I yield the floor to Bill.

Bill Michael - *Lindquist & Vennum - Chair, White Collar & Regulatory Defense Practice Group*

Good afternoon. Thank you very much for having me on this Web cast. Today's presentation is one that's really an overview of the topic of government investigations, and it's going to delve into internal investigations simply because those two topics really fit hand-in-glove together when the government comes knocking on your door. As Michael kind of talked about a little bit earlier, the breadth of the issues that could be discussed, as well as the depth of discussion on each of those issues, really could in many ways take up a full day. We don't have a full day, we've only got an hour. I am going to be fairly brief. The presentation here is more to provide an overview of many of the issues so that you, as corporate counsel, can spot these issues, understand the issues, and address them.

Additionally, I would tell you that the Info-Paks on Internal Investigations and Responding to Government Investigations are available via the ACC Web site or also through my law firm's Web site at lindquist.com. I'm going to direct your attention, really, to the substance of the slide presentation, which starts at Slide 3. When government investigators come knocking on doors of corporations, oftentimes these things are really "bet the company" types of situations. We've all been reading the newspaper

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lately. We're familiar, obviously, as is the general public, with the names of Enron, WorldCom, Global Crossing, Rite Aid, Arthur Anderson, et cetera, et cetera. That's because the government has elected to investigate them. Some of them have been investigated criminally, some of them have been investigated civilly, some of them have been investigated both criminally and civilly, and we're going to talk about that as well.

But these investigations, when I talk about "bet the company" investigations, really are things that can have an impact that can close down corporations and/or send individuals to jail. Staggering amounts of money have been paid. Two examples, Columbia/HCA, a healthcare provider, paid almost three quarters of a billion dollars to the government to resolve its criminal and civil cases. Abbott Labs recently, as a result of an undercover government operation down in the Southern District of Illinois, paid about \$600 million. And there are more examples every day in the newspaper.

Additionally, no industry is really exempt from these government investigations. And government investigations tend to spawn other things, such as class action shareholder litigation or other types of third-party litigation. We've seen this from State AGs out in New York and in other states targeting various industries. And so it really is something that is, as we all know or we wouldn't be in this Web cast, something that's pretty crucial. Really, the purpose today is to allow you to identify issues which will help you eliminate your exposure at the corporate level, minimize potential damages, and also understand some of these key issues.

But before we get into those three things, I thought it would be helpful to kind of briefly explain the types of investigations that might take place. And if you go to Slide 4, there's really three types. There is a civil or administrative investigation. And what I mean by that, it really is an investigation that seeks some sort of monetary compensation or penalty, discouragement, injunctive or declaratory relief, but it doesn't threaten the loss of liberty of individuals. In other words, they're not going to have individuals going to jail. There's a list of agencies there, the list is somewhat endless that could be added that have investigative responsibility. The second type that we're going to talk about is criminal investigation. And the third is parallel investigations, which really are when there are two or more investigations.

So if we turn to Slide 5, the civil administrative investigations, as we talked about before, have different remedies that they're seeking. And I mentioned 1 through 4 earlier, but I also want to talk about No. 5, because those types of companies that deal with the government -- whether it be the healthcare industry or the defense industry or others -- No. 5 really can be something that could lead to the death of the company. You have exclusion processes for healthcare providers that will basically forbid them from dealing with the federal healthcare program. The states have the same exclusion authority to deal with the Medicaid system that they oversee. And so those are things that literally can shut down a business.

Now, when agents come in and start investigating on the civil cases, you're going to see, in Slide 6, that oftentimes that information that they gather in the course and scope of a civil investigation or an administrative investigation can be given over to criminal prosecutors, either at that time or later. And I've used the term "stalking horse" on Slide 6 because oftentimes what the government does is they use this civil investigation to gather information knowing full well that the gathering techniques would be different if the company knew there was also a criminal investigation ongoing. In other words, the companies want to deal with the government, want to provide information, but if they knew that a criminal investigation were ongoing, they would be much more reticent in providing that information because the stakes change.

One thing that you also have to understand is when we're dealing with administrative investigation, many of these regulatory agencies, either through their Inspector General's office or other arm of the agency, also have the ability to investigate. Oftentimes you'll see the Department of Labor or you'll see the FDA or Health and Human Services, the Securities and Exchange Commission is obviously very prevalent nowadays in the media surrounding its investigations. And those things obviously are extremely important, but, again, they seek dollars, for the most part. If you go to turn to Slide 7, we're going to start and talk about the criminal investigations for a little bit.

Criminal investigations, the information that these agents learn is different than the information learned by agents in a civil investigation. What I mean by that is the criminal investigators generally use grand juries to obtain their information. They'll

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either do it by subpoenaing people into the grand jury or subpoenaing documents either from the company or from third parties. And we'll talk about subpoenas later today, but the criminal matters or the information that is gathered generally is not shared with the civil side. And so that's a very real distinction. There are exceptions to it, but those exceptions generally have to go through the court.

Additionally, criminal investigations are often fairly lengthy in process. You have to understand the role that a prosecutor plays. He's sitting there at his desk waiting for various agents to come in and bring him cases. He evaluates those cases, talks to the agent, makes a determination about whether or not the agent needs to do more on that particular investigation. The agent goes off, they may subpoena records, that may take a long time. That's why the statute of limitations is lengthy. And it varies depending on the types of crimes, but generally, there's three types of statute of limitations or three ranges.

Most crimes are subject to a five-year statute of limitations. In other words, five years after a crime was committed, it generally cannot be prosecuted if it wasn't brought before that. Tax cases are generally six years. And financial institution cases are generally ten years. But that's one of the things that allows the prosecutors that time to gather up information, to deal with the counsel on the other side or to deal with reluctant witnesses and compel them or to deal with third parties who are just delaying the process by slowing -- slowly producing evidence.

The other important thing to recognize about criminal investigations is they have a tendency to shift focus. And what I mean by that is that oftentimes the criminal investigation will be started on the basis of an allegation. It may be an allegation raised by a whistleblower or a disgruntled employee, a competitor, a former employee or some other mechanism. It may, in fact, be brought as a result of media attention and the prosecutor and the agents learn it through the newspapers. But they have the ability to then go and start to investigate that. And what they tend to do is use that grand jury process to go in and look at the circumstances that they have -- has been brought to their attention. However, as things are learned, other areas become relevant, and that focus -- what may have been a very narrow focus in the beginning -- tends to shift to other areas.

The grand jury also has the ability to determine and do an investigation simply to ensure that no crime was committed. In other words, they don't need to have a belief that a crime was committed, they can, in fact, investigate to ensure that no crime was committed. And that's pretty unique in our system, which ultimately leads to a lot of problems for corporations and the senior management in the corporations.

On Slide 8, I talk a little bit in here about what investigators are going to look at. And I will tell you that corporations are something that have become a focus of both prosecutors and agents over the course of the last probably about five years. Now, if you think about corporations, they act through their agents, that is their employees, their officers, their directors. Well, that also is how the activities occur. And so the investigators are going to look not just at the corporation and what it did, but they're also going to look at the individuals who did it, who were responsible, or should have known what was going on.

Now, let's talk a little bit about criminal responsibility and criminal liability of the corporation. Because as we talked about before, corporations act through their agents. Well, because they act through their agents, the courts have developed what's, in essence, a respondent superior liability for corporations. And on Slide 9, these are the elements that are required for a prosecutor to convict a corporation. In essence, what has to happen is the essential elements of whatever crime is charged have to have been committed by an agent of the corporation. There has to be some benefit. It has to only be a very minor benefit, but there has to be some benefit towards the corporation in those actions. And lastly, the agent has to have acted within the scope of their employment.

Now, in saying that, what you've got in many instances is a corporation that's got literally thousands of employees. And those thousands of employees, their actions really have the ability to end up compromising the integrity and/or potentially subjecting the corporation to criminal responsibility. Well, a strong compliance program is essential and is obviously a very good thing. Compliance programs don't always catch everything.

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Michael Booden - Association of Corporate Counsel Litigation Committee - Chair

Bill --

Bill Michael - Lindquist & Vennum - Chair, White Collar & Regulatory Defense Practice Group

Yes.

Michael Booden - Association of Corporate Counsel Litigation Committee - Chair

-- I have a question.

Bill Michael - Lindquist & Vennum - Chair, White Collar & Regulatory Defense Practice Group

Sure, Mike.

Michael Booden - Association of Corporate Counsel Litigation Committee - Chair

If a federal prosecutor or someone from the FBI or a different investigator were to contact one of your employees, what's the proper response? And you find out through -- be it an employee informing someone in upper management or through some other sources. What does the employee have to do? And what should you do in terms of preparing your employees, if anything, in order to respond to such an inquiry?

Bill Michael - Lindquist & Vennum - Chair, White Collar & Regulatory Defense Practice Group

Sure. It's a great question, because it happens all the time, and it raises a lot of very complex issues. First of all, the first question that comes to mind is -- What position does that employee hold? Is it a management position or not? Because if you look at the ethical rules, specifically Rule 4.2, that deals with contacts with represented people and persons and parties, depending on which state you're in. And so one of the things that is necessary to look at is first of all, was the agent acting under the scope of a prosecutor? And secondly, did the prosecutor know that, in fact, the corporation was represented? Third, what role did that employee have? And the statements that that employee made may, in fact, bind the corporation or may, in fact, have waived a privilege.

So getting back to the second part of your question, Michael, what's crucial is the minute you learn, as corporate counsel, that one of your employees or former employees has been interviewed by some government investigator, it's absolutely essential that you debrief that employee. You find out when it occurred, how it occurred, what questions were asked, who the agent was, what answers were given. Because like I said before, those statements of an agent of the corporation can, in fact, be used against the corporation later at trial. They can, in fact, be used later by the government to assert that a privilege has been waived.

And it's also helpful to try and determine what's happening. And we'll get to it a little bit later, but in my opinion, knowledge is power and you have to know what's going on. You've got to learn as many facts and circumstances about what's happening as quickly as possible so that you can start making informed decisions. Is this -- the nature of the inquiry related to that employee, individually? Or is it broader in scope? Is that going to create a conflict for that employee with the corporation and bring up issues of separate counsel and indemnification and things of the like?

So the answer to the question is -- it's very fact dependent on what happens, and you've got to learn what happened in order to really try and figure out where you sit as corporate counsel and where the risks are that are attendant in this situation now. Now, the criminal investigation we're going to talk about in more depth. I want to briefly just touch on parallel investigations.

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So parallel investigations at Slide 10 really are something that are a combination. And the Department of Justice uses these quite routinely. And, in fact, the U.S. Attorney's Manual, which governs the actions of federal prosecutors, state that, in fact, they are -- that is the prosecutors are to work with their civil counterparts at the Department of Justice to ensure that where appropriate, parallel investigations go forward.

Let me give you some perfect examples. Healthcare industry is ripe with parallel investigation. You have qui tam litigation or whistleblower litigation out there, and you have criminal investigations of that. And so the prosecutor and his civil counterpart need to coordinate their investigations in order to utilize the resources that each have to benefit both of them, as well as not handcuff each other. The perfect example is the grand jury. If a federal prosecutor in a parallel investigation of a healthcare case uses grand jury subpoenas, as I said before, that information can't be shared with his civil counterpart for the qui tam litigation.

On the other hand, Congress addressed that when they enacted HIPAA legislation and they created something called a AID or Authorized Investigative Demand, which is, in essence, a subpoena that can go out to gather that information, but it's not a grand jury subpoena, so it doesn't have the same restrictions on secrecy. So now the information that's gathered through that AID can be used both in the criminal investigation as well as in the civil investigation.

Another benefit on the AID is Simply that prosecutors can continue to use those AIDs even up after the case is -- the criminal case has been indicted. The indictment generally shuts off grand jury investigative subpoenas, but it won't shut off the Authorized Investigative Demands. And they're very prevalent.

I'll give you a quick example. I was just in a healthcare fraud trial for two months this summer and the prosecutors had issued over 1,300 Authorized Investigative Demands. And they were issuing them all the way up through and including during the trial. And so it allowed them to do things. But you, as corporate counsel, need to know certain things. For instance, if you're in the healthcare industry, you have to know that if you get an Authorized Investigative Demand, one of the Department of Justice's requirements is that there be a criminal investigation open before that AID can be issued. So you may see it and say -- Fine, it's requesting information. But if you didn't already know that a criminal investigation had to be open before that could be issued, now you do. And it's important that you understand that to learn what it is that you're potentially facing.

One of the other issues on parallel investigations -- and that's on Slide 11 -- really deals with conflicts or competing interests that can be raised here. We have different types of investigations that go on where you may have mandatory reporting obligations. Now, clearly in the highly-regulated industries, these are more prevalent, but give you another example, and this one is kind of an individual, but these investigations, as I said before, focus on corporations as well as individuals. Again, in the healthcare context, let's say the investigation's focused on the healthcare provider and yet it also focuses on one of the particular doctors. That may lead to licensure board examinations or reviews. And if you have a board of medical practice that's investigating a particular doctor who's also under criminal investigation, you're going to have competing interests. Most board of medical practice requires doctors to assist the investigation and cooperate with the investigation or risk losing their license.

On the other hand, the criminal investigation obviously raises Fifth Amendment concerns about whether or not they should cooperate and/or are they compelled to produce evidence. We've got a whole host of criminal investigative techniques that I want to cover with you simply because in the realm of these government investigations the criminal one is really the big stick, if you will, in the government's arsenal. And if you turn to Slide 12, it kind of lays out some of the investigative techniques that I just want to cover briefly with you. There are a number of them, and quite frankly, the number of techniques is only limited by the imagination of the agents. And it really doesn't matter the types of investigative techniques and what type of industry you're in because law enforcement has gotten a lot more aggressive in white collar cases.

When I came up as a federal prosecutor into Minnesota -- I had been one in south Florida -- I was doing covert investigative techniques on drug organizations in south Florida. I came up, starting using those same sorts of techniques in white collar cases, some of which we're going to talk about here. And that's very prevalent now. The first one I want to talk about is search warrants. And if you turn to page 13, I want to go through this. I've created a PDF that you can download, which gives you a checklist for use on search warrants. Now, one of the things that you've got to consider is search warrants usually occur with absolutely no

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notice to you. You're going to find out that it occurs because the agents beat you to the doors of the corporation in the morning, and it's often the first indicator that there is a criminal investigation being conducted. And it is something that requires immediate action and appropriate action at that time in order to protect your interest.

If you've never been involved in one of these before or you haven't properly prepared your corporation for it, you generally run a very real risk of waiving important rights. And we're going to talk about that a little bit, because it really is something that's extremely important. But before we do that, I want to focus on a couple of things. There are important considerations here if a corporation is hit with a search warrant. The first is that the government has already convinced a neutral judge that there's probable cause to believe a crime occurred, and that there is some evidence of that crime on your location. So they've already been looking at it, and they've convinced a neutral judge that there's evidence there.

The second important consideration is one that the government has elected to use the search warrant technique instead of a subpoena because, for whatever reason, they don't trust that they're going to be able to get the information through a subpoena. Now, just so you quickly understand, for those of you who aren't involved in these types of things, a search warrant literally is an authorization from the court to go in and search a business for the particular items that are authorized by the court. And oftentimes it involves going through computers, it involves going through files, it involves going through desks and drawers, et cetera.

A subpoena is simply a document request that is provided and it is mandatory, with certain exceptions, that those documents be produced. So the issue of trust is one that is crucial to address. You're going to have to address it with the government. You're going to have to figure out -- why did they use the search warrant and not the subpoena request? Some other important considerations here are that first of all, you have to understand the agents when they come in, they're going to be dealing with your employees. They're going to be asking questions of your employees, such as -- who works here; whose desk is this; where are certain documents located; how do they access documents through the computer system?

Michael Booden - Association of Corporate Counsel Litigation Committee - Chair

Bill?

Bill Michael - Lindquist & Vennum - Chair, White Collar & Regulatory Defense Practice Group

Yeah.

Michael Booden - Association of Corporate Counsel Litigation Committee - Chair

I have a quick question.

Bill Michael - Lindquist & Vennum - Chair, White Collar & Regulatory Defense Practice Group

Sure.

Michael Booden - Association of Corporate Counsel Litigation Committee - Chair

Regarding the difference between a search warrant and a subpoena, you spoke of trust, is there a different level of reasonable cause or probable cause that the prosecutors have to have when they issue a search warrant versus a subpoena? And does that impact or factor into whether the corporation should believe they are in serious trouble? For example, if you get a subpoena versus a search warrant, does that indicate that maybe they're not ready to prosecute you, but they're just sort of fishing?

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Bill Michael - *Lindquist & Vennum - Chair, White Collar & Regulatory Defense Practice Group*

Well, there is a different level of requirement, if you will, on the prosecutor. To get a search warrant it's got to be approved by a court. The standard is probable cause to believe a crime was committed and truth evidence or instrumentalities of that crime are on the location to be searched. With respect to a subpoena, the prosecutor just has to believe that those documents might be relevant to his investigation. And it is extremely easy to issue subpoenas. Prosecutors do not need to go to the court to do it. No judge reviews it. They sit in their office and generally have an agent come in and say -- Mr. Prosecutor, I think we need the bank records of this particular corporation. Low and behold the prosecutor types up a subpoena to the financial institution, who then is required to produce the records of the corporation. Or they end up issuing a subpoena to the corporation demanding certain records.

And I can tell you these subpoenas are drawn with an idea of being overly broad. And the reason is they don't want to issue repeated subpoenas and get into kind of a wordsmithing game about whether or not it was requested. So they're extremely broad. I'll tell you in one case I issued a subpoena that had 62 separate paragraphs requesting separate documentation. And one paragraph alone in talking with the corporate counsel was going to cost the corporation over a million dollars to comply with.

Now, there are ways that prosecutors will work with you in trying to minimize those costs, expenditures, and problems, but the standard is much easier, the prosecutor gets it at basically his will. And trying to quash the subpoenas is extremely difficult. So there is a difference. It's important to recognize the difference, but in reality, it's going to lead to the same information. Now, one of the other things to recognize is a practical (ph) concern. And that is generally subpoenas can be handled internally. In other words, the Department of Justice or some investigative agency gives it to the corporation and the media never finds out about it. On the other hand, when a search warrant occurs, as is often the case, it's amazing the number of media people who are there 2 minutes after the agents show up. And now you have the 5 o'clock news videotaping FBI agents with raid jackets on going into your company to bring out boxes of documents, which obviously creates significant public relations issues.

With respect to the search warrant, there's a few things -- and I really, really do recommend that you download the search warrant checklist and take a look at it. It's got a brief little synopsis of the law, but more importantly, none of us want to be believing that our company is going to get hit with a search warrant, because we hope that we're all good corporate citizens and that all of our employees are good corporate citizens. But there are certain precautions that you ought to take ahead of time anyway, and they make good business sense, whether it deals with a search warrant or not.

And in that PDF checklist for search warrants I go through a number of them about the general precautions that ought to be taken ahead of time. Things such as clearly marking and segregating attorney-client privilege material. If the agents come in and attorney-client privilege material is not segregated or not marked, they're going to scoop it up and they're going to take it. Now, they may take it even if it is marked, but that gives you a better basis for claiming the privilege. Additionally, without knowing that it's there or where it's at, it's more difficult to assert the privilege.

Another issue is computers. One of the prevalent practices right now, because of the computer industry being so prevalent in our society, is the agents go in and they seize all the hard drives, all the software, all the backup tapes. Now, that leads to some crucial problems. You have some issues that are going to be absolutely impacted immediately -- payroll; accounts receivable; accounts payable; shipping; transportation; inventory, et cetera. Those things need to be dealt with. Additionally, if you have backup tapes that are available at the location, they're likely to be seized. So if you keep your backup tapes somewhere else, not only do you protect the backup tapes in case of fire or other calamity, but you also protected them in case the agents come in to seize them.

I want you to understand something, too, with respect to the computer stuff, and I'm going to direct your attention to Slide 14. There's a backlog now, because of the vast quantity of data that is on computers nowadays, the FBI has what are called CART teams, Computer-Assisted Research Teams or something like that. And what these CART teams do is they're the ones that go

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in -- and other agencies have similarly trained agents -- and they're the ones who scoop up all the electronic data. But once they get it, they don't really know what they're looking for and they've got to start searching through it. The backlog is huge. It's months in many cases. And you as a corporation are going to need your information. So there are ways of working with the prosecutor to either make mirror images of stuff so that you can have access to it as well. You may have to claim that there's privileged material on it because there are emails sent from corporate counsel that have been now seized via the server.

You also have issues concerning the actual seizure of materials. Obviously, we are now not only a national industry, if you will, but an international one where servers may be located in one jurisdiction and you access them from a remote site. Your corporate headquarters are located in Minnesota, but you've got offices in Chicago and New Jersey. If a search warrant's executed in New Jersey and they go -- the agents go into the computer system, they may actually be pulling information that they're not authorized to pull out of the server, which is located in Minnesota. So these things are things you have to be thinking about ahead of time.

Another key issue, very briefly on search warrants, is the employees, because this is just absolutely crucial. The agents are going to try and interview them as much as possible, and if they are -- if the employees are improperly instructed, it could lead to obstruction of justice charges. And so the employees don't have to cooperate with the agents, but if you are instructing your employees not to cooperate, you're subjecting yourself to big problems. So you really do need to pay attention to what advice is given to those employees at the time so that you're not escalating the problems that are occurring with search warrants. Like I said, these topics are such you could spend literally a day talking about search warrants, but we're going to try and move on to cover some of the other ones.

On Slide 15, and the next series of slides, we're going to talk about subpoenas. There's two types of subpoenas, in essence. One is a duces tecum, in other words requesting documents, if you will; and the other is an ad testificandum, which is really a subpoena requesting testimony. I want to talk about the document subpoenas first. In essence, these subpoenas have to be relevant to the inquiry, reasonable in its scope, and also particular in its demands. But I talked earlier about quashing these subpoenas, and they are very, very difficult to quash. I think one of the best cases out there that deals with quashing a subpoena is where a subpoena was so overly drafted, if you will, that it requested pretty much every record of a corporation. That's likely to get it quashed by a judge.

But the problem is you don't know what the scope of the investigation is when you're served with a subpoena. So it's really hard for you to argue that it's not relevant to the inquiry, because you're in the dark about what the inquiry is. When I say you're in the dark, there are things you can do, though, to try and gather some information. You can look at the subpoena request. Obviously, the particular documents that are requested are going to help focus you on what that investigation is. And this goes back to gathering as much information as possible. I also want to touch back briefly on search warrants, because it deals with the same issue. The search warrant, before it can be issued, has to have an affidavit that sets out that probable cause. If that affidavit and application are not sealed, you can get that through the clerk's office, and you can find out more about the investigation. But oftentimes, especially in complex white collar cases, the prosecutors don't want to give that information up. And so they don't want the defense to understand what's happening; they don't want the corporation to understand what's happening; they want to keep you in the dark as long as they can. So they seal the affidavit up and then you can't get it.

So there are ways of trying to gather the information via search warrant or via the subpoena, but you have to take a look at it and try and gather that information any way that you can. One of things with respect to the subpoenas -- and I'm going to direct your attention to the Info-Pak at the -- for Responding to Government Investigations. There's a whole section in there that gives you some practical considerations about subpoenas. You need to look at it. You need to review it. You need to determine when, in fact, it's due. You have to figure out from a practical aspect -- who's going to maintain the documents that you've gathered; how are you going to do that; how are you going to control them? These document requests oftentimes will run into the hundreds of thousands or more.

I'll give you a perfect example. I currently have a securities fraud case where there are over 2 million documents, and we're only a couple of months into the case. So these documents, you've got to control them somehow. One of the best ways nowadays is electronically. And that's going to require the use of electronic experts to help you image these documents; electronically

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date them; code them; put them into some sort of document control software like Summation so that you can pull them; and also so that you know and can review them, whether or not there are any privileged documents; you can create a privileged log; keep those privileges from being turned over -- or those privileged documents from being turned over to the government.

A couple other key points, and this goes to Slide 17. We talked a little bit about electronic information, but spoliation of evidence. Spoliation of evidence is crucial. It is one of the issues that can get you in trouble immediately with the government. And you should consider very strongly, if you get a subpoena request, sending out a spoliation letter immediately. What I mean by that is a letter that says - you employees of the corporation cannot destroy this type of information. You may have to suspend your document retention policy, which allowed for destruction of documents, but you need to create a confident system for ensuring that documents, whether they be hard copies or electronic files, or disks aren't shredded or destroyed.

I'll give you another brief example where there's oftentimes competing interests. In the healthcare industry there are HIPAA concerns, which means basically privacy of a patient information for this instance, where that information starts to gather up and it's no longer necessary, a lot of healthcare providers shred it. Well, what happens is the perception is very bad when there are huge bags of shredded material going out or huge bags of material being shredded when the government is requesting documents. It may be perfectly legitimate, but you've got to address it because that perception is going to potentially lead back to a search warrant, because the trust issue that we talked about before is something that you've got to be concerned about.

We've all heard about Arthur Anderson and the document retention policy issue that came up. You don't want to be the next corporation that's subpoenaing -- or appealing to the Supreme Court. So be very cautious about the document retention policy and spoliation issues should a subpoena come. Now, on Slide 18 we talk a little bit about the Fifth Amendment. The Fifth Amendment allows persons, that is people, not corporations, but people to refuse to provide evidence against themselves. Corporations, unfortunately, don't have that Fifth Amendment privilege.

Accordingly, if a subpoena comes and it requests literally the silver bullet on a criminal investigation, that's got to be turned over, unless there is some other basis, such as attorney-client privilege or it falls outside the scope of the subpoena, et cetera. So those types of things have to be reviewed. They've got to be reviewed by the lawyers. Whether it's in-house or outside experts, you've got to take a look at those things. You have to look at every document that is going to be turned over to the government for privilege waiver issues, because an inadvertent waiver is a waiver. And there are certain steps you can take to try and minimize that damage, should it occur. But you don't want to be in a position of trying to minimize damage, you want to be in a position ahead of time of eliminating that risk.

Turning to Slide 19 -- and this goes back to a question Michael had asked earlier about employees, and it kind of cracks through if an employee gets a subpoena, much like if an employee has been interviewed. The interview obviously will have already occurred before you learn of it in Michael's hypothetical, but in this case, you're going to know about it, hopefully, when the employee comes in and says -- I have a subpoena to appear on some future date and give testimony. Unfortunately, the subpoena's not going to say what it is in reference to. So you, as corporate counsel, and/or through the help of outside counsel need to interview that employee immediately. You've got to determine whether or not they're going to need separate counsel, which get into indemnification issues.

And indemnification issues -- I know Michael had gotten a question earlier that he forwarded to me about indemnification -- indemnification's a crucial issue. It's something that can absolutely poison the relationship between the employee and the corporation if it's not handled appropriately. But you also have precedence setting issues. So one of the things that you need to be familiar with, if this occurs, is your corporate bylaws on indemnification, as well as the State statutes, either where the corporation's incorporated or where it's practicing. Certain states, such as Minnesota, have mandatory indemnification clauses, which basically say a corporation shall indemnify a person, provided certain things are met. So you ought to take a look at that.

Another important issue with respect to the indemnification, while we're on it, is undertaking letters. And undertaking letters are a way to protect the corporation. In essence, it's a fronting of the indemnification fees, to outside counsel or whomever,

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with an understanding that if the indemnification statute is ultimately determined not to be met, then the employee owes that money back.

Michael Booden - *Association of Corporate Counsel Litigation Committee - Chair*

Now, Bill, when you're talking about undertaking letters, you're talking about the corporation's agreement to reimburse an employee attorney's fees relating to the investigation; correct?

Bill Michael - *Lindquist & Vennum - Chair, White Collar & Regulatory Defense Practice Group*

Correct. Absolutely. And that's something that there are some very real practical considerations. First of all, the very fact depends about whether or not someone's going to need separate counsel. You've got all sorts of issues with respect to that. But generally speaking, the practical concerns about indemnification is -- assuming that you have a right not to indemnify, your bylaws say that you don't have to, there's no mandatory obligation to do it, there still may be very practical reasons to do it. You don't necessarily know where this investigation is going. As we talked about before, the focus of them tends to shift often, and you may find out that by not paying a small amount of attorney's fees for this employee who has to go testify, that you've just created an adverse witness in either an upcoming civil litigation matter or more importantly, a criminal investigation. So --

Michael Booden - *Association of Corporate Counsel Litigation Committee - Chair*

Bill, I have another question --

Bill Michael - *Lindquist & Vennum - Chair, White Collar & Regulatory Defense Practice Group*

Sure.

Michael Booden - *Association of Corporate Counsel Litigation Committee - Chair*

-- (inaudible) it's by one of our listeners. And the question is essentially -- can an employee -- can a corporation choose to defend a criminal case involving a criminal act of the employee when they're outside of the scope of employment, and that would be pursuant to let's say the company's code of conduct? And are there ramifications if the corporation says -- oh, well, we're not that concerned about the scope of employment issues here; you're our guy and you've been with us 28 years and we're going to defend you. Does that have any impact upon the corporation if the corporation decides to defend that employee?

Bill Michael - *Lindquist & Vennum - Chair, White Collar & Regulatory Defense Practice Group*

It does. And there's a number of potential ramifications, depending on the specific facts. First of all, even though the actions are outside the scope of the employee's act -- employment, later ratification of those acts, if that occurs, may subject the corporation to criminal responsibility itself. So that's a concern. The second concern is the fact that if the corporation is being looked at for other matters, the Department of Justice also looks at whether or -- kind of what remedial action the corporation took.

There's a policy called the Thompson Memorandum out there, which is a Department of Justice policy which is set forth later in here, and one of the key concerns is in charging a corporation, whether or not the Department of Justice should charge that corporation with some offense is what remedial actions did they do? For instance -- and they specifically address paying the fees of the employees who did wrong.

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Now, there's a footnote in that Thompson Memo, and just so -- I see we're about 7, 8 minutes, from the head of the hour, we may not get it to it completely, but let me just tell you where the Thompson Memo is at so that you can address it. It is attached at the back of the Info-Pak for the Responding to Government Investigations. There's also an in-depth analysis of the Thompson Memo in that Info-Pak.

But in essence, the Department of Justice while recognizing certain states mandate indemnification, on the other hand, if the corporation is not required to indemnify, but elects to, that may ultimately be held against the corporation. So it's important to recognize that. Let me briefly talk about a couple other techniques that are currently being used in the white collar area. Several years ago one of the very prevalent ones involved ADM, where there were undercover tapes made. And if you go to Slide 20, it's entitled, "Wiretaps and Undercover Stings." The government is using these phony businesses to go ahead and subject people to surreptitious recordings.

Now, there's a difference between wiretaps and consensual recordings. Very briefly, wiretaps are where no party to the conversation knows that it's being taped. In other words, it's completely surreptitious. In order to have that authorization, the government needs to go to the court and get approval for it. There are certain restrictions on it, and it is not that easy to get.

I will tell you that when I was a federal prosecutor, the last affidavit we did seeking court approval for a wiretap was -- the affidavit was 60 pages long. In essence, you have to convince the court that the other techniques have either been tried and failed or are likely to fail. But consensual recordings are different. What that means is that one party to the conversation knows it's being taped. Now, the federal government and many states say that one party is enough, as long as it's not for a tortious reason. On the other hand, some states require all parties to know that it's being taped, unless it's for law enforcement purposes.

Now where this distinction's important is that rogue employee. If you have a rogue employee who's tape recording board minutes -- or excuse me, board meetings, then you need to be checking as to whether or not all people need to know it, because you may have a basis to take steps to seek to either keep that evidence from being turned over to the government or being used in any civil fashion. But generally speaking, the government is, in these types of scenarios, using techniques that were generally used for Mafia kingpins and drug lords, and they're now using them in board rooms.

I will tell you that in a healthcare case I've had a case where they set up a phony storefront operation, they secretly videotaped people at that phony storefront business in meetings with various secret recording devices. They even went so far as to have a meeting in an airport world club room that they set up a pinhole camera in and secretly video and audio-taped it. That's on a healthcare case. It's happening in other industries as well. It's not just the Mafia and the drug cases anymore. That really covered Slide 21, and so we're going to move into Slide 22, which talks about interviews. And we've talked about this a little bit already with respect to the search warrants, so I don't want to spend any more time on it. I'm happy to take any questions you may have, but these interviews can be absolutely crucial to your corporation. You need to protect those employees, and more importantly, the corporation. You can do that appropriately, but you have to be careful so that you don't get accused of obstruction of justice.

Slide 23 talks about records reviews. Those are done oftentimes by agencies, which -- and most of the time in financial investigations, whether they be SEC or HHS-type investigations where they'll review a tremendous number of documents. One of the common practices nowadays in doing this is for the government to extrapolate damages based on a statistical review. What I mean by that is they'll try and pull up what they believe is a small sampling that is statistically -- it at least agrees with the total population of the review. And they'll look at that small number of claims and then say -- All right, we looked at one-tenth of the claims, we believe that the damages here should be extrapolated to the tune of 100% based on this 10% of the review. That creates a tremendous amount of difficulties. You have to have statistical experts. You've got to be looking at whether or not the sampling is a stratified sample or not and other issues there.

Let me go to Slide 24, trash pulls. This is commonly thought of as a technique that companies -- or excuse me, that law enforcement uses to go into drug houses and find wrappings of cocaine and things like that. But let me tell you, they are also doing it on corporations. Because of the amount of trash and the poor quality of document security at many corporations, lots

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and lots of information is being gathered by law enforcement through the refuse. And so that's something that you're going to need to concern yourself about. One of the other important Department of Justice policies that I want to talk about quickly is the Ashcroft Directive, and that's on Slide 25. That's something that is really -- the Department of Justice is focused on going after the most serious offense. You used to be able to go in and do something called charge bargaining, you could go in and say -- Look, government, you believe you could bring all these different charges. How about if we resolve it by allowing us to do something that is somewhat minimized from the maximum amount possible?

The government has, in essence, precluded its prosecutors from doing that through the Ashcroft Directive, where the prosecutors have been directed to go after the most serious, readily provable offense and take a plea to the most serious, readily provable offense. That's crucial because of the practical concerns that are out there, the attendant third-party-type issues. For instance, we go back to either exclusion or debarment. If it's a healthcare company and you plead to the most serious readily provable offense, which happens to be a healthcare fraud, now you have a mandatory exclusion from the program. So that could be the death, now, of the corporation. There are ways around it that you need to know those things. You need to understand the collateral consequences. The Ashcroft Directive is also set forth in the Info-Pak on Responding to Government Investigations.

On Slide 26, very briefly, the U.S. sentencing guidelines are very important for corporations. There's -- it's an issue that has just hit the Supreme Court. The Supreme Court has now changed roughly 17 years of past practice and said they're no longer mandatory, that they be followed to now only advisory. There's a particular section, Chapter 8 of those guidelines that came into effect in 1991 dealing corporations. It deals, in essence, with cooperation with the government and compliance, and allows benefits to the corporation. Those are things that need to be considered right at the beginning. I see we're pretty much out of time, I do want to just very briefly talk about two other things in the next 2 minutes and then kind of wrap it up, unless there's other questions.

First of all, in Slide 27, knowledge is power. You can't make informed decisions without knowing what's going on, the ramifications, the potential exposures, and the investigative techniques that are out there and what those techniques may subject you to. It is crucial that you do that. In Slide 28, some of those reasons are out there. There's your fiduciary responsibilities as officers or directors of the corporation. WorldCom now tells us that no question about it, you'd better make sure that you're exercising your fiduciary responsibilities appropriately. Even if you don't have criminal exposure, you may have personal civil exposure. And WorldCom former directors are now going to pay \$18 million to settle a lawsuit on that.

There's a business judgment rule, I go through that in a fair amount of detail in the Info-Pak. Please take a look at that. There's also attached, on the Web site, a PDF Checklist for Internal Investigations. That's something that you need to make a determination. Once you know that there's a government investigation about whether or not you need to do an internal. There are, on Slide 29, some other potential considerations. We've talked about privileges. There is an issue about turning over privileged documents deliberately to the government in a limited fashion. Please take a look at that, it is crucial that you take a look at that if you're going to be turning over privileged material. And also joint defense agreements, which are something that are very prevalent now and very beneficial to the process of investigations by governments.

Michael, I just want to conclude here by saying that if you've got any other questions, I'm happy to take them via email or my contact information. And I very much appreciate the opportunity to speak to you today. I very much appreciate Michael's input and his insights prior to today in putting together this presentation. For the participants, I hope you came away with today's program -- understanding that it was kind of short and quickly done, but I hope you came away with an ability to spot some of the important issues, have a better understanding of how these government investigations work, as well as some of the complexities that are involved. And so, Michael, if you can (inaudible) --

Michael Booden - Association of Corporate Counsel Litigation Committee - Chair

I have a -- I want to thank you for your time, and you did a fabulous job, and I know that this is just sort of a tip of the iceberg presentation, and that's obviously what it was meant to be. And the Info-Paks are fabulous and I would urge anyone who thinks

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that this could possibly happen to their corporation, I think it could possibly happen to any of our corporations, to really review those Info-Paks, because they are invaluable. I just have a real broad question -- you get a call at 5:30 in the morning and you've been told that there are federal agents outside your warehouse, they have a search warrant, exactly what instructions do you give them?

Bill Michael - *Lindquist & Vennum - Chair, White Collar & Regulatory Defense Practice Group*

First of all, I give them the instructions that they are to cooperate completely with law enforcement. They are not to give law enforcement any authorization, and I immediately contact an experienced criminal prosecutor to walk through the process, and I get there as quickly as I can. Because you're going to have to be dealing, as the corporate counsel, with these agents, you want to know what happened, you don't want to have to have it told to you. You want to have somebody who's done this before and is experienced in the issues there protecting your rights, such as the computer issues, such as the advice to the employee issues, such as -- you should have a plan in place with your HR department already. You should have a plan in place with your IS or IT department already if something is to occur like this. And you should be basically going down that call tree and implementing that plan. And that plan can be created off of the checklist that's out there for you. So I would highly recommend that you pull out that checklist while you're on the call and see what's happening.

Michael Booden - *Association of Corporate Counsel Litigation Committee - Chair*

Okay. That's great. Bill, I just want to let our listeners know that if for some reason they missed part of the Web cast, it will be available today at 4:00 p.m. Eastern time from the ACC Web site, as well as it will be on the ACC Web site for one year. And that applies to all of our Web casts. So if anyone's missed part of it, it will be on the Web site for an entire year. Bill, if you don't have anything to add, I think we should conclude. And again, if anyone has additional questions, please feel free to forward them to Bill and he'll be happy to address them.

Bill Michael - *Lindquist & Vennum - Chair, White Collar & Regulatory Defense Practice Group*

Michael, thank you very much. I appreciate the opportunity.

Michael Booden - *Association of Corporate Counsel Litigation Committee - Chair*

Thanks a lot. This concludes our Web cast today.

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