These Paper Tigers Have Teeth!

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Anticipating and Responding to Document Subpoenas From Government Authorities in Federal Matters

Recent events in the securities industry and other regulated areas have virtually ensured that many companies will receive subpoenas for documents from federal authorities. Often, companies will receive the subpoena from the Department of Justice in the context of a white collar criminal action against a third party. Subpoenas may also arrive from the Securities and Exchange Commission or another regulator. Regardless of the source, the general approach for responding is substantially the same, and the consequences for failing to follow those rules can be severe. Physically gathering documents and responding to a subpoena can be costly and disruptive, and managing the response can be more complicated than one might expect. Creating a record that demonstrates "good faith" compliance is vital.

Companies that prepare a written plan, in advance, will be better positioned to respond to subpoenas efficiently, with minimal disruption. A written plan also ensures that, if mistakes occur, the company and its employees can point to a positive retention process, which is inconsistent with the corrupt mental state element required for federal obstruction of justice prosecution.

Once the investigation starts and the subpoena appears, the consequences of mistakes while responding are striking. Federal law provides a wide range of punishment for obstruction of justice and witness tampering to address non-compliance.[1] For this reason, companies (and, more specifically, their attorneys) must tightly control the document gathering and production process. A small investment, and planning on the front end, will prevent costly nightmares on the back end.

The end results of the process of gathering, reviewing, and producing documents in response to a subpoena should be twofold: (1) presenting the documents that are responsive (and not privileged), and (2) preparing a documented summary of steps taken, personnel involved, locations searched, etc. In many cases, after the documents are produced, it may take months for regulators to review the documents.

Quattrone: A Cautionary Tale

Illustrations abound of the increasing need for counsel to help companies plan retention programs before subpoenas arrive, and then tightly monitor and control companies and their employees throughout the document preservation process after an investigation starts. Successful Credit Suisse executive Frank Quattrone represents a well-known cautionary tale.[2] Credit Suisse received document subpoenas during an investigation by different authorities (first the NASD, then the SEC, and eventually the grand jury in the Southern District of New York).[3] Credit Suisse's attorneys, prudently, advised employees to preserve an expansive range of documents in response to what one attorney characterized as an "extremely broad" request, as is often the case.[4] The undisputed facts showed that Quattrone learned in June 2000, at least generally, of an initial investigation.[5] He learned of a federal grand jury investigation in December 2000.[6]

Two days after he learned about the grand jury investigation, Quattrone

e-mailed the group that he managed, endorsing a colleague's earlier e-mail encouraging employees to immediately destroy documents consistent with the firm's regular document retention and destruction policy.[7] He later claimed that he never saw the subpoena, and was insufficiently aware of its contents.[8] Credit Suisse's Legal Compliance Department sent an e-mail countermanding Quattrone's document destruction endorsement e-mail the very next day, noting that (as is normal) the document destruction component of any retention policy is suspended during investigations.[9]

Quattrone's endorsement e-mail was sufficiently inconsistent with the company's obligation to retain documents that he was federally charged and convicted of violating statutes[10] prohibiting people from "corruptly" persuading others to destroy documents during a government investigation. On appeal, the Second Circuit focused on evidence regarding the mental state required for conviction under the federal obstruction statutes, ultimately vacating the conviction only because of jury instruction flaws relating to description of the requisite mental state.[11]

In considering the stakes associated with subpoena responses (and the ease with which employees can inadvertently run afoul of document preservation requirements), it cannot be overemphasized that the Second Circuit repeatedly observed that there was sufficient evidence to convict Quattrone.[12] In doing so, the appellate court demonstrated the low level of intent and mild evidence that arguably can give rise to obstruction of justice and witness tampering charges in the corporate context. The court underscored that a "defendant need not read the grand jury subpoena or know its precise contents" to suffer obstruction of justice exposure.[13] Rather, "it is enough if he knows that a subpoena calls for a category of documents, or even one particular document, and then takes steps to place those documents beyond the reach of the grand jury."[14]

But for an appellate court vacating his conviction, Quattrone would be serving a substantial prison term. Because of a brief and careless e-mail, Quattrone's career was sidetracked, and he endured the anxiety, expense, and distraction of a lengthy criminal investigation and prosecution.

Principal Quattrone Lesson: Counsel Must Proactively Control the Process

Quattrone compels a highly prudent approach for lawyers who counsel corporations in white collar matters. Counsel (not random employees, such as Frank Quattrone) should control the retention and subpoena response process both vigilantly and proactively. In worst-case scenarios, certain employee mistakes, once made, can be extremely difficult to remedy.

Although the company's lawyers took the correct steps, with alacrity, to correct Quattrone's mistake, prosecutors evidently believed that Quattrone's bell could not be unrung. In an ideal world (i.e., one where corporate employees actually follow advice of counsel), this problem could have been averted if non-lawyer employees had been instructed not to send instructions to each other regarding document retention. Document retention messages should always issue from a single source of lawyers. Questions should be directed to counsel before any actions are taken.

Quattrone's conduct fell far short of the classic obstruction scenario of "shredding documents in the back room late at night." He sent his e-mail openly to a group, unconcealed from his in-house legal department. This was inconsistent with a covert effort to have employees surreptitiously destroy documents, and was consistent with a belief that he sent his document retention e-mail without the requisite intent for his action to constitute a crime. As with in-house counsel's prompt remedial measures, the openness of the e-mail, surprisingly, was insufficient to ward off prosecution, conviction, or negative appellate assessment of the evidence against Quattrone.

Avoiding Prosecution (Or Other Litigation) in Document Cases

How can companies and executives avoid a similar fate? They must engage in front-end planning, constantly communicate with both employees and the government, and involve experienced counsel at every stage.

Have Retention and Response Plans in Place Before Subpoena Arrives

Before a subpoena comes, companies should take time to prepare a plan. Identify which company representative will act as the subpoena response designee who is in control of document retention and compliance with the subpoena. This person should be a high-level executive, if only to demonstrate to the government that the company has taken the process seriously. She should, ideally, be an attorney. She should be familiar with the company's business, document retention plan, method of storing documents, and corporate organization. If not an in-house attorney, she

should be trained by outside counsel in document retention and subpoena response practices, and closely directed by outside counsel. The company should select the outside attorney during the planning stage, and that attorney should participate in developing the plan. All employees should review this plan regularly, and sign an acknowledgement that they have reviewed it.

In addition to keeping the contact information nearby for outside counsel, the subpoena response designee should prepare and maintain a chart listing other instrumental individuals to be involved in the document preservation process. These key people will be contacted immediately and work closely with the company after a subpoena arrives. This chart might include individuals within the company's information technology department, administrative assistants responsible for key executives' documents, or individuals who have supervisory responsibility for all of the documents within a particular department.

Once the subpoena arrives, the corporate designee and outside counsel will work as a close team. By making one person (or a tight team of outside counsel and a high-level, trained employee) responsible, documents are less likely to slip through the cracks, there is less possibility of sending mixed messages to employees, and the task of explaining the response process to the government will be simplified.

Although it may seem counterintuitive, having clear rules regarding document destruction is part of a complete document retention plan. When a company is operating normally — before any investigation or subpoena — employees should, on a strict schedule, destroy documents that they are not required to retain for legal or corporate reasons. This will reduce volume and prevent other problems when an investigation is revealed to the company and documents must be more broadly maintained. But, even more critically, the "destruction" component of the retention plan must emphasize — and ensure that employees understand — that routine destruction stops the moment the corporation learns of a potential investigation.

Control and Document The Situation After Subpoena Arrives

After the subpoena arrives, having a plan in place prevents mistakes, eliminates anxiety, and lowers response costs. The company's subpoena response designee will have outside counsel's contact information at hand, and should contact them immediately. Employees should be told to switch into the planned, broad document retention mode. Because there will be a plan, critical time will not be lost and confusion will be minimized.

Instruct all employees that no documents are to be destroyed (including e-mails) until further notice, and any electronic recovery systems that routinely delete e-mails or other documents should be reset so that they do not destroy any materials. Counsel should consider offering clients a memorandum to distribute to employees explaining this policy and providing other critical instructions. Require employees to sign and return it so that there is evidence of their acknowledgement. This preservation memo eliminates confusion, and directs employees to contact the subpoena response designee with questions. This, again, lessens the likelihood of mixed messages. The initial preservation instructions should be written. Follow-up, as well, should ideally be in writing.

Check the Rules

Companies may receive subpoenas from a wide range of state and federal regulators and prosecutors (not to mention subpoenas in private civil litigation, which are not addressed in this article). While the recommended practices in this article are applicable to all subpoena responses, specific requirements obviously vary depending on the subpoena's source. Thus, counsel should not adopt a "one size fits all" approach. For every subpoena, review both the actual subpoena's instructions and the procedural rules (e.g., Fed. R. Crim. P. 17) applicable to the type received. The procedural rules provide valuable guidance regarding what is required in the response, and also regarding whether tactical steps to narrow or challenge the subpoena are advisable, such as a motion to quash.

Broadly Interpret the Word ‘Document’

Interpret document requests broadly. Subpoena instructions generally reiterate this. Unless there is a written narrowing agreement, instruct clients to gather all hard and electronic drafts of documents, including different electronic drafts, printed copies of different versions, and copies with different handwritten annotations. Readers who practice in the white collar area will not find this observation novel. Employees have particular trouble with this, and need frequent reminders and explanation.

Get to Know the Prosecutor Or Regulator

The best resources when attorneys receive a subpoena are the telephone and e-mail. After counsel receives subpoenas for documents, and have reviewed the instructions and rules and conferred with the client, their first move should be to call the prosecutor or regulator. During this call, counsel can identify and correct ambiguities, extend response time, narrow and define the date range and subject scope, and determine which categories of documents should be maintained, provided to counsel, and potentially produced. During that first conversation and over the course of follow-ups, counsel can save the client money and dramatically reduce burden and exposure by narrowing the categories of requested documents, identifying counsel’s perspective on the issues, and setting other ground rules.

Regulators and prosecutors often formulate subpoenas at the beginning of an investigation, when they are not familiar with a company’s business and its record keeping practices. Therefore, the government must often use the subpoena as a “fishing expedition” to acquire a broader range of documents than it needs or can use. During initial calls, educating the government about the company and what documents are available can save both parties time and effort, and can conserve the client’s resources. Memorialize modifications in an e-mail to the prosecutor or regulator.

Developing a good working relationship with the appropriate government attorney also helps with assessing the threat of the subpoena to the company. Does the subpoena signify that the company is a target and potentially subject to prosecution, or is the company merely being asked to provide documents relevant to an investigation of another person or corporation? This inquiry defines the relationship with authorities and the approach to document production.

For the same reason, defense attorneys should follow up on a regular basis with the prosecutor or regulator to discuss what the attorneys are finding during the internal review in preparation for production. This often offers further opportunities to correct misunderstandings, narrow issues, and frame counsel’s view of the case. The collaborative dialogue with prosecutors or regulators also serves the client by providing a regular source of feedback regarding investigation status that they might be less willing to provide if counsel had contacted them less frequently or outside the context of cooperating with document production.

Subpoenas, Confidentiality, And the Media

The document preservation memorandum provides the additional benefit of giving counsel an opportunity to ensure that all employees acknowledge their confidentiality obligations. Depending on the profile of the company or investigation, subpoenas can trigger leaks to media or media attention. Employees may be contacted by media or otherwise feel compelled to comment externally. Employees may make inaccurate or improper statements that harm the company in both legal and non-legal (e.g., reputational) ways. The preservation document can help control reputational risks that an investigation or subpoena poses for the company by unequivocally instructing employees to refrain from commenting publicly and to direct all inquiries to a corporate spokesperson. As with all good lawyering, providing this additional business “counseling” — protecting the company by adding confidentiality language — is another means for supplying additional experienced-based value to the service attorneys provide for their corporate clients.

Last Details

Finally, remember the "nuts and bolts" aspects of production. As with any production, counsel will conduct a careful privilege and responsiveness review. Documents should always be Bates stamped, and counsel should confer with the prosecution early regarding the format of the privilege log.

Document each and every significant step taken as part of the document preservation and production process, including methodology, locations and custodians searched, and instructions provided.

Conclusion

Mistakes in responding to government subpoenas can have serious consequences. Indeed, failure to adequately plan for, and respond to, subpoenas can create more exposure for companies than the underlying investigation, and companies and individuals who could have avoided being charged are often prosecuted for obstruction of justice when the government perceives them as "playing games" with documents. In this regulatory climate, planning now for the inevitable subpoena will streamline the response, calm employees and eliminate confusion (and, therefore, mistakes), and demonstrate to the government that the company takes the response seriously. For this reason, now — not when the subpoena arrives — is an ideal time to partner with outside counsel and formulate a plan.

Notes

1. See 18 U.S.C. § 1501 through 1521. In particular, focus on §§ 1503, 1505, 1512, and 1519, which are commonly applied in obstruction and witness tampering prosecutions associated with document-intensive underlying cases.
2. See United States v. Quattrone, 441 F.3d 153 (2d Cir. 2006).
3. See id. at 162-65.
4. See id. at 162.
5. See id.
6. See id. at 164.
7. See id. at 166.
8. See id. at 169.
9. See id. at 166-67.
10. Although there are other applicable statutes, Quattrone was convicted of obstruction of justice under 18 U.S.C. §§ 1503 and 1505, and witness tampering under § 1512(b)(2). See 441 F.3d at 170, n.18, 176. For a superb, quick survey of these and the other federal obstruction provisions, readers are referred to Kathryn Keneally and Kenneth M. Breen, Defining and Defending Obstruction Charges in the Wake of Arthur Anderson and Quattrone, The Champion, June 2006, at 30.
11. Quattrone, 441 F.3d at 180-181.
12. Id. at 170.
13. Id. at 171.
14. See id.