

Enron's End Run

By Matthew G. Jacobs

Imagine this: A legislative committee in a distant state subpoenas a roomful of your most sensitive trade secret documents. The committee refuses to enter into an enforceable protective order covering the documents. When you decline to turn them over without such an order, the committee recommends to the full legislature, in a publicly filed report detailing your alleged contumacious behavior, that it finds you in contempt. As a sanction, the committee also recommends that the legislature impose enormous fines.

Does this sound like, in the words of *Seinfeld's* Kramer, "kooky-talk"? Think again, for this is exactly the situation in which Texas-based Enron Corporation found itself in the California Legislature earlier this year. For refusing to turn over, without an enforceable protective order, a boatload of documents, a state Senate committee recommended to the full Senate that it fine Enron up to several billion dollars.

Perhaps emboldened by the recent spate of congressional investigations (Big Tobacco, Clinton/Lewinsky, and Firestone/Ford), state legislatures have taken up the cudgel. They have found legislative investigations to be both good political theater and a lot more interesting than just working on new bills.

With all the zeal of recent converts, legislators aren't even waiting to complete their investigation to tell their constituents the results. The entity that subpoenaed Enron is called, "California Senate Select Committee to Investigate Price Manipulation of the Wholesale Energy Market." Does that title suggest the verdict preceded the trial? Too bad. According to the chair of the Select Committee, "The same due process concerns that are applicable to a court proceeding are not equally applicable to an investigation by the Legislature."

The chair, however, is dead wrong. The same due process concerns do apply. See *Mason's Manual of Legislative Procedure* 562 (1989 ed.); *Attorney General v Brissenden* (Mass. 1930) 171 NE 82. And you, as corporate counsel, must assert and protect your client's due process rights in a legislative investigation, just as you would in any other forum.

For example, legislatures cannot conduct investigations for the purpose of laying a foundation for criminal proceedings or to assist prosecutors in obtaining indictments. Although as a practical matter a legislative investigation is almost impossible to enjoin, you may have a chance if you can establish that it is really a stalking horse for a criminal investigation. Short of that, your subpoenaed clients may face the Hobson's choice of testifying and having their words used against them later or making a very public and embarrassing assertion of the constitutional right against self-incrimination.

Matthew G. Jacobs is a partner at Downey, Brand, Seymour & Rohwer in Sacramento and a former federal prosecutor. © Copyright Matthew G. Jacobs, 2001.

If your client wants or needs to take the Fifth, don't take no for an answer. A legislature cannot override this constitutional right, at least not without thereby conferring immunity on your client. And immunity is generally a good thing; it makes it virtually impossible for the government to later prosecute your client criminally. But if you're going to stand on this privilege, you'd better ring up your public relations department a few days ahead of time.

What about other privileges, such as the attorney-client, marital, psychotherapist, or, with Enron, the trade secret privilege? Can a legislature simply ignore them in conducting its investigation? The short, lawyerly answer is "probably not." But like many legal disputes, the facts tend to drive the legal analysis.

In the Enron matter, a Sacramento superior court judge issued a tentative ruling that rejected Enron's request for a protective order against the Legislature,

calling such an order an "unacceptable" intrusion into the Legislature's internal operations. But after oral argument, the court granted the request, reasoning that if the Legislature could obtain confidential documents without a protective order from Enron, it could do the same from newspapers, attorneys, or psychiatrists.

Legislative investigations raise myriad other legal issues and practical concerns. But as a general matter, if you're on the receiving end of a legislative subpoena, you need to treat it with as much caution as if it had come from a federal prosecutor. After all, if the prosecutor leaks one of your confidential documents, he may go to jail; if a legislator does it, he may become a political hero. □

