

Focus

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The Practitioner Government Law

Investigative Tool

Legislative Subpoenas Are Committees' Apparatus du Jour

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The California Legislature is now issuing subpoenas at a brisk pace. Buoyed by the Assembly Insurance Committee's success last summer in the Quackenbush hearings, the legislative investigation — through its primary investigative tool, the legislative subpoena — has become the Legislature's apparatus du jour for ferreting out all manner of social and economic ills and going after those it deems responsible. Most recently, committees of both houses have launched separate investigations of the state's energy woes.

Now, instead of receiving a call from a confused client who has just been served with one of the various forms of subpoena we're all used to, your client may fax you something you've never seen before: a legislative subpoena. While the form of the document itself may appear antiquated and formalistic, you ignore or neglect it at your own (substantial) risk.

While there's no established procedure for conducting legislative investigations and hearings — it may change from one hearing to the next, even within the same investigation, as during the Quackenbush probe — the broad parameters are laid out in Government Code Sections 9401 to 9414. They provide some idea of how a legislative subpoena gets issued, what it is supposed to contain and what could happen if its recipient ignores it.

From the public record of the Quackenbush hearings, we also have some sense of the extent to which evidentiary privileges can be asserted, whether a witness's requests to consult with counsel will be honored and the manner in which objections will be ruled upon.

Article 4, Section 11 of the California

house's Rules Committee. Section 9401.

Legislative subpoenas can issue for testimony only, for documents within a witness's "possession or under his control" or for both. Section 9405.

The subpoena must meet certain requirements to be facially "sufficient." Under Section 9402, it must state precisely which house or committee the proceeding is before; be "addressed to the witness"; require the witness's attendance "at a time and place certain"; and be signed by the Senate president, Assembly speaker or the chair of the committee seeking the witness's attendance. Service typically is made by the sergeant-at-arms. Section 9403.

As stated above, the "witnesses or material subpoenaed" must be "pertinent to the subject matter of the investigation." *Connecticut Indem. Co.* Since a

cution under this section is entirely independent and separate from the Legislature's power to jail a contemnor.

If a subpoenaed witness fails to appear at the appointed time and place, the Legislature may direct the sergeant-at-arms to arrest the witness and bring him or her before it. Section 9409. "The only warrant or authority necessary authorizing the arrest is a copy of a resolution of the Senate, Assembly or committee." This provision was actually used during the Quackenbush hearings (for the first time in over 50 years).

Finally, attorneys should beware of the broad provision penalizing those who obstruct legislative subpoenas. It is a misdemeanor to for someone to "attempt to coerce" someone not to appear as a witness; for an employer to threaten to deprive someone of employment (or to "request[]" that an employer do so) because that person may become a witness before a committee; and for an employer "directly or indirectly" to harass an employee when "motivated by the fact that the employee" may be a witness. Section 9414.

If, in addition to demanding your client's documents, the legislative subpoena requires his or her testimony at a hearing, you're into a whole new ballgame.

A witness in a legislative investigation has no right to counsel, at least if he or she is not being directly accused of a crime. *McCarthy*. The lawyer typically will be able to sit at the table with the witness at the hearing, but interrupting or asserting other than well-recognized evidentiary privileges probably isn't a good idea. See, e.g., Section 9409.5 (no witness may refuse to testify or produce documents on the grounds that it "may tend to disgrace the witness or otherwise render the witness infamous").

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witness cannot be punished for failing to comply with a subpoena without such a showing (*In re McLain*, 99 Cal.App.2d 274 (1950)), this creates a potential argument that pertinence must show on the subpoena's face.

The statutes provide no explicit notice period; the requirement appears to be "reasonable notice." Section 9405. Since this period is undefined, counsel may have to negotiate a crucially needed extension of time from the investigating committee to avoid having his or her client held in contempt for an untimely response. Sections 9405 to 9408.

The witness who ignores a legislative

which objections will be ruled upon.

Article 4, Section 11 of the California Constitution gives either house of the Legislature the power to select committees necessary for the conduct of its business, including ones "to ascertain facts and make recommendations to the Legislature" on subjects "within the scope of legislative control." The Legislature can "investigate, by the testimony of witnesses or otherwise, any subject or matter, in reference to which it has power to act." *Ex parte McCarthy*, 29 Cal. 395 (1866).

While this investigative power seems broad, it's not unlimited. "[I]ssuance of [a legislative] subpoena is proper only if (i) it is authorized by ordinance or similar enactment, (ii) it serves a valid legislative purpose, and (iii) the witnesses or material subpoenaed are pertinent to the subject matter of the investigation." *Connecticut Indem. Co. v. Superior Court*, 23 Cal.4th 807 (2000).

A subpoena "requiring the attendance of any witness" can be issued by a committee of either house, a joint committee of both houses or any properly authorized subcommittee. Sections 9400, 9401. More specifically, the Senate's president, the Assembly's speaker or the chair of any committee, or even of a subcommittee, has the power — on his or her own — to issue a subpoena for the witness, as long as permission has been obtained from the respective

9408.

The witness who ignores a legislative subpoena risks contempt, arrest and conviction. Several provisions purport to confer some level of power on the Legislature to punish those who would ignore or impede its subpoenas: Sections 9405 to 9409, 9411, 9412. These code sections basically provide that anyone who "neglects or refuses to obey a subpoena, or appearing, neglects or refuses to testify, or to produce ... any material and proper books, papers or documents ... has committed a contempt." Section 9405.

To proceed against a contumacious witness, the Senate or Assembly must enter a resolution containing "an express recital of the facts affirmatively showing not only the precise questions that he has declined to answer, or the precisely specified books or papers that he has refused to produce, but also affirmatively setting forth the facts that show the materiality and pertinence of each of these forms of evidence to the issue before [the Senate, Assembly or committee thereof]." *In re Battelle*, 207 Cal. 227 (1929); Section 9406.

Ominously, once such a resolution has been entered, the Senate or Assembly can take "such action as may be deemed necessary." Section 9407. Such action includes directing the sergeant-at-arms to haul the witness off to the Sacramento County Jail "until he shall have purged himself of his contempt by answering the questions which had been propounded to him." *McCarthy*. Judicial review of such a commitment is had by way of writ of habeas corpus. *McCarthy*. A noncompliant state employee can be fired or barred for life from state employment. Section 9411.

The district attorney can get into the action as well; Section 9412 makes refusal to comply with a legislative subpoena a misdemeanor. A criminal prose-

... tend to disgrace the witness or otherwise render the witness infamous").

The hearing isn't a deposition; it's a public event in which you and your client will be carefully scrutinized and possibly judged harshly.

The testifying witness may be placed under oath (Section 9404), but needn't be. Unsworn witnesses still "give their testimony under the penalty of being adjudged guilty of contempt, and punished accordingly if they prevaricate or testify falsely." *McCarthy*.

Section 9410(a) explicitly acknowledges the witness's right to refuse to testify on the basis of the privilege against self-incrimination. If, however, the witness asserts that right and the Legislature nonetheless requires the witness to testify, Section 9410(a) confers what is known as "transactional" immunity and is far more generous than what is constitutionally required.

As mentioned above, a witness may also assert privileges such as the attorney-client privilege at Legislative hearings. But who rules on such assertions? If the Quackenbush hearings are any guide, the investigating committee's chair, as the "presiding officer" of the "proceeding" (Evidence Code Section 901), will determine claims of privilege. Evidence Code Section 914(a).

Obviously, the increased use of legislative subpoenas raises numerous questions beyond these basic procedures, including how one responds to a defective subpoena (probably by attempting to enjoin its enforcement); how one negotiates and enforces a protective order for privileged or sensitive documents; and how one challenges a privilege ruling.

However one chooses to deal with these issues, this much is clear: With the Legislature adopting a more adversarial investigative approach to issues, legislative-subpoena practice has become a new, important specialty for the California practitioner.

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Letter to the Editor

Soccer-Mom Case Doesn't Affect L.A.

Professor Erwin Chemerinsky, in his May 18 Forum article titled "Moving Violation," says that the U.S. Supreme Court decision in *Atwater v. City of Lago Vista*, 2001 U.S.LEXIS 3366 (April 24, 2001), will enable police officers in Los Angeles to arrest persons and take them into custody for minor traffic violations and other minor offenses. He asserts that this case "makes it easier for the police to harass people and violate their civil rights."

In California, professor Chemerinsky is wrong on both counts. As pointed out in the second paragraph of the *Atwater* case, the arrest in that case took place in Texas, and Texas law expressly authorizes any peace officer to arrest without a warrant any person found committing a

violation of the Texas seat-belt laws. The *Atwater* case found that law to be constitutional.

But California is different. Toward the end of the *Atwater* opinion, the court pointed out with approval that "[m]any jurisdictions ... have chosen to impose more restrictive safeguards through statutes limiting warrantless arrests for minor offenses," and it referred to California as one of those jurisdictions.

And, indeed, California Vehicle Code Sections 40302 and 40504 set forth a procedure whereby a person stopped for a traffic offense must be released by the officer unless the person refuses to sign a written promise to appear (i.e., a traffic ticket), present other satisfactory evidence of identifica-

tion, demands an immediate appearance before a magistrate or is being arrested for driving under the influence. Penal Code Section 853.5 has similar provisions requiring the release of persons stopped for non-Vehicle Code infractions.

The *Atwater* decision does not limit or overrule the application of these California statutes. Thus, officers in Los Angeles — and throughout California — will have to conform to these statutes in making arrests and taking persons into custody for minor offenses, just as they did before the *Atwater* decision.

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