

White Collar & Criminal Law News

## INSIGHT: State Investigations—50 Takes on Subpoena, Privilege, Document Rules

By Brendan Parets

Jan. 27, 2020

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While federal congressional investigation law is relatively developed and has been in the news because of inquiries into the Trump administration, similar investigations at the state level can have unfamiliar rules and processes. Covington & Burling's Brendan Parets looks at what attorneys should be aware of across the country.

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The law of federal congressional investigations is relatively developed and has accelerated with the inquiries into the Trump administration, spurring numerous cases on contested subpoenas. But on the state level, differences in rules for legislative investigations can abound.

While less visible than Congress, state legislatures may also investigate individuals and organizations. Many concepts in state legislative investigations are similar to congressional investigations and the protections offered witnesses tend to be the same. But differences exist among the 50 states, and organizations and individuals facing state legislative investigations can face unfamiliar rules and processes.

### Subpoena Powers

State legislatures generally have broad investigative powers ancillary to their legislative authorities. Like with Congress, state legislatures tend to have subpoena power to compel attendance at hearings and documents from individuals and organizations. And, as with Congress, these authorities often include the power to enforce their subpoenas by holding a recalcitrant witness in contempt in contempt.

Subpoena powers of state legislatures may be broad, but they are not unlimited. The investigation, in the first place, must have a valid legislative purpose, and the witness or documents subpoenaed must be pertinent to that investigation. As one Florida court put it, while "the power of investigation is a necessary adjunct to the exercise of the power to legislate ... the power is not an unbridled one," as "it must be circumscribed by reasonable limitations and should never be used to 'hunt witches.'"

In general, though, courts often defer to legislatures on whether the subpoena has a valid legislative purpose. In a 2000 case, the California Supreme Court declined to quash subpoenas issued by a municipal legislative body to liability insurers who faced liability for groundwater contamination. The insurers challenged the subpoenas, asserting that they were issued solely to assist the municipality in impending litigation against the insurers.

The court disagreed and gave significant deference to the municipality's stated purposes for the subpoenas, as "it is well established that courts generally do not engage in such second-guessing of legislative motive." While that case involved a subpoena from a municipal legislative body, the court's analysis is likely applicable to a subpoena issued by the state legislature.

### **Witnesses Maintain Rights**

Witnesses also maintain all of their rights under the federal Constitution, including the right against self-incrimination, the right against unreasonable searches and seizures, and the right to freedom of association.

A New Jersey state trial court considering subpoenas issued by a state legislative committee to two individuals involved in the "Bridgegate" scandal held that, in light of looming federal and state prosecutions, the Fifth Amendment protected the witnesses from producing potentially incriminatory information and that certain overly broad requests violated the Fourth Amendment.

The court did determine, however, that the state legislative committee could compel production of the documents if it provided use and derivative-use immunity to any materials shielded by the self-incrimination privilege. In general, a grant of use and derivative-use immunity by a state applies to federal prosecutions as well. First Amendment protections may also be asserted, particularly when the subpoenas are sent to political or interest groups or when the subpoenas concern First Amendment activity.

State constitutions may provide additional protections against testimony and document production. In a heavily litigated and ongoing Florida case involving an investigation by the Florida House of Representatives of a television producer who received state subsidies, a Florida state trial court in 2018 quashed a subpoena seeking the producer's financial and tax records based on the right to privacy in the Florida constitution.

In some states, however, these rights might be difficult to vindicate. A Connecticut trial court declined to rule on whether a legislative subpoena met certain procedural requirements and rejected summary constitutional arguments. The court held that as long as the subpoena was a component of legitimate legislative activity, the state speech or debate clause precluded judicial review.

While the case is an outlier, a potential lack of recourse to the courts certainly affects the bargaining positions of both parties in negotiating the contours of appearances and document production in an investigation.

### **Attorney-Client Privilege**

Lastly, as with congressional committees, the availability of the attorney-client privilege and work-product protections in state legislative investigations varies.

The applicability of the common-law attorney client privilege to legislative investigations has been recognized by the Washington Supreme Court and the Supreme Judicial Court of Massachusetts. By contrast, the Arizona Supreme Court and the Maryland Court of Appeals both interpreted the attorney-client privilege narrowly in the context of legislative investigations and so did not reach the question of whether the privilege was generally applicable to state legislative investigations.

Investigations by state legislatures pose many of the same legal risks to witnesses as congressional investigations. In addition to the potential production of embarrassing documents or disclosure of sensitive information, witnesses must be sure they are not waiving any of their constitutional protections or attorney-client privilege for other proceedings, whether state or federal criminal investigations or criminal litigation.

Those caught up in state investigations would be poorly suited by treating the investigation as a lobbying exercise and should instead seek the advice of competent counsel.

*This column does not necessarily reflect the opinion of The Bureau of National Affairs, Inc. or its owners.*

#### **Author Information**

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