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William F. Lemke, Jr.*

INTRODUCTION AND EARLY CASES

A major function of the Federal Trade Commission is the collecting of business information from individuals, partnerships and corporate business organizations. The Commission may utilize the information it secures in preparation of special studies or reports made at its own instance, at the request of Congress or at the request of the President or the Attorney General.1 It may use the information in connection with promulgation of industry guides and regulations.2 Frequently, the Commission seeks information on which to base issuance of a complaint or the initiation of other corrective action.3

Although much of the information collected by the Commission is obtained through voluntary submission by the parties from whom it is sought, the Commission sometimes encounters resistance.4 To meet this resistance, the Federal Trade Commission Act5 provides three tools which may be used to compel the furnishing of information by those who elect not to supply it voluntarily: (1) Section 6(b) of the statute authorizes the Commission to require most corporations which are engaged in interstate commerce to submit special reports regarding their respective business activities;6 (2) Section 9 of the statute gives the right of access to documentary evidence of corporations being investigated and proceeded against;7 and (3) Section 9 also confers the subpoena power.8

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2. F.T.C. Procedures and Rules of Practice, §1.6, 16 C.F.R. §1.6 (1968).
3. F.T.C. Procedures and Rules of Practice, §3.43(c), 16 C.F.R. §3.43 (1968).
4. See p. 6, ATRR #214 (8/17/65).
8. Id.
This article will not attempt to discuss the special report or access powers other than to point out that the special report has become well established as an investigational device utilized to collect various types of business information from widespread sources. The use of the special report has been given firm support in the courts. In sharp contrast with the status of the special report is the right of access. The extent to which access can be obtained and the methods through which it can be achieved still remain shrouded in doubts cast by the early American Tobacco case.

The third information collecting device is the subpoena. It has been used in support of adjudication (post-complaint) and investigational (pre-complaint) matters. This article will review the use of the subpoena for non-adjudicative, investigational purposes where no complaint has been issued.

The first real court test of the investigational subpoena power came in 1927 in an investigation the Commission was making pursuant to a Senate resolution. Subpoenas to compel testimony and production of documents were served on officials and members of an unincorporated trade association. A lower Federal Court enjoined enforcement of the subpoenas. In affirming the decision, the appellate court considered only jurisdiction to issue the injunction, and ruled that the injunction was proper because the witness' only other method of testing the validity of the subpoenas was to fail to comply with them, thereby exposing themselves to the criminal sanctions of Section 10 of the Federal Trade Commission Act. The court said requiring a witness to accept such a risk amounted to denial of due process and equal protection of the laws.

On further appeal the matter was again before the appellate court which reversed its previous holding on the theory that Section 9 of the Federal Trade Commission Act gave the Commission authority to compel appearance of witnesses. The court held that if the witness should...
refuse to produce the documentary evidence called for, the statute also provided an adequate remedy for testing whether the Commission also had authority to require the witness to produce the documents.

Although the early cases did not foreclose the Commission's use of investigational subpoenas, they, together with the unfavorable rulings on the Section 9 access powers, appear to have discouraged use of the subpoena in pre-complaint situations. It was not until Oklahoma Press Publishing Co. v. Walling that the power to utilize the subpoena ducxs tecum soley for investigating purposes was clearly established. In Oklahoma Press and United States v. Morton Salt Company, the Supreme Court rejected arguments that exercise of the subpoena and special report powers by the Commission against corporations violated the unreasonable search and seizure provisions of the Fourth Amendment or the due process clause of the Fifth Amendment, saying:

> It is not necessary, as in the case of a warrant, that a specific charge or complaint of violation of law be pending or that the order be made pursuant to one. It is enough that the investigation be for a lawfully authorized purpose within the power of Congress to command. .

and

> Even if one were to regard the request for information in this case as caused by nothing more than official curiosity, nevertheless law enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest.

Of course a governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power. But such objections are overcome if the inquiry is within the authority of the agency, the demand is not too indefinite, and the information is reasonably relevant.

The subpoena powers may also be used by the Commission in its enforcement of the other statutes which it administers. The various labeling statutes incorporate by reference the enforcement provisions of the Federal Trade Commission Act. While the Clayton Act does

\[ \text{14. 327 U.S. 186 (1946).} \]
\[ \text{15. See note 9, supra.} \]
\[ \text{16. 327 U.S., at 208.} \]
\[ \text{17. 338 U.S., at 652.} \]
\[ \text{18. F.T.C. v. American Tobacco Co., supra note 10.} \]
\[ \text{19. United States v. Morton Salt Company, supra note 9.} \]
not contain any provisions which assimilate the Federal Trade Commission Act's enforcement powers, it has been held that the Commission may use its full subpoena powers in enforcement of those sections of the Clayton Act which it administers.\textsuperscript{21}

Although the special report authority is limited to corporations,\textsuperscript{22} and the right of access is limited to corporations "being investigated or proceeded against,"\textsuperscript{23} the subpoena power is not so restricted. It can be utilized to secure testimony and production of records from corporations which are not themselves being investigated, but which have information bearing on the investigation.\textsuperscript{24} Its use has also been held proper to compel testimony and production of records from individuals who are engaged in business as sole proprietors.\textsuperscript{25}

\textbf{Applicability of Administrative Procedure Act}

Since the power and authority to use the investigational subpoena are now well established in the Commission's favor, the areas where most controversy arises are those in which the procedures or methods under which the subpoena is used are challenged. The balance of this article will discuss the Commission's procedures relative to investigational subpoenas.

When considering the investigational subpoena powers and their exercise, it is very important to note that such a subpoena is being used in a non-adjudicative proceeding—one in which no rights of the subpoenaed witness or any other party are being determined. As will be shown below, many of the procedures and rights of witnesses which are common to adjudicative proceedings are not found in the investigational subpoena hearing.\textsuperscript{26} It appears likely that much controversy arises from the failure to recognize the difference in use of the subpoena in the non-adjudicative framework as contrasted with its employment in adjudicative matters.

In general, the Federal Trade Commission procedures are governed by the Commission's Procedures and Rules of Practice, Part 2, Non-adjudicative Procedures, Subpart A—Investigations.\textsuperscript{27} The Commission's procedures are governed by the Commission's Procedures and Rules of Practice, Part 2, Non-adjudicative Procedures, Subpart A—Investigations.\textsuperscript{27}
sion's rules have been molded by the Administrative Procedure Act\textsuperscript{28} and the experience gained in use of the investigational subpoena by the Commission and other agencies. Section 6(a) of the Administrative Procedure Act (hereafter APA) provides:

A person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented and advised by counsel or, if permitted by the agency, by other qualified representative.\textsuperscript{29}

An initial question arises whether the above quoted portion of the APA applies to use of the subpoena in non-adjudicative matters. In Hannah v. Larche,\textsuperscript{30} the Supreme Court compared the quasi-judicial, adjudicative functions of administrative agencies with their fact finding, investigational functions. It indicated the agencies are governed by the APA insofar as quasi-judicial actions are concerned, saying there the parties are entitled to the procedural safeguards which are traditional in a judicial trial. On the other hand, if the agency is pursuing a fact finding investigation many of these safeguards are not required to meet constitutional requirements. This is true even though the information obtained may be used to initiate adjudicative proceedings.\textsuperscript{31} In Wanderer v. Kaplan,\textsuperscript{32} a District Court reached the conclusion that Section 6(a) of the APA did apply to investigational subpoena hearings. The Wanderer court held the existing F.T.C. rules did not allow a subpoenaed witness the right of representation by counsel accorded by the APA.

Shortly after Wanderer the Commission was again confronted with the applicability of Section 6(a) of the APA. A subpoena duces tecum had been issued by the Commission requiring the appearance of an official of the Mead Corporation at a non-public investigation. In a motion before the Commission the subpoenaed witness claimed he was entitled to “full representation” by counsel.\textsuperscript{33} In its opinion the

\footnotesize{\begin{itemize}
\item 28. 5 U.S.C. §§551 (1965-67 Supp.).
\item 29. 5 U.S.C. §§555 (1965-67 Supp.).
\item 30. \textit{See} note 26, supra.
\item 31. \textit{See} F.C.C. v. Schreiber, 329 F.2d 517, 526 (9th Cir. 1964): “Since the Supreme Court has not decided the question of the applicability of the first sentence of Section 6(a) of the Administrative Procedures Act to non-adjudicative, fact finding investigations, neither should we unless it is necessary. We need not and do not do so, because, assuming that the first sentence of Section 6(a) applies to the instant investigation, we hold that its requirements have been met.” Review on this issue was not sought and therefore it was not ruled upon when the case went to the Supreme Court. F.C.C. v. Schreiber, 381 U.S. 279, 287 n.14 (1965).
\item 33. \textit{In re} Mead Corporation, F.T.C. File #5710656, ¶ 9580.721, CCH (1963).
\end{itemize}}
Commission decided Section 6(a) of the APA applied to investiga-
tional hearings where witnesses are compelled to appear and give testi-
mony. Therefore the witness was entitled to be represented as well as
accompanied and advised by counsel. The extent to which the right of representation was to be accorded was spelled out in the opinion which became the basis for the Commission's present rule on "Rights of Witnesses."

PROCEDURES

The investigational subpoena procedure commences when subpoenas
drafted by the F.T.C. staff are signed by one of the agency's five
Commissioners. The statute authorizes signature by any one of the
Commissioners.

In August 1969 the Commission delegated to the Directors and
Assistant Directors of its Bureaus of Restraint of Trade, Deceptive
Practices, Textiles and Furs, Industry Guidance and Economics the
authority to issue investigational subpoenas. For many years the
Commission has delegated such authority in adjudicative matters to its
hearing examiners. This long-time agency practice may be a prece-
dent in support of delegation of investigational subpoena authority.
There is also judicial support in Freeman v. Fidelity-Philadelphia
Trust Co. which upheld delegation by the Secretary of Agriculture in
similar circumstances. Delegation could also be commended because
it may make investigations more efficient and expeditious were it not for
the fact that the Bureau of Field Operations, which actually makes most
investigations, is notably missing among the delegees.

In recent years it has been customary for the Commission to issue a
resolution before using subpoenas in an investigation. The resolution
broadly states the purpose of the investigation and the statutory author-
ity, and expresses the Commission's authorization to use subpoenas or
other compulsory process. Although perhaps desirable because it es-

tablishes the scope of the investigation and throws the full sanction of
the Commission behind it, a resolution is not an indispensable step in
the procedure. If the nature and purpose of the investigation is stated

34. F.T.C. Procedures and Rules of Practice, §2.9, 16 C.F.R. §2.9 (1968). To be
discussed infra under "Rights of Witnesses."
FTC's Use of Investigational Subpoenas

on the face of the subpoena, this is sufficient.80

The investigational subpoena may be addressed to a natural or corporate person. It may require giving of testimony and/or production of documents.40 Frequently the practice is to issue a subpoena ducès tecum to a corporation or one of its officers plus subpoenas ad testificandum to other officers or employees who may be able to testify regarding documents which have been produced.

Where the subpoena is addressed to a corporation, the usual rule applies that the artificial entity acts only through its human agents. An appropriate officer or representative who is responsible for conduct of the corporation's affairs must appear and make the return.41 Generally, the corporation's attorney is not such an officer or representative. While he may appear in the capacity of accompanying and representing a witness, the attorney is not as a rule qualified to testify as the corporation's agent. The Commission's hearing officer should be entitled to reject testimony of the attorney and require appearance by an appropriate corporate official.

The subpoena can be broadly drawn. The only limitations on its scope are that it must:

(a) relate to subject matter within the regulatory authority of the Commission,
(b) be reasonably relevant to the matter under investigation,
(c) not be too indefinite, and
(d) not be too burdensome.42

Counsel representing a witness should compare the specifications of the subpoena and the interrogation of the witness with the purpose of the investigation as stated in the Commission's authorizing resolution or on the face of the subpoena. He should also note the extent of the Commission's regulatory authority. He should advise his client not to furnish information which is not relevant to the particular investigation or which is not within the regulatory authority of the Commission.43

The courts have applied a liberal standard in determining relevancy. Unless a subpoena calls for information which is clearly irrelevant, the subpoena will be enforced.44 Nevertheless, counsel is justified in in-

sisting that ambiguous or indefinite subpoena specifications or questions directed to the witness be clarified before response is made.

The contention that return on a subpoena will be unduly burdensome will be difficult to sustain. A court might give relief from a subpoena demand which would cause "serious hindrance" to the conduct of the witness' business.\textsuperscript{45} However, the witness bears the burden of establishing the fact of unreasonableness.\textsuperscript{46} Removal of subpoenaed documents from Philadelphia to the Commission's offices in Washington for a short period of time (30 days) was held to be reasonable.\textsuperscript{47} So was a requirement that all letters, telegrams or copies thereof relating to 18 different items over a period of two and one half years be produced.\textsuperscript{48} The Commission may reduce the effectiveness of an argument of burdensomeness by accepting return on the subpoena at the witness' place of business.\textsuperscript{49} Or it may offer the assistance of its representatives who could use sampling methods to reduce the number of documents required by the return.\textsuperscript{50} When the issue of burdensomeness is raised the courts will not be impressed by exaggerated pleas for relief. A clear showing of real hindrance to the witness' business will be required to induce a court to limit a subpoena.

**Preliminary Motions**

After the subpoena has been issued and served,\textsuperscript{51} but before return has been made, the Commission's rules permit filing a motion to limit or quash the subpoena. The motion must be filed with the Secretary of the Commission within 10 days after service of the subpoena, or if the return date is less than 10 days after service within such time as the Commission may allow.\textsuperscript{52} The Commission can rule on the motion with its supporting memorandum or brief. It is not necessary to provide time or the occasion for oral hearing and argument on the motion to quash or limit. Since an investigation is not an adjudicative proceeding, Section 554 of the Ad-

\textsuperscript{47} F.T.C. v. Standard American, \textit{supra} note 43.
\textsuperscript{49} Civil Aeronautics Board v. Hermann, 353 U.S. 322 (1957).
\textsuperscript{50} Hunt Foods and Industries v. F.T.C., 286 F.2d 803 (9th Cir. 1960).
\textsuperscript{51} The subpoena may be served by registered mail, delivery to an individual, delivery to the principal place of business of a person, partnership, corporation or association, or by delivery to the residence of an individual. F.T.C. Procedures and Rules of Practice §4.4, 16 C.F.R. §4.4 (1968).
\textsuperscript{52} F.T.C. Procedures and Rules of Practice §2.7, 16 C.F.R. §2.7 (1968).
ministrative Procedure Act does not apply.\(^5^3\)

In several cases decided at the District Court level witnesses filed motions to quash or limit subpoenas. When these motions were denied by the Commission, the witnesses were successful in using the Declaratory Judgment route to obtain injunctions halting investigational subpoena hearings before they were commenced.\(^5^4\) These cases are in opposition to the early Claire Furnace Company case where the Supreme Court refused to enjoin the Commission from enforcing or attempting to enforce orders to make special reports pursuant to Section 6 of the F.T.C. Act.\(^5^5\) The Court held there was an adequate remedy at law when and if the Commission requested the Attorney General to institute enforcement proceedings.

In 1966 the Court of Appeals for the Eighth Circuit ruled on the same issue when presented in connection with investigational subpoenas.\(^5^6\) A complaint seeking declaratory judgment and injunctive relief was dismissed. Subpoenas had been issued and served and a motion to quash denied by the Commission, but no hearing had been held to accept the return nor had the Commission instituted any proceeding to compel the return. The Court held the witness could appear before the hearing officer and make a good faith challenge to the subpoena, and indicated that if the Commission thereafter sought enforcement any defenses could be asserted by the witness at that time.

It thus appears a court should refuse to enjoin a Commission attempt to exercise the investigational subpoena power. The appropriate time for a witness to judicially challenge a subpoena does not arrive until the Commission institutes enforcement proceedings.

**Format of Hearings**

The investigational subpoena is returnable before the full Commission, one Commissioner or a designated representative. The person who is in charge of the proceedings is referred to as the “presiding official.”\(^6^7\) Generally he will be one of the Commission's staff attorneys. It is not necessary that the “presiding official” be qualified as a Hearing Examiner under the provisions of the Administrative Procedure Act.\(^5^8\)

\(^{53}\) F.T.C. v. Hallmark, Inc., 265 F.2d 433 (7th Cir. 1959).
\(^{56}\) Anheuser Busch, Inc. v. F.T.C., 359 F.2d 487 (8th Cir. 1966).
\(^{57}\) F.T.C. Procedures and Rules of Practice, §2.8(b), 16 C.F.R. §2.8(b) (1968).
The investigational hearing may be conducted at any designated place and time. Often the hearing will take place in the offices of the Commission in Washington or the field, but in some instances it will be at the offices of the witness. There are no limitations on the distances from which the witness may be summoned to attend, but he is entitled to payment of the same fees and mileage as witnesses before Courts of the United States. However, the fees and mileage need not be tendered in advance of actual appearance.

The return may be at a public or private hearing. As might be expected, witnesses compelled to attend are not satisfied with either type of hearing. While the private hearing has been characterized as a star chamber proceeding, the public hearing has been bitterly assailed as jeopardizing good will and doing irreparable damage to the witness personally and to his business. The current rules of the Federal Trade Commission specify that hearings shall be non-public unless otherwise ordered by the Commission—presumably in its resolution authorizing the investigation. In *F.C.C. v. Schreiber*, the Supreme Court held it to be within agency discretion to determine whether to hold public hearings. A witness requesting confidential treatment has the burden of showing that the public interest, proper dispatch of business, or the ends of justice will be best served by non-public hearings.

Hearings are stenographically reported and the witness is entitled to purchase a copy of his testimony except where for good cause, in a non-public hearing, he is limited to inspecting the transcript. The witness’ right of copy or inspection extends only to his own testimony and not to that given by other witnesses in the same investigational hearing.

The hearings have evolved two basic formats. In one version, the “presiding official” acts strictly in that capacity and interrogation is conducted by another Commission attorney. This format is undoubtedly more comfortable to counsel representing witnesses because it conforms

61. *Id.*
65. F.T.C. Procedures and Rules of Practice, §2.8(c), 16 C.F.R. §2.8(c) (1968).
67. F.T.C. Procedures and Rules of Practice, §2.9(a), 16 C.F.R. §2.9(a) (1968).
to the familiar alignment of opposing sides found in the court room. In the other format, the "presiding official" conducts the interrogation himself, acting the roles of both presiding official and interrogator. This arrangement avoids the confrontation of counsel facing each other from separate tables, tends to discourage unnecessary and fruitless argument and conforms the investigational hearing into the non-adversary type of proceeding which it purports to be.

Since the change adopted after the *Mead* case, the officer conducting the hearing has been given authority to regulate its course, preventing unnecessary delay and restraining disorderly, dilatory, obstructionist, or contumacious conduct by counsel or witnesses. The "presiding official" is thus limited to reporting allegedly improper conduct to the Commission as he is not invested with direct disciplinary authority.68

**RIGHTS OF WITNESSES—GENERALLY**

The Commission's current rules relating to rights of witnesses who have been summoned to appear and testify or to produce documents in investigational hearings were announced in the *Mead Corporation* case.69

In substance a witness is entitled to:

1. obtain or inspect a copy of his testimony and any documents submitted by him.
2. be accompanied, represented and advised by counsel.
3. file motions challenging the Commission's authority to conduct the investigation or the legality or sufficiency of the subpoena. Such motions must be filed with the Commission (not with the "presiding official") in advance of the hearing.
4. on completion of his testimony, at the discretion of the "presiding official" to make a statement clarifying any of his testimony.70

A major concern is the extent to which a witness is entitled to services of counsel. It has been held there is no constitutional right to have counsel in a civil, non-adjudicative proceeding. The Supreme Court has stated:71

... We have found no authorities suggesting that the rules governing Federal Trade Commission investigations violate the Con-

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68. *Id.* §2.9(b)(6).
69. See note 33, *supra*.
stitution, and this is understandable since any person investigated by the Federal Trade Commission will be accorded all the traditional judicial safeguards at a subsequent adjudicative proceeding. . . .

The witness' rights depend on what is conferred by Section 6(a) of the Administrative Procedure Act:

*Appearance.* A person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative.

Under the Commission's rules, counsel is limited to advising a witness, on counsel's own initiative or at the witness' request, regarding any question the witness is asked. If counsel advises his client not to answer, the legal grounds for the advice may be stated on the record. If counsel claims the testimony or evidence sought is outside the scope of the investigation or that the witness is privileged not to respond, counsel may object and state on the record the grounds of his objection. Counsel may not object or interrupt the examination of a witness for any other purpose. The rules do not appear to preclude objections to relevancy or materiality if they are based on contentions that the evidence sought is outside the scope of the investigation. Objections directed to such matters as hearsay, competence of the witness or opinion evidence are not permitted.

There is no provision for cross examination, nor may the party under investigation produce his own witnesses. These apparent restrictions must be balanced by realization that investigational subpoenas are used by the Commission only when information must be obtained under compulsion. There is nothing which prevents any person from furnishing information to the Commission on a voluntary basis without resort to the compulsory process.

The witness is entitled to be informed of the nature, purpose and scope of the investigation for which he is subpoenaed. If, as is frequently the case, he is the party under investigation, he may wish to know the identity of the complainant. This desire will go unfulfilled because the Commission has consistently held to a policy not to divulge the identity of the complainant. The rationale given for this position is that the Commission regards itself as the complainant on behalf of the

72. *Id.* at 446.
73. *See* note 29, *supra*.
75. *Id.* §2.6.
public interest. The person requesting an investigation does not make the investigation nor is he a party to any proceedings resulting from the investigation.\textsuperscript{76}

In \textit{Hannah v. Larche},\textsuperscript{77} the Supreme Court considered the rights of witnesses summoned to appear at an investigational hearing of the Commission on Civil Rights. The Court analysed the Federal Trade Commission's investigational subpoena procedure and indicated it met constitutional and administrative procedures standards. The Court said:

However, when these agencies are conducting non-adjudicative, fact-finding investigations, rights such as appraisal, confrontation, and cross-examination generally do not obtain . . . . A typical agency is the Federal Trade Commission. Its rules draw a clear distinction between adjudicative proceedings and investigative proceedings. \textit{16 C.F.R.}, 1958 Supp. §1.34. Although the latter are frequently initiated by complaints from undisclosed informants, \textit{id.}, §§1.11, 1.15, and although the Commission may use the information obtained during investigations to initiate adjudicative proceedings, \textit{id.}, §1.42, nevertheless, persons summoned to appear before investigative proceedings are entitled only to a general notice of “the purpose and scope of the investigation,” \textit{id.}, §1.33, and while they may have the advice of counsel, “counsel may not, as a matter of right, otherwise participate in the investigation.” \textit{Id.}, §1.40. The reason for these rules is obvious. The Federal Trade Commission could not conduct an efficient investigation if persons being investigated were permitted to convert the investigation into a trial.\textsuperscript{78}

The immunity of a witness from criminal prosecution because of testimony he is compelled to give by an investigational subpoena does not extend to civil proceedings. Information obtained through an investigational subpoena may subsequently be used in an adjudicative proceeding leading to issuance of a Cease and Desist order against the witness. This is true even though a violation of the order may be punished by heavy civil penalties.\textsuperscript{79} Further, a corporate officer who responds to a subpoena addressed to the corporation or to him in his representative capacity is not protected from subsequent criminal proceedings by the immunity provision of Section 9 of the Federal Trade Commission Act.\textsuperscript{80} If the subpoena is addressed to the proper corporate

\textsuperscript{76} \textit{Id.} §2.2.
\textsuperscript{77} See note 26, \textit{supra} at 445-46.
\textsuperscript{78} 363 U.S. at 446 (1960). At the time Hannah v. Larche was decided, the F.T.C. rules provided only that a witness could be accompanied and advised by counsel. The right of representation was not included until after the Mead case.
\textsuperscript{79} Drath v. F.T.C., 239 F.2d 452 (D.C. Cir. 1956), \textit{cert. denied}, 353 U.S. 917 (1957).
\textsuperscript{80} U.S. v. Frontier Asthma Co., 69 F. Supp. 994 (W.D.N.Y. 1947); Wild v.
officer, he cannot refuse to produce company records on grounds he lacks authority to do so. 81

RIGHTS OF WITNESSES— PRIVILEGE

The broad limitations on the subpoena power which were enunciated in United States v. Morton Salt 82 apply to all investigational subpoenas. A witness cannot be compelled to respond unless the demand for information is within the regulatory authority of the Commission, reasonably relevant, not too indefinite, and not too burdensome.

In addition to the above, the Commission's rules entitle counsel to object to subpoena demands on grounds his witness is privileged not to answer. 83 Except for self-incrimination which is removed as a basis for objection by the statutory immunity provision, the rules do not define privileged communications or privileged subject matter. It appears reasonable to assume that communications between husband and wife and attorney and client are privileged to the same degree as they are in the courts. The attorney-client privilege can be applied to communications between corporations and their legal counsel. 84

Efforts to extend privilege beyond the standard areas have generally been unsuccessful. Although the Federal Trade Commission Act does not permit the Commission to make public disclosure of trade secrets, 85 a witness is not privileged to refuse to reveal a trade secret. The limitation on the Commission's authority to disclose such information does not extend to its power to obtain it. The only limits on this power are relevancy and necessity. 86

Certain reports which were required by Act of Congress to be filed with the Census Bureau were described in the statute as confidential and not subject to disclosure by any officer or employee of the Department of Commerce. Nevertheless, the Supreme Court held copies of such reports in the hands of the corporation which filed them were

Brewer, 329 F.2d 924 (9th Cir.), cert. denied, 379 U.S. 914 (1964); cf. Maricopa By Products Co. v. United States, ¶ 72, 346 CCH Trade Cases, (9th Cir. 1967), cert. denied, 392 U.S. 926 (1968).
82. See note 9, supra.
86. F.T.C. v. Green, supra note 81. "Trade secrets" is a term of indefinite connotation. Ordinary business records, even though confidential, are not trade secrets. See In re Hood, note 90, infra. Nor are market, pricing and income data, Covey Oil Co. v. Continental Oil Co., 340 F.2d 993 (10th Cir. 1965).
not privileged from production when they were demanded by the Federal Trade Commission under compulsory process.\textsuperscript{87}

Although the State of Illinois has created statutory privilege in the accountant-client relationship, this privilege may not be set up as a ground for refusing to respond to a Federal Trade Commission investigational subpoena.\textsuperscript{88} Reports filed by members of a trade association with an accounting firm which used them to prepare statistical reports were not privileged and the accountant was required to produce them.\textsuperscript{89}

\textbf{RIGHTS OF WITNESSES—IN CAMERA}

In some instances a witness may feel evidence he is required to produce, although not privileged, is nevertheless entitled to protection from public disclosure. To obtain such protection he may request the evidence be received "in camera."

The Commission defined "in camera" in the \textit{Hood} case:\textsuperscript{90}

\textit{... The term "in camera" in our practice means that documents made subject to such orders are not made a part of the public record but are kept secret and only respondents, their counsel and authorized Commission personnel are permitted access thereto.}

In view of the Commission's Rules on Confidential Information and Release of Confidential Information,\textsuperscript{91} an "in camera" request should be made even though the investigational hearing is non-public. The rules indicate that a greater degree of protection against subsequent release of information may be given to a witness in a non-public hearing who is successful in obtaining "in camera" treatment, thereby reinforcing or supplementing the amount of confidentiality which is routinely granted to investigational files.

Since the Commission's rules do not give the "presiding official" at an investigational hearing the authority to grant "in camera" status, a motion to amend or limit a subpoena in this respect should be made by

\textsuperscript{87} St. Regis Paper Co. v. United States, 368 U.S. 208 (1961). Following this decision 13 U.S.C. §9 was amended to read: "No department, bureau, agency, officer, or employee of the government, except the Secretary in carrying out the purposes of this title, shall require, for any reason, copies of census reports which have been retained by any such establishment or individual. Copies of census reports which have been so retained shall be immune from legal process, and shall not, without the consent of the individual or establishment concerned, be admitted as evidence or used for any purpose in any action, suit, or other judicial or administrative proceedings. As amended, Oct. 15, 1962, Pub. L. 87-813, 76 Stat. §22."

\textsuperscript{88} F.T.C. v. St. Regis Paper Co., 304 F.2d 731 (7th Cir. 1962).

\textsuperscript{89} F.T.C. v. Tuttle, \textit{supra} note 24; see also F.T.C. v. Cooper, 1962 Trade Cases ¶ 70,353 (S.D.N.Y. 1962).

\textsuperscript{90} In re H.P. Hood & Sons, Inc., 58 F.T.C. 1184 (1961).

counsel and filed with the Commission in advance of the return date for the hearing.

The Commission's standards for a grant of "in camera" treatment were established in the *Hood* case where it was held the party seeking "in camera" had the burden of proving there was "good cause" for granting it. "Good cause" would exist only if public disclosure would "result in a clearly defined, serious injury to the person or corporation whose records are involved." The Commission decided trade secrets such as secret formulae or processes were entitled to sympathetic "in camera" consideration, but ordinary business records would be received "in camera" only if there was a clear showing of irreparable injury which would follow disclosure. Mere embarrassment of the witness or the possibility of exposure to treble damages suits are not sufficient reasons for granting "in camera" treatment of documents.92

**ENFORCEMENT**

If a witness refuses to appear and testify or refuses to answer any lawful question or to produce documentary evidence when it is within his power to do so, the Commission is given enforcement powers by Sections 9 and 10 of the Federal Trade Commission Act.93

Section 9 gives the Commission authority to invoke the aid of any court of the United States to require attendance and testimony of witnesses and production of documentary evidence. This section also gives any United States District Court, within whose jurisdiction an investigation is being carried on, the power to order any corporation or other person who has declined or refused to respond to comply with the requirements of a subpoena. Failure to obey the court's order is punishable as contempt.

Section 10 provides:

Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry or to produce documentary evidence, if within his power to do so, in obedience to the subpoena or lawful requirement of the commission, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $1000 nor more than $5000, or by imprisonment for not more than one year, or by both such fine and imprisonment.94

Section 10 appears to create a separate criminal offense for: (1) failure to appear and for the purpose of testifying or producing documentary evidence; or (2) for failure to testify and produce documentary evidence during the course of an investigational hearing at which appearance has been made. It should be noted that distinct and different sanctions for non-compliance are provided for in Sections 9 and 10, apparently for the purpose of allowing each section to stand on its own feet for enforcement purposes. This, of course, would establish alternative methods for securing enforcement of subpoenas.

The willingness of the courts to enjoin use of investigational subpoenas during the Commission’s early history may be traceable to the courts’ belief that Section 10 did, in fact, create criminal penalties which a witness must risk if he challenged a subpoena. This belief may also account for the willingness of more recent courts to allow declaratory and injunctive proceedings to be used to halt subpoena returns at their outset.

The harsh requirements of Section 10 were softened in Anheuser Busch, Inc. v. Federal Trade Commission, where the Court of Appeals for the Eighth Circuit read all criminal sanctions out of Section 10 except those applying to contumacious refusal to appear and testify. In all cases where a witness appears in response to a subpoena and thereafter, in good faith, challenges the subpoena by refusing to testify or to produce documentary evidence, enforcement is relegated to proceedings under Section 9. Under that section the Commission must secure court enforcement of its subpoena. If a court order directing compliance is not obeyed, the witness could be cited for contempt.

It thus appears that counsel who feel they must test the lawfulness of a subpoena should make certain the proper witness appears at the opening of the investigational hearing. Thereafter, a good faith refusal to testify would lead to a court test under Section 9 of the Federal Trade Commission Act rather than exposure to the criminal sanctions of Section 10. The latter section may still be applicable to the witness who neglects or fails to appear at the hearing.

95. Compare Section 1 of the Sherman Act, 15 U.S.C. 1 "... Every person who shall make any contract or engage in any combination or conspiracy declared by Sections 1 through 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both of said punishments, in the discretion of the court." Many persons and corporations have, of course, been convicted in Sherman Act criminal proceedings.
96. F.T.C. v. Millers National Federation, supra note 11.
97. Wanderer v. Kaplan, supra note 54.
98. See note 56, supra.
In seeking enforcement of its subpoenas the Commission has on some occasions applied to the District Court on its own behalf and on other occasions has sought the aid of the United States Attorney for the District. The authority of the Commission to institute proceedings on its own has been challenged and the courts are divided on the issue.99

CONCLUSIONS

The investigational subpoena gives the Federal Trade Commission an effective and flexible tool which may be used to obtain both testimony and documentary evidence from non-voluntary witnesses. The Commission has already made extensive use of the investigational subpoena and undoubtedly will continue to do so whenever situations require it.

Many of the issues relating to authority for use of the subpoena and the procedures to be followed in returns already have been settled in the courts. There have been two developments which may lead to smoother and more effective use of the subpoena. One is the Commission's adoption of a rule that all returns are non-public unless otherwise ordered.100 This rule may eliminate many of the complaints that business standing and reputation may be injured by public hearings. The other development is the decision in the Anheuser-Busch case101 which, although decided against the Commission, may alleviate much of the controversy concerning subpoena returns because it softened the harsh impact of Section 10 of the statute on a witness who refuses to testify because he believes, in good faith, that he is not legally required to do so.

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100. F.T.C. Procedures and Rules of Practice, §2.8(c), 16 C.F.R. § 2.8(c) (1968).
101. See note 56, supra.