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Defense Big Guns Tell Court Subpoena Puts Companies at Risk

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THE AMERICAN Bar Association, the Washington Legal Foundation, the U.S. Chamber of Commerce, and Chicago-based DRI - The Voice of the Defense Bar this week formally added their heavyweight voices to a request that the U.S. Supreme Court review a lower court ruling that let federal prosecutors subpoena documents which foreign companies had sent to law firms in the United States.

Normally foreign documents are outside the reach of grand jury subpoenas. But once such documents come into the U.S., the circuit courts of appeal are split on whether prosecutors can use grand jury subpoenas to grab them.

The [Chamber/DRI amicus brief says](#) the appeals court decision places defendants in the "untenable position" of choosing between the risk of adverse consequences in civil litigation and the risk of self-incrimination. "Plaintiffs can exploit this dilemma as leverage to extract speedy and sizable settlements unwarranted by the merits of their cases," it states.

The brief also notes the split of opinions that spans six circuits, creating "inconsistent laws nationwide and inevitably leading to predatory forum shopping." The brief's author, Lisa Blatt of Arnold & Porter, was not immediately available for comment.

WLF, a pro-business legal advocacy group, says the appeals court decision "threatens to inhibit a multinational company's ability to fully defend itself in civil litigation" when there is a parallel criminal investigation.

The [ABA states that the ruling](#) involves "an existing conflict among the circuit courts on an issue of great importance to the legal profession." The brief was submitted by William Robinson III, the ABA's president-elect and the member-in-charge of the Northern Kentucky offices of Frost Brown Todd.

The ABA also says the question "has significant potential to affect the trust and confidence that are the essential foundations of the attorney-client relationship."

The original case involves White & Case lawyers in Washington, who were representing Tokyo-based Toshiba Corporation in an antitrust probe.

U.S. prosecutors, investigating price-fixing in the liquid crystal display panel market, served the subpoenas on four law firms that were involved in parallel civil class actions and criminal proceedings in federal district court in San Francisco.

The government wanted access to the civil discovery, including thousands of pages of documents sent by companies from overseas, even though the documents were under a civil protective order.

Federal district court judge Susan Illston quashed the subpoenas sent to K&L Gates, Lief Cabraser Heimann & Bernstein, Nossaman, and White & Case. But Illston noted that the case raised novel issues with "far-reaching implications" about the power of the grand jury.

The government appealed her decision. Last December, a three-judge panel on the court of appeals reversed and

ruled for the prosecutors. Noting that the documents were not covered by attorney-client privilege, the appeals court said, "By a chance of litigation, the documents have been moved from outside the grasp of the grand jury to within its grasp. No authority forbids the government from closing its grip on what lies within the jurisdiction of the grand jury."

In February, White & Case asked the Supreme Court to hear the case and reverse the ruling. The four major legal organizations all filed their amici briefs this week, making good on plans, following Illston's decision, urging the court to review the Ninth Circuit ruling and to heal the split among the circuits.

White & Case declined comment. Representatives of the ABA, WLF, and the Chamber were not immediately available.