

Five Tips for Helping Your Client Navigate the Federal Grand Jury Process

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Effectively responding to a grand jury subpoena is critical for your clients and may have extensive and disastrous consequences if mistakes are made. That's why what you do, and how you do it, matters. Here are five tips that will help you successfully counsel and direct a subpoena recipient in the right direction.

Explain the Basics to Your Client

The grand jury is a secret proceeding that aids a prosecutor in investigating a case, and it may ultimately result in an indictment charging an individual, a company, or both, with a crime.

A federal grand jury is composed of randomly selected individuals from the community who are no different than we are—men and women, young and old, doctors and musicians. The grand jury consists of up to 23 people, but a quorum of 16 grand jurors is required before evidence may be heard. Regardless of whether there are 16 or up to 23 grand jurors present, 12 grand jurors are always required to vote for a “true bill”—which results in an indictment.

The grand jury is *not* a trial. It is important to remember that the grand jurors are not determining whether the accused is guilty or not guilty; such a verdict can only be rendered at trial. Instead, the grand jury is empowered by law to evaluate the strength of the evidence presented to them by the prosecutor

and to determine whether there is “reasonable cause to believe”—meaning that it is probable the accused committed the crime charged. In other words, the prosecutor only has to show that the defendant *could* have been involved in a crime, not that he *was*. Finding probable cause is generally a low bar. As a practical matter, a grand jury will almost always return an indictment presented to it by an able prosecutor. This has led to the famous proverbial phrase that a prosecutor can get a grand jury to “indict a ham sandwich.”

There is no judge in the grand jury. You, as the attorney, cannot be there. The prosecutor selects what evidence to present to the grand jury and instructs the grand jury on the law. The prosecutor is also permitted to vigorously question a hostile or uncooperative witness.

While grand jurors, the prosecutor, and the grand jury court reporters are under a strict duty to keep any matter occurring before the grand jury a secret, the rule of secrecy does not apply to grand jury witnesses. If your client is a grand jury witness, your client has the right to tell the whole world about the questions asked and the answers given. Of course, it may not be in your client's best interest to do so.

Although the authority to subpoena witnesses belongs to the grand jury, in practice, subpoenas are issued by the

prosecutor in the name of the grand jury and often without the prior knowledge or consent of the grand jury. The face of the subpoena indicates which type of subpoena the client received: (a) for testimony (*ad testificandum*), (b) for documents or objects (*duces tecum*), or (c) for both. The client may be subpoenaed either as an individual or as a custodian of records for a business entity. While an individual has the Fifth Amendment right against self-incrimination, a corporation does not.

Contact the Prosecutor

Shortly after speaking with a client who has received a subpoena, counsel should contact the prosecutor to understand the client's "status" in the investigation. Counsel will want to learn whether the client is simply a witness, a subject (a person of interest), or a target of the investigation.

If you learn that your client is a subject or target and may therefore have criminal exposure, then additional time may be

Illustration by Jimmy Holder

required to understand the facts and to carefully review any documents before providing any testimony or producing any documents pursuant to the subpoena. To the extent necessary, counsel can generally, and likely should, negotiate an extension of time to produce any responsive documents and request that the government agree to a rolling production.

There may also be privileged items that counsel may attempt to withhold under limited circumstances. If testimony is required, your client may invoke the right not to testify under the Fifth Amendment so long as your client has a reasonable basis to conclude that his or her testimony could be used as “a link in the chain of evidence needed to prosecute” him or her. Typically, it may not be prudent for target clients to testify before the grand jury, as their testimony is unlikely to persuade a grand jury not to vote in favor of returning the indictment and will absolutely be used against the client in a later proceeding.

Determine the Scope of the Subpoena and Assess Whether Your Client Has Responsive Documents or Testimony

Read, analyze, and understand what the subpoena asks for. Often the scope of the subpoena is broad—at times, too broad—and it is appropriate to ask the prosecutor about his or her priorities in an effort to narrow the scope of the documents required to be produced pursuant to a rolling production. This information will also allow you to better defend your client’s interests.

If the subpoena is overly broad and the government is not amenable to narrowing its scope, you may consider moving to quash the subpoena—for example, on the basis of a lack of particularity or on any other pertinent grounds. Bear in mind, however, that grand jury subpoenas are almost never quashed on grounds that they call for irrelevant information or go beyond the grand jury’s authority. Counsel could also attempt to emphasize the expense and disruption to the individual or business activity and the fact that a more narrowly drawn subpoena will make reviewing documents easier for the prosecution. Practically speaking, it may be more effective to attempt to negotiate the scope of the subpoena with the prosecutor.

Once counsel has resolved all objections and litigated all possible motions to quash, the subpoenaed client must comply. Counsel should ensure privileged and nonresponsive documents are not produced in response to the subpoena.

Prepare Your Client, If Compelled to Testify, for a Grand Jury Hearing

Always counsel your client to tell the truth. As mentioned above, if your client is subpoenaed for testimony as a custodian of records, the client may be able to avoid answering substantive

questions by invoking the Fifth Amendment. This is true even if the client is not a target of the investigation. Indeed, the right to invoke the privilege against self-incrimination is much broader than most witnesses and even attorneys realize. If a truthful answer to a grand jury question could incriminate the client, for example, the client can and should invoke the privilege and refuse to answer. How can a truthful answer tend to incriminate the client? By providing a link in the chain that the prosecutor may later use to indict and convict the client.

It may be more effective to attempt to negotiate the scope of the subpoena with the prosecutor than to try to quash it.

Some prosecutors may call witnesses back to the grand jury to testify on multiple occasions. Because you do not want your client to inadvertently provide inconsistent testimony, prepare, prepare, prepare.

Attend the Grand Jury Hearing with Your Client

As counsel, you cannot accompany your client into the grand jury room, but you can and should wait right outside the room. The client is entitled to consult with you at any point, as long as the client is not attempting to disrupt the grand jury process. Even if your client does not have any specific questions, he or she maintains the right to leave the grand jury room and brief you about the questions being asked and his or her responses. At every opportunity during break and at the conclusion of the testimony, obtain a thorough account from your client about the questions asked and the answers provided during the testimony. Because the witness is not provided a copy of the transcript of his or her testimony, counsel will want to have as detailed an understanding as possible of what went on in secret behind the closed grand jury door.

One more thing: It may be beneficial to keep open lines of communication with the prosecutor, particularly after your client’s grand jury hearing. For example, if your client is a fact witness—and not a target—it may be worthwhile to touch base with the prosecutor after the hearing to verify that everything went according to what the prosecutor expected. ■