

The Federal Grand Jury: Ten Tips If You Receive a Subpoena

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Other than having to respect testimonial and constitutional privileges of the people called to appear before it, a federal grand jury can pretty much do what it wants in questioning witnesses and compelling the production of documents. Federal grand jury subpoenas are almost never quashed on grounds that they call for irrelevant information or go beyond the grand jury's authority. Federal grand juries have a maximum of 23 members, 16 of whom must be present to form a quorum. Indictments are returned by a vote of 12 or more members. Federal grand juries typically sit for a term of 18 months and meet at regular intervals. As a practical matter, a grand jury will almost always return an indictment presented to it by a prosecutor. This is the basis for Judge Sol Wachtler's famous saying that a prosecutor can get a grand jury to "indict a ham sandwich." Testifying or providing documents to such a powerful body entails grave risks. You should never attempt to face these risks without the help of an experienced white collar criminal defense attorney. Here you will find 10 tips for responding to federal grand jury subpoenas that call for your testimony or documents. Of course, every case is different and you should always develop a strategy in consultation with your attorney.

1. Keep Your Attorney Close at Hand.

Your lawyer can't be with you in the grand jury room, but he or she can be right outside the room and you have the right to consult with him or her after each and every question. In fact, you can spend as much time as you need conferring with your lawyer, as long as you are not attempting to disrupt the grand jury process. You can also leave the grand jury room in order to brief your attorney about the questions being asked and your responses. In most federal jurisdictions you can also take notes of any questions asked during the grand jury session. These can later be shared with your attorney.

2. Beware of Agreeing to Pre-Grand Jury Interviews

You are under no obligation to talk to government agents before the grand jury process begins. Some Assistant United States Attorneys trick unrepresented persons into interviewing with federal agents prior to the beginning of the grand jury session. The letter accompanying the witness' subpoena may ask or direct the witness to appear an hour or two early at the grand jury room or the U.S. Attorney's Office. These pre-grand jury interviews are dangerous and ill-advised and the government has no authority to compel them. You may make a harmful admission during one of these interviews. In addition, you may be accused of lying to a government agent during the interview. Lying to government agents during an interview, like lying to the grand jury, is a federal crime. At the grand

jury session, however, there will be an official recording and/or transcript of the proceedings, so there will be no dispute about what you say. The pre-grand jury agent interview will not be recorded. Two federal agents will take notes of what you say and it will be their word against yours in the event of a dispute.

3. Don't be Bullied or Misled About Grand Jury Secrecy.

Federal grand jurors, grand jury court reporters and the prosecutors running the grand jury are under a strict duty to keep any "matter occurring before the grand jury" a secret. This duty is codified in Rule 6(e) of the Federal Rules of Criminal Procedure. Violations of this rule can result in sanctions or criminal contempt charges against a prosecutor. But the rule of secrecy does not apply to federal grand jury witnesses. If you are a grand jury witness, you have the right to tell the whole world about your grand jury testimony. Of course, it may not be in your interest to do this. You may want to keep your appearance before the grand jury under close wraps. You need to understand, however, that it is your call-not the government's. But some federal prosecutors attach cover letters to grand jury subpoenas, informing the witness that revealing the contents, or even the existence, of the subpoena "may impede" a criminal investigation. These cover letters then "request" non-disclosure of the subpoena (and/or the documents requested in the subpoena) and ask the witness to notify the prosecutor if the witness has any "problems" with non-disclosure. You should by no means put up with this nonsense. If you receive a cover letter like this, you should consider having your attorney write a polite response to the prosecutor or the case agent including the following language: "Your cover letter requests non-disclosure of the subpoena (and/or the documents requested in the subpoena) and asks to be notified if there are problems with such non-disclosure. I am reluctant to have my client take on a formal affirmative obligation, regarding either non-disclosure of the subpoena or notification of problems with such non-disclosure, beyond the requirements, if any, found in Fed. R. Crim. P. 6(e) or in some other statutory or court authority you can point me to. Rest assured, however, that my client has absolutely no desire to compromise your investigation or to publicize the existence of either the subpoena or your investigation."

4. Insist on Grand Jury Secrecy from the Government.

As mentioned, Rule 6(e) prohibits the government from revealing "a matter occurring before the grand jury." This prohibition, of course, covers the content of grand jury testimony. But it goes much further. The government cannot even reveal that you appeared before the grand jury or that you have been subpoenaed or scheduled to appear. Many prosecutors and agents get sloppy about this and reveal that a person or company has been subpoenaed. In addition, some grand juries have waiting rooms where multiple witnesses are invited to wait until they are called. In these situations, each witness is told, in effect, that the other witnesses waiting with him have been summoned to appear "before the grand jury." On other occasions, members of the press, who know what day the federal grand jurors meet, have been tipped off to be at the courthouse entrance, so that they can see a grand jury witness enter and draw the obvious conclusion. Your white collar criminal defense attorney should be vigilant in guarding against these abuses and should put the federal prosecutors handling your appearance on notice not to violate grand jury secrecy with such maneuvers.

5. Let Your Attorney Accept Service of the Subpoena.

Your attorney should arrange with the prosecutor to accept service of the grand jury subpoena on your behalf. This spares you the embarrassment of being personally served by FBI agents at your home or in the workplace. What if the agents don't know or care that you have an attorney, and

decide to serve you personally anyway? You should politely accept service, tell the agents that you have an attorney, and decline to answer any and all substantive questions about the case. Refer all questions to your attorney. What if you don't yet have an attorney when you are personally served with the grand jury subpoena? Politely accept service and tell the agents that you will decline to answer any substantive questions until you have had the opportunity to obtain an attorney. You are under no obligation to do anything other than accept service of the subpoena. If you say anything at all about the case to the agent you could be making dangerous admissions that may be used against you at a later time. For example, let's say that you are being investigated in connection with an alleged tax fraud scheme involving foreign trust accounts. Assume that there are no documents which on their face tie you to any such trust accounts. Then an FBI Special Agent (or an IRS Criminal Investigation Division Special Agent) serves you with a grand jury subpoena for all records related to those foreign trust accounts. When she serves the subpoena, the agent asks: "Are you going to cooperate?" You respond: "Yes, I'll cooperate. You'll get the documents." What have you done? You have just admitted to the government that you possess or have access to the foreign trust account documents. You have in effect acknowledged a connection between yourself and the foreign trusts. If you instead respond to the agent as follows: "I'm sorry, but I have an attorney and she will be contacting you," you have admitted nothing.

6. Learn the Difference Between Types of Grand Jury Subpoenas.

Federal grand jury subpoenas are for: (a) testimony (*ad testificandum*); (b) documents or objects (*duces tecum*); or (c) both. The face of the subpoena will inform you which type of subpoena you received. You will be subpoenaed as an individual or as a custodian of records for a business entity. In many instances, individuals have the right to refuse to answer grand jury questions by invoking the Fifth Amendment's Privilege against Self-Incrimination. Corporations and other business entities, however, cannot invoke this privilege. But since a corporation operates through human agents, it must designate a custodian of records when subpoenaed by the federal grand jury. Under Supreme Court case law the corporate custodian is only required to answer a narrow category of questions, related to how the subpoenaed documents were searched for and gathered. If you are properly subpoenaed as a business custodian, it is very important that you limit your answers to this narrow category of questions. Prosecutors love to get corporate custodians into the grand jury room and ask extra questions. These questions might seem innocuous, but they are often very dangerous. You need to have your white collar criminal lawyer with you for consultation, right outside of the grand jury room, to ensure that you are not tricked into answering one question too many. Some federal prosecutors have recently started the practice of issuing one subpoena to a person in that person's individual capacity and his custodial capacity. This tactic is dangerous, confusing, and, in my view, unauthorized. It is tantamount to issuing one subpoena to two persons or companies. Your attorney should insist on two separate subpoenas—one for you as an individual and one to the company's custodian of records.

7. Don't Testify if You Have Exposure.

As mentioned above, if you are subpoenaed for testimony in your individual capacity, you may be able to avoid answering substantive questions by invoking the Fifth Amendment's Privilege against Self-Incrimination. This is true even if you are not a target of the investigation. Keep in mind that even if a prosecutor designates you a witness or subject, rather than a target, this designation provides you with no rights or protection and can be changed at any time. The right to invoke the Privilege against Self-Incrimination is much broader than most witnesses and attorneys realize. If a truthful answer to a grand jury question would even tend to incriminate you, you can invoke the privilege and refuse to answer. How can an answer tend to incriminate you? If it furnishes a link in the chain that

might lead to your conviction. Can a person who is totally innocent of wrongdoing invoke the privilege? Absolutely! The Supreme Court has ruled that the privilege protects the innocent as well as the guilty. Why would an innocent person want to invoke the privilege? To keep from being ensnared by a mistaken, incompetent, or unscrupulous prosecutor. Take the following example. The federal grand jury is investigating a corporation for accounting fraud. You work in the corporation's accounting department. The prosecutor believes that any accounting department employee who reviewed Document X and later booked entries related to Document X is guilty of fraud. You looked at Document X and later booked entries related to Document X, but don't believe you defrauded or intended to defraud anyone. No record shows that you reviewed Document X and no other person knows that you reviewed Document X, but several documents and co-workers can establish that you booked entries related to Document X. If you testify at the grand jury and truthfully admit that you reviewed Document X, you will tend to incriminate yourself, even though you don't believe that you are guilty, because you will furnish a link in the chain that the prosecutor may use to indict and convict you. You also may be able to invoke the Privilege Against Self-Incrimination to avoid producing certain documents. Although documents created prior to receipt of a grand jury subpoena are typically not covered by the Privilege, this is not always the case. If the very act of producing a document would tend to incriminate you, the Privilege will often apply. For example, if you are under investigation for receiving classified documents, and you are subpoenaed for those documents, the very act of producing the classified documents to the grand jury is in itself incriminating.

8. Review Your Prior Testimony.

Some federal prosecutors like to call witnesses back to the grand jury to testify on multiple occasions. This is dangerous because it can cause you to inadvertently give inconsistent testimony under oath. Under §1623(c) of the federal criminal code, the government can prosecute you for testifying to two irreconcilably contradictory statements under oath, and the government does not even have to prove that either of the statements in question was false. When you are called back to the grand jury to testify for a second time, your attorney should insist on your right to review ahead of time the official transcript of your first session. In this way, you can refresh your recollection as to your earlier testimony, correct any mistakes, and prepare yourself for the upcoming session. The United States Court of Appeals for the District of Columbia Circuit recently ruled that grand jury witnesses, even if they have not been called back to testify for a second time, have an inherent right to review a transcript of their earlier testimony.

9. Conduct a Shadow Grand Jury.

If you have the money, your attorney can often conduct what is known as a shadow grand jury. Friendly witnesses will sometimes inform you if they have been subpoenaed to the grand jury and you and your defense team can often figure out who else the government may call. Grand jury witnesses are then interviewed, before or after they testify, giving you valuable information on where the investigation is heading. Of course, grand jury witnesses are under no obligation to cooperate with your defense team, and the use of shadow grand juries often infuriates prosecutors. You should proceed with great caution and make sure that all interviews are carefully documented so that your defense team is not accused of witness tampering or obstructing justice. And it should go without saying that your attorney and his staff should conduct and arrange all interviews-not you.

10. Don't Wait Until the Last Minute.

Do NOT wait until one day or one week before your grand jury appearance date to contact a federal

criminal defense attorney. Any decent attorney will need time to discuss the facts of your case with you in detail and talk to the Assistant U.S. Attorney who is running the grand jury. In other words, your attorney needs time to assess your level of exposure and develop a game plan. This can't be done overnight. On rare occasions, prosecutors issue "forthwith subpoenas" requiring witnesses to appear before the grand on very short notice. Even in these situations, you should immediately consult an attorney who can advise you on how to proceed. At the end of the day, you may be nothing more than a routine witness, asked to provide routine documents. But federal grand juries exist to investigate, and prosecute, serious crimes. You could be stepping into a mine field. Don't go it alone and don't wait until the last minute to seek professional help.

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