Grand Jury Witness Checklist

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Representing grand jury witnesses presents unique problems. The procedures are without parallel to any other aspect of criminal practice. Time is often so short that counsel may first meet the client in the morning only to be arguing against civil contempt by the afternoon. Counsel and witness may know nothing about the grand jury's ultimate target. The witness—whether or not she is represented—may not take counsel with her into the grand jury room. The witness faces the Assistant United States Attorney (AUSA) and from 16 to 23 citizens alone.

Like any legal problem, however, preparation is the key to handling the typical grand jury case. The more important preparation is to become fluent with grand jury procedures. Since time is usually short and knowledge regarding the United States Attorney's purposes is scant, mistakes are easily made in the opening round. The first days or, in some instances, *hours* on the case are not the time to make your first acquaintance with the grand jury's procedures.

Counsel interested in developing a grand jury practice will need to collect their own library of materials and have them ready for immediate adaptation. For those who merely want to be ready to represent the occasional client through the initial decisions, a single resource and set of motions may suffice. The most readily available book is *Representation of Witnesses Before Federal Grand Juries* (National Lawyer's Guild, 1996). Other books provide an alternative to the Guild's somewhat didactic approach, however, and many specialized practice manuals are geared towards providing the casual practitioner with useful practice tips. Another favorite resource is Paul Diamond's, Federal Grand Jury Practice and Procedure (Prentice Hall).

The following is a checklist of the principal issues to consider in most grand jury cases. Special issues such as immunity, privileges, and contempt are available through the brief bank or may be obtained through local counsel specializing in grand jury representation.

I. Initial Contact

Regardless of whether your client is a stranger to the present concerns of the grand jury (and wants to talk), or is closely related to the target and the events under scrutiny (and has nothing to say) — certain steps must be taken.

- ☐ Determine the date of witness's appearance.
- ☐ Determine whether the subpoena requires production of documents. Are they under your client's control? Are they personal documents subject to a Fifth Amendment objection?
- ☐ Determine the ending date of the current grand jury session. The grand jury's last day is the practical limit to civil contempt time. Grand juries generally sit for 18 months and the start date is public record. Absent the rarely granted extension, the grand jury's authority to question your client (and the court's authority to jail your client) expires 18 months after the start date.

☐ Determine to the extent possible how your client fits in the investigation. Is she a target? a remote witness? a percipient witness? a mere custodian of documents?

☐ Determine whether any motions to quash appear appropriate. Possible motions are listed below.

☐ Educate the client regarding grand jury proceedings.

1. The witness appears by herself, no counsel allowed. Generally pen and paper will be permitted.

2. You are left in the hallway—now you *are* a "Potted Palm."

3. A reporter will record all questions and responses verbatim.

4. The witness may leave the room to consult with you; the witness should be permitted to take notes, recording each question verbatim before consulting with you. The Assistant United States Attorney may seek to intimidate your client into staying put in the witness chair.

5. There are limited privileges that may permit the witness to refuse answering questions. *Trammel v. United States*, 445 U.S. 40, 47 (1980). Federal privileges are quite limited: your state's statutory and common law privileges will *not* apply. Some exotic federal privileges exist. See 42 C.F.R. § 2a.1–.8. The strongest privilege is the Fifth Amendment. A *possibility* of prosecution is sufficient to exert the Fifth. *In re Master Key Litigation*, 507 F.2d 292, 293 (9th Cir. 1974).

6. The witness may be granted immunity from prosecution (transactional immunity). 18 U.S.C. § 6002; *United States v. Irvine*, 756 F.2d 708, 710 (9th Cir. 1985) (contract principles apply).

7. Penalties for misconduct before the grand jury include perjury, criminal contempt ,and civil contempt.

☐ Educate the client re: grand jury secrecy

1. You won't know diddly about the grand jury's knowledge. Because previous witnesses testified in secret, and the AUSA is forbidden from discussing the events occurring before the grand jury, you and your client will be in the dark.

2. You may not even know what the grand jury's interest is.

   a) On the other hand, it's worth asking—some AUSAs may disclose the outline of their investigation.

   b) If possible, find out how your client fits in the scheme of things. Who is the target in relation to your client? Is the target *already* indicted? Why is your client being called to testify against an already indicted target?

3. You will be assured by the AUSA that your client's testimony will remain secret.

4. Despite such assurances, your client's testimony will not remain a secret if your client is later required to testify in court (rendering the previous grand jury testimony discoverable under *Jencks*). Keep in mind that the current law imposes no condition of secrecy upon the witness who may discuss her testimony with anyone she chooses.

☐ As soon as possible, get a commitment from your client. The client MUST either:

1. Be prepared to give truthful answers to every conceivable question.

   Even if the government's interest is limited, once the client enters the grand jury room and answers anything beyond the most benign background questions, the client waives the Fifth Amendment. Once the privilege is lost, *any* answer may be demanded of your client. The general rules of relevance, hearsay, etc. are of no avail. The grand jury is an institutionalized fishing expedition.

   In other words, the decision to talk is a decision to talk candidly and, once carried into the grand jury room, *this decision generally cannot not be changed*. A claim of recently discovered illegal electronic surveillance may be asserted after the initial appearance: most other claims are waived.

2 OR — Be prepared to keep silent, risk being immunized, endure contempt.

   While this course is grueling, it has several redeeming virtues. First, the government may not seek to immunize your client. If so, your client is off the hook (for testimony, that is; your client may still be indicted). Second, if she is granted immunity, the witness can now testify regarding any past criminal conduct with whatever confidence one gets from transactional immunity. The prospect of your client copping to the Lindberg kidnapping (called taking an immunity "bath") may discourage the prosecutor from offering immunity. Third, following immunity, your client may still refuse to answer, setting a course towards contempt. If the contempt is civil (most are), your client preserves the option of changing her mind and cooperating with little (tactical) loss. Civil contempt is *coercive*: change your mind and get out of jail free. Criminal contempt is rare; it cannot be purged, the sentence is determinate and *punitive*. While it is rare, the charge is occasionally brought. *See United States v. Armstrong*, 781 F.2d 700 (9th Cir. 1986). At least under criminal contempt your client is haled into court before a judge and jury. You even get to sit at counsel table again and make evidence objections. Oh, boy.

   If your client asserts the Fifth, is then immunized, but remains — briefly — recalcitrant, a subsequent change of heart puts her back at Option 1, above. The witness can avoid civil contempt, or terminate coercive confinement, merely by accepting the AUSA's offer to testify. Keep in mind, however, that a highly public refusal to cooperate can result in the practical loss of any privacy. It is very hard to use the "key" in your pocket without everyone in town knowing. Grand jury secrecy at this point is a fiction.

3. Note: Be certain that your client understands the nature of the Options 1 and 2. Your client must not attempt to outsmart the grand jury. Such heroics are the stuff of perjury and criminal contempt convictions.

Heroics and lies will fail, and before long your client's lies inside the grand jury room will turn into lies to you in the hallway about the lies being told inside... Clients are allowed to change their mind about keeping silent—but counsel must make sure the client understands that a witness cannot reverse course once the witness has begun answering questions. There is no safe retreat from a prior course of cooperation.

☐ A third option exists: The truth, the *incomplete* truth, and nothing but the truth...

Your client could tell less than the whole truth if the government agrees to withdraw the subpoena in favor of a limited informal interview. This is rarely given. In cases where the government ultimately needs cooperative trial testimony, it is never given. Witnesses will not be permitted to snitch off one guy but keep their "friends" out of the discussions.

Where the government might be willing to merely gather data, however, this option is possible. For the reasons set forth below, you want an agreement that the interview is being conducted in lieu of formal testimony as part of a negotiation under Evidence Rule 410.

This is most likely to occur where your client may have access to a limited privilege, or the government does not need testimony but badly wants the intelligence.

1. Remember—the government can later renege if it believes it did not get a candid interview. If the government re-issues its subpoena, your client is back to square one. Was the interview conducted under ER 410?

2. Now, forced to revisit the cooperation or contempt decision, your client may find that you are the only witness present at the "free talk" capable of corroborating her version of her unrecorded statement. You are thrust in the awkward postion of advocating for your percipient observations, an ethical no-no. And since the interview was not technically conducted in the context of a plea discussion—but merely to avoid a subpoena—the substance of your client's statements may be admissible in a subsequent hearing notwithstanding Evidence Rule 410.

3. Limited interviews have a habit of breaching even the most specific restrictions. Your client may be drawn into disclosing more than was agreed to.

☐ You are out of options unless the government withdraws the subpoena—or you have a successful motion to quash.

1. Denial of a motion to quash is not reviewable (not a final decision). Contempt is the only means to obtain 9th Circuit review. The appellate rules governing contempt appeals require that the circuit issue its decision within 30 days from appeal. Be prepared to work *fast*.

2. Sometimes withdrawal of the subpoena can harm your client.

   If others are aware of the subpoena, withdrawal could appear to signal that your client agreed to give informal cooperation.

   Furthermore, any chance of obtaining immunity is probably lost. In some cases, a client may want to be subpoenaed if immunity is the goal. Apart from the

typical situation where your client wishes to turn state's evidence, there are other reasons that might cause your client to insinuate herself into an immunity agreement. When, for instance, the government is unaware of the client's depth of involvement and offers immunity for some ancillary details, your client's confession "pollutes" the government's case. Oliver North's immunized testimony shows how far this pollution can go.

The risks are palpable: use immunity is not foolproof. If your client is a key player who currently is unsuspected, however, you should at least discuss the benefits flowing from an immunity grant.

Consider condensing the client's "confession" into a succint written statement, a poison pill that can be swiftly entered in its entirely into the record. Some texts refer to this process as an "immunity bath" -- whatever the metaphor, it's a high risk gambit but one that may confer enormous benefit. In any event, the "confession" may not stop with your client's planned statement: the witness will probably find that having exposed herself to the AUSA and investigating agents, there are more questions regarding other participants . . . .

II. Pre-Appearance

- ☐ Notify the government that the Fifth will be invoked. While the court ultimately decides the immunity motion, the Department of Justice requires that the AUSA obtain statutory authorization from Washington, D.C.

  1. Informal ("pocket") immunity will not trigger the contempt statute.

  2. There was a time that formal immunity authorization from D.C. took weeks. What once took weeks is now routine, and immunity is often authorized with little bureaucratic delay. Sometimes authorization from the Department of Justice is ready before your client even appears.

  3. Consider asking for assurances regarding state and foreign immunity. The author has thrown the AUSA's schedule into chaos by insisting on IRS civil immunity.

- ☐ Motions to file:

  1. Notice of intent to take the fifth. Used purely to educate the court on the client's position (innocent but vulnerable to prosecution).

  2. Quash because subpoena or the duces tecum portion, are too burdensome.

  3. Quash because electronic surveillance was used in violation of federal law. Generally, however, this motion is brought at the contempt phase. See, 18 U.S.C. § 2515; *Gelbard v. United States*, 408 U.S. 41 (1972).

  4. Marital privilege.

  5. Reporter's privilege. Currently non-existent in the Ninth Circuit, see *In re: Grand Jury (James Richard Scarce)*, 5 F.3d 397 (9th Cir. 1993).

6. Doctor/Patient or other exotic privilege. At least one court in the Southwest has found a child-parent privilege.

7. Request for interpreter for non-English speaker.

8. Request for transcripts of previous testimony by witness.

9. Use your imagination and check the resources cited at the end of this article.

☐ Creative Investigation

1. Check the grand jury file, some other witnesses may have filed public documents.

2. Figure out who else has received subpoenas; contact them or, if represented, their attorneys.

3. Hang around the court house on the appropriate floors and meet the other witnesses. During recent grand jury sessions investigating the Animal Liberation Front, the author dropped by the Federal Courthouse looking for folks wearing Birkenstocks and reading "Outside" magazine.

4. Witnesses are not obliged to observe the grand jury secrecy rules; approach others carefully but ask for information regarding their experiences—this may be your only way to learning the grand jury's objectives. Be mindful that the witness may think he can't talk to you.

III. Appearance

☐ On the day of the appearance, make sure your client reports with you, or that you meet at a neutral place within the Federal Building. Sometimes misguidedly helpful staff at the clerk's offices will escort your unchaperoned client directly to the AUSA's office for a chat while you are out wandering the halls...

☐ Script your client's responses to the likely questions you expect she'll be asked. If she is taking the 5th, give her a detailed script.

☐ Prepare to spend the hours in the hallway outside the grand jury room.

Bring other files to work on. Take a laptop, cellular phone, etc. Set up shop.

☐ Prepare your client for extreme pressure to ditch you—even during face-to-face meetings with you present.

Prosecutor: "We have enough to indict your client, but we'll forget about all that in exchange for his cooperation unless *you* gum it up with motions..."

☐ Prepare your client for extreme pressure not to assert the Fifth.

Beware of sword rattling outside the grand jury: "Your client's taking the Fifth? Fine and dandy, we'll just commence a Priority–One investigation of your client beginning with who's paying his fees!"

Beware of "fake" questions in the grand jury room: "Won't you at least tell us *why* you are taking the fifth?"

Remember: there is no recovery from a waiver.

Sometimes, prosecutors just don't appreciate the consult–with–counsel routine. While it is inconvenient to have the proceedings interrupted every question, witnesses rarely answer even the safest sounding questions in a manner that does not either raise more issues or a later headache for themselves. It is common practice to insist on client contact for every question. The AUSA may threaten but only the Federal Judge, after a warning, can take action. Keep an eye on the clock during your hallway meetings and be prepared to justify the time.

- ☐ Have your briefs ready to argue the propositions that the client can write down questions and consult with you. The National Lawyer's Guild manual has helpful sections on this and a multitude of other motions.

IV. Contempt

- ☐ Procedure

Due process sets forth three stages for civil contempt. Each stage potentially consists of an appearance before the grand jury, paired with a hearing before the court. The procedures could be collapsed or combined under special circumstances, but the following represents the typical progression.

1st Appearance: the client takes the Fifth

> In Court: The government will ask the court to immunize your client once Justice authorizes the AUSA's request. If Justice refuses to give approval for immunity, your client's invocation of the Fifth ends the matter. Unless, of course, your client is later indicted based on the testimony of other witnesses...
>
> This first phase may occur *ex parte* and the order may be signed prospectively. While an objection could overcome an order immunizing your client, typically there is little practical benefit to insisting on an immunity hearing. Even in the face of multi-district investigations, transactional immunity as enforced under *Kastigar v. United States*, 406 U.S. 411, 445 (1972) is deemed adequate protection.

2nd Appearance: the client persists in silence

> In court: Show cause why your client is not required to answer. If there is no "just cause" under 28 U.S.C. § 1826, the judge will order the witness to answer. This is the time to raise objections to wiretapping. The witness returns to the grand jury room...

3rd Appearance: the client refuses foreman's command to answer

In court: your client may want to bring her toothbrush.

Now you can appeal. Take care to note the special rules for Recalcitrant Witness Appeals. Get the names and numbers of the Ninth Circuit's criminal motions unit attorneys. Expect to work very fast during the next 25–30 days. Release pending appeal is possible and if the district court turns you down, appeal to the circuit. If your client is out on appeal, do not permit the district court to order your client to jail following circuit affirmation: make sure the mandate has issued before acquiescing to district court's jurisdiction.

V. Post Contempt

- ☐ Once contempt is ordered, the appeal can be taken to the Ninth Circuit. The briefing schedule is frantic; oral argument will probably be denied. There are special rules governing the appeal of an order confining the "recalcitrant" witness. Be sure to check “local” circuit rules, not just the West version of the national rules.

  If you can convince the judge that coercive measures have failed, due process commands that the witness be released. Of course, the government *can* pursue criminal contempt....

- ☐ Relief from civil contempt prior to the expiration of the grand jury is possible. The arguments for a due process attack on "non–coercive" confinement are well established under *Lambert v. Montana*, 545 F.2d 87 (9th Cir. 1976); *Simkin v. United States*, 715 F.2d 34 (2nd Cir. 1983); *In re: Braun*, 600 F.2d 420 (3rd Cir. 1979) (distinguishing between a punitive *subjective effect*, commonplace and legal—and a punitive *purpose*, illegal).

Two treatises cover this field: P. Diamond, Federal Grand Jury Practice and Procedure (Prentice Hall); Representation of Witnesses Before Federal Grand Juries (National Lawyers Guild, Clark Boardman). The Department of Justice Manual has important sections on grand jury procedures. As always, local practice and the specific AUSA can determine how rigorous the grand jury session will be. When in doubt, even when not, be sure to have a local attorney with grand jury experience near at hand.

NOTE: There has been recent litigation in the area of frivolous fifth amendment abuse and in the rights of the witness to exit the room to speak with counsel. Be sure to check your jurisdiction for new cases. –JKF 2001