

## Responding to a Federal Grand Jury Subpoena

Long before the founding of our country, the use of a grand jury “*before good and lawful men*” was guaranteed in England’s Magna Carta. [1] Since our legal system was based on English common law, we adopted the use of grand juries. As the Fifth Amendment to the Constitution states:

**“no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or an indictment of a grand jury...”[2]**

Today, with the exception of America and Liberia, grand juries are a thing of the past in most of the world. England stopped using them in 1933. Despite the fact their use has practically disappeared abroad, its use in our country is well entrenched in the Federal criminal law process.

### I. What is a Federal Grand Jury?

Under Federal law, and in most states, before an individual is charged with a serious crime, the allegations are first presented to a panel of private citizens. This panel is known as a “grand jury.” The individuals selected to sit on a grand jury are charged with determining whether or not probable cause exists to believe that an individual has committed a crime. At the Federal level, a grand jury is usually comprised of 16 to 23 citizens who are randomly chosen from voter registration rolls.

Viewed in its most favorable light, the grand jury is essentially a shield. It is meant to protect individuals and entities from overly zealous prosecutors who might otherwise bring a serious criminal case without first presenting allegations of wrongdoing to an impartial group of citizens – the grand jury. As the U.S. Supreme Court has indicated, the grand jury “*a kind of buffer or referee between the Government and the people.*”[3] Unfortunately, in real life, the grand jury rarely protects individuals and entities from prosecution. Attorneys for the government are the only legal counsel permitted in the room with the grand jury while it is deliberating or voting. As such, the Assistant U.S. Attorney representing the government is in a position to guide the panel wherever the government wants it to go. As former New York State Judge once stated in an interview [4] with the *New York Daily News* when discussing the influence a District Attorney has on a grand jury “***by and large***” ***they could get them to “indict a ham sandwich.”***

### II. Pre-Indictment Investigative Activities:

Federal grand jury subpoenas are issued to gather evidence to investigate alleged ***criminal*** activities that can demand witness testimony (*ad testificandum*) and/or the production of business documents, records, and objects (*duces tecum*). As Section 9-11.101 of the United States Attorney Manual (USAM) states:

***“[the] grand jury’s principal function is to determine whether or not there is probable cause to believe that one or more persons committed a certain Federal offense within the venue of the district court.”***

At the Federal level, there are a number of law enforcement agencies who are tasked with investigating allegations of fraud and other wrongdoing. When evidence of criminal conduct is identified, these agents and investigators will typically make a referral to their local U.S. Attorney’s Office. After reviewing the allegations assembled by investigators, an Assistant U.S. Attorney will decide whether or not to present the evidence before a grand jury. To the extent that a Federal prosecutor believes that an individual or entity should be charged, the evidence must first be presented to the grand jury.

Grand jury subpoenas are prepared by an AUSA and issued through the Court in the jurisdiction in which the party resides. Subpoenas are presumed to be reasonable and the recipient has the burden to show that it is unreasonable and should be quashed. A subpoena may be issued either as to a named party or to the custodian of business records for a business entity. Subpoenas are typically served by the FBI. A party may arrange to have their attorney accept service.

### **III. Don’t Speak with Agents or Investigators Without First Talking with Your Attorney:**

Unfortunately, this is a common mistake. If you are contacted by a government investigator or agent asking to speak with you – keep your mouth shut. Don’t agree to be interviewed by a Federal agent without first speaking with your attorney. Remember, everything you say is evidence. To the extent that you speak with an agent, if you make a statement that the agent subsequently claims was a lie, your conduct could be cited as the basis for a separate crime.

While you cannot lie to government agents or investigators, can they lie to you? ***Absolutely.*** If an FBI, OIG or another Federal agents lies to you during questioning, it doesn’t render any statements against interests that you may make, involuntary and inadmissible. In a landmark U.S. Supreme Court case,<sup>[5]</sup> a homicide suspect was interrogated by the police and the police falsely told that the suspect that an accomplice had already implicated him in the murder. Based on this lie, the suspect confessed to the murder. The U.S. Supreme Court ruled that such use of trickery and deceit can be permissible (depending on the totality of circumstances) provided that it does not shock the conscience of the court or community.

How should you respond if the FBI shows up at your door and wants to come in without a warrant?

Ask for a copy of the agent's business card. Absent an emergency or a search incident to an arrest, the FBI generally cannot come into and search your home unless you invite them in. What if an FBI agent forces his way into your home? Don't resist. Reiterate the point that you have not given them permission to enter your home.

Can the FBI agent require you to answer questions? No. You don't have to answer any questions. **Remember, everything you say is evidence.** Should you choose to answer questions, step outside, shut your door and then respond (limiting your responses to your personal identification). Tell the FBI agent that you want to exercise your rights under the 5<sup>th</sup> Amendment and want to speak with your attorney before making a statement.

***"I want to speak with my attorney before making a statement."***

How do you respond if the FBI agent says "You shouldn't need an attorney if you haven't done anything wrong." Most individuals will be very differential to FBI agents and will want to address any questions that they have. You need to fight this instinct! Exercise your rights under the 5<sup>th</sup> Amendment to the Constitution. You can merely state:

***"At this time, I am choosing to exercise my rights to remain silent."***

#### **IV. Grand Jury Secrecy:**

Individuals selected to serve on a grand jury are required by oath to adhere to a strict obligation of secrecy under Rule 6(e) of the Federal Rules of Criminal Procedure. The secrecy rule prevents the sharing of grand jury information, but it is essential to the system for several reasons. Without secrecy, panel members might be subjected to tampering by groups or individuals in favor, or opposed, to the investigation of certain parties, and witnesses brought before a grand jury are more likely to be candid in their testimony if they know that their statements are secret. Further, if grand jury proceedings were not secret, criminal wrongdoers might otherwise seek to escape before an indictment is issued and an arrest can be made. If after reviewing the evidence, a grand jury "no bills" a party, the party's reputation may not be tarnished if the proceedings remain secret. This is also one of the reasons that Federal False Claims Act cases are filed "Under Seal."

#### **V. Responding to a Grand Jury Subpoena:**

Should you be called to testify before a grand jury, your first order of business should be to obtain experienced legal representation. Depending on what is known at this time, separate legal counsel may be needed for you and other employees of your company. Although the grand jury may have no real interest in you or your company, it may believe that you have information relevant to their investigation of a completely different party. Since it may not be clear where the grand jury is

heading with its investigation, one of the first goals of your legal counsel may be to learn if you are the focus of the grand jury. As Section 9-11.151 of the Justice Manual provides, ***“It is the policy of the Department of Justice to advise a grand jury witness of his or her rights if such witness is a “target” or “subject” of a grand jury investigation.”*** Your legal counsel will therefore work to ascertain if the government views you as a **witness, target, or subject.**

**Witness:** *A witness is an individual who is not currently a subject or a target of an investigation but is thought by the government to possibly possess information or knowledge that is relevant to the government’s investigation.*

**Subject:** *A subject of an investigation is a person whose conduct is within the scope of the grand jury’s investigation.*

**Target:** *A target is a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant. An officer or employee of an organization which is a target is not automatically considered a target even if such officer’s or employee’s conduct contributed to the commission of the crime by the target organization. The same lack of automatic target status holds true for organizations which employ or employed an officer or employee who is a target.*

## **VI. Testifying Before a Grand Jury:**

Despite the fact that the grand jury process is almost entirely one-sided (and not in your favor), there are a number of steps you can take to try and partially level the playing field. These steps include, but are not limited to the following:

**Point #1: Don’t Show up to Testify Without Experienced Legal Counsel.** Despite the fact that your attorney is not permitted to be with you when you testify before the grand jury, it is still imperative that your attorney accompany you to the proceeding. Your attorney can be outside the room. When you are asked a question by the grand jury, you have the right to take a break, leave the room and consult with your attorney before answering the question.

**Point #2: Grand Jury Secrecy Rules are Often Misunderstood.** Under Rule 6(e) of the Federal Rules of Criminal Procedure, members of the grand jury and prosecutors are required to keep matters occurring before the grand jury a secret. As a grand jury witness, with a few exceptions, you are not covered by this rule. Nevertheless, the government will often tell you that you cannot even disclose the existence of the grand jury or the matters that you discussed when you testified.

The Federal prosecutor may also say that any disclosures may impede the government's ongoing investigation and that should you disclose grand jury matters, you may be charged with "obstruction of an investigation" or some other criminal violation. In any event, you should not disclose grand jury without first speaking with your attorney. More often than not, it is not in your best interests to discuss your grand jury testimony with other parties.

**Point #3: Exercise Your 5<sup>th</sup> Amendment Privilege Against Self-incrimination if Appropriate.** Witnesses appearing before the grand jury may invoke their Fifth Amendment privilege against self-incrimination when asked to give individual testimony. Custodian of business records, on the other hand, may not invoke the Fifth Amendment with respect to the subpoenaed documents because corporations or business entities do not have Fifth Amendment rights. Regardless of the nature of the subpoena, witnesses and records custodians should meet with legal counsel and prepare prior to testifying.

**NATIONWIDE REPRESENTATION — CALL 1 (800) 475-1906**

**As former Federal and / or State prosecutors and white collar defense attorneys,[6] we will aggressively work to protect your financial interests and, most importantly, help safeguard your liberty. Do you need help? Give us a call for a complimentary consultation. We can be reached at: 1 (800) 475-1906.**

[1] "[\*Magna Carta and the Right to Trial by Jury\*](#)." William & Mary Law School Scholarship Repository. Faculty Publications. (Page 155)(2014).

[2] [Fifth Amendment to the Constitution](#).

[3] [\*United States v. Williams\*](#), 504 U.S. 36, 37 (1992).

[4] Judge Sol Wachtler coined the term in a January 1985 [interview](#) with the *New York Daily News* ' Marcia Kramer and Frank Lombardi.

[5] [\*Frazier v. Cupp\*](#), 394 U.S. 731, 1969.