Preparing a Grand Jury Witness: Sweaty Palms, Racing Heartbeat

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Preparing a witness to testify in front of a federal grand jury presents unique challenges, certain to induce sweaty palms and a racing heartbeat in even the most experienced lawyer. If counsel does not anticipate and address those challenges with the witness, there may be dramatic consequences, including criminal charges against your client.

From the witness and her counsel's perspective, there are at least four differences between grand jury testimony and deposition or trial testimony in a civil case.

First, in civil proceedings, if a witness doesn't get things 100 percent right in her deposition, counsel is right there to rehabilitate her. Counsel for the grand jury witness, on the other hand, is not permitted in the grand jury room. No one can be in the room to protect the grand jury witness from being badgered, to clarify questions for her, to advise her on privilege, or to keep track of inconsistencies. All of this leads to the possibility of a mistake by the witness that is misinterpreted and stands uncorrected.

Second, at trial, a judge is present and can stop any bullying or mischaracterizations. During a grand jury proceeding, there is no judge, magistrate, or anyone else present to control the prosecutor, to make sure that only pertinent questions are asked, or even to lodge an objection to improper or misleading questions. Present in the grand jury room with the witness are the prosecutors (and those assisting them), a court reporter, and the grand jurors; no one else.

Third, in a deposition, not only is the witness's attorney present, but also the witness has 30 days after receiving the transcript to make "changes in form or substance. . . ." Fed. R. Civ. P. 30(e). When a witness testifies in front of a grand jury, she does not even have a right to see a transcript of her testimony—unless she is indicted.

Fourth, and most important, how many witnesses do you know who have been indicted for perjury during a deposition? None. Different answer for witnesses testifying before a grand jury! An example is the Barry Bonds trial in April 2011. While a mistake in testimony in a civil case may be ascribed to a misrecollection or faulty hearing on the part of the witness, the government may not be so understanding in the context of a criminal case. Government attorneys have brought numerous prosecutions for perjury under the federal criminal law that prohibits lying to a grand jury. Under 18 U.S.C. § 1623, it is a crime to "knowingly make . . . any false material declaration" before the grand jury. "False," for these purposes, merely means incorrect. In contrast, the statute governing perjury in proceedings other than a grand jury requires that the false statement be

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made *willfully*—a higher standard. *See* 18 U.S.C. § 1621. Thus, the likelihood of perjury charges stemming from grand jury testimony may be greater than from a trial or other proceeding.

How can counsel protect a grand jury witness from the very real threat of a perjury charge?

First, learn about the investigation. While this may sound obvious, it is frequently difficult in the context of a grand jury proceeding. There is no complaint setting forth the allegations, and there are no discovery requests. The government is not required to answer interrogatories. But there are places you can look for information. The grand jury subpoena, if it includes a document request, may provide some insight. If the client's employer has referred her to you, or if others have testified, you may be able to access information or documents from other lawyers through a joint defense agreement, although you must be careful here. Try the traditional sources, such as documents from your client or Google searches, for publicly available information about the investigation. You should ask the prosecutor why the government is interested in your client, what her status is (target, subject, or witness), what the prosecutor expects your witness to testify about, and what documents or emails the government is really interested in. Be mindful, though, that the prosecutor may not give you the full story because he may plan to use the grand jury to test your client's credibility without your coaching.

Next, decide whether the witness will choose to testify as opposed to asserting her Fifth Amendment privilege against self-incrimination. Without any grand jury testimony, there obviously cannot be any perjury. The decision to invoke the Fifth Amendment privilege against self-incrimination should not be made reflexively because it can involve collateral consequences, such as creating an adverse inference in civil proceedings, or because it may have professional and business consequences that the client feels are more important than the protection from the threat of perjury or self-incrimination it affords. *See* Richard L. Scheff, Scott A. Coffina & Jill Baisinge, *Taking the Fifth in Civil Litigation*, Fall 2003, Litigation at 34.

Immunity

If a witness chooses to "take the Fifth," the prosecutor may force her to testify by granting immunity by letter (so-called informal immunity) or through statutory immunity ordered by the court under 18 U.S.C. § 6002. Neither type of immunity provides protection against perjury—in fact, prosecutors frequently have a higher standard of candor for witnesses who have received immunity.

Consider trying to persuade the prosecutor to meet with you and your client for an interview as an alternative to testimony. The interview witness is still subject to prosecution for "knowingly" false statements under 18 U.S.C. § 1001, but at least you would be there to help her.

If you decide that your client will (or must) testify before the grand jury, the next challenge is preparing her. The initial stages of this preparation are much like the preparation of a witness for a civil deposition or a trial—thoroughly reviewing the documents, communicating to the client a clear understanding of the witness's role in the case, and giving the standard instructions to listen, answer the question, tell the truth, and not speculate. Emphasize that the client has a right to counsel at all times during her testimony before the grand jury, even though you will not be in the room with her. The client can and should come out to consult with you at any time during the testimony that she feels the need.

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Some witnesses may not have the will to ask to speak with counsel and then stand up and leave the room. Others may think it's a sign of personal weakness to ask to consult with counsel. Remind the witness that no adverse inference will be drawn from the fact that she chose to consult with you. Tell the witness that if she has any doubt about the question, she should come out and see you. How much you need to emphasize depends on the personality of your witness. One technique is to tell the witness to take periodic breaks—every hour or every 45 minutes or so—to clear her head. (Testifying is hard work if done properly.) At the breaks, you can debrief her on the subjects explored while they are fresh in her mind, and you can also provide words of encouragement and reminders about the basic rules of testifying. Let the witness know that this is not a marathon session to see who can endure the most pain.

When your witness appears for a break, ask her whether she has any questions and answer them. Move on to the general topics that were covered in the testimony and then focus on the documents she was shown. Finally, reinforce any particular themes or instructions that you believe will be necessary in the remainder of her testimony, and send her back in.

In particular, be sure to instruct the client to come out and

see you before testifying about communications with lawyers. Consulting with you does not mean that the witness will not answer the questions—it just means that the witness will have the benefit of your guidance before answering a question that may reveal privileged information.

Even if your client is not the target of the investigation or on the hook for an underlying crime, the possibility of charges for perjury is still in play. The witness should never lie during the grand jury investigation; when asked a comfortable question, she should answer honestly, and when asked an uncomfortable one, she should come out of the room and consult you. In what is known as the "perjury trap," a prosecutor deliberately "calls a witness before a grand jury for the primary purpose of obtaining testimony from him in order to prosecute him later for perjury," *United States v. Chen*, 933 F.2d 793, 796 (9th Cir. 1991), based on the witness's own conflicting statements. Because of its secrecy and special perjury rules, the grand jury is a uniquely powerful tool for pursuing not only the substantive target of the investigation but also witnesses who contradict themselves.

In certain limited circumstances, courts may consider evidence of a perjury trap as a form of entrapment defense that excuses charges of perjury. Because courts construe the scope of legitimate inquiry broadly, though, this defense is limited to extreme cases of prosecutorial abuse. A savvy witness may be able to pick up on cues when a prosecutor is veering off the investigatory path and laying a perjury trap, but she should still come out and confer. If a witness is called back to testify before the grand jury in the same investigation a second or even a third time, you will not have the benefit of a transcript of the prior testimony; hence the importance of keeping detailed notes when conferring. Perjury-trap situations call for treading lightly, consulting the lawyer often, and making absolutely sure the answer is accurate.

Debrief Your Client

After the session is over, debrief your client. You will not receive a transcript of the witness's testimony, so detail in this step is critical. Ask the witness to tell you everything she recalls about her testimony, including what questions were asked, the answers to the questions, and any documents the witness was shown. If you ignore the prosecutor's questions and ask the witness only what she said during her testimony, you may be missing a valuable chance to learn about the prosecutor's theory of the case or what facts, documents, or witnesses the prosecution is focusing on—all very useful information in a process in which there is virtually no discovery. Resist the temptation to interrupt the witness as she goes through the first mental download of her testimony. Let the witness keep talking as long as possible; you can go back and get the particulars later. Once the witness has completed the download, you can then hone in on specific topics for more details or ask about areas the witness did not mention at all, including specific, significant documents, or names of other individuals or companies. After you have thoroughly debriefed the witness, instruct her to make a note of any additional details of her grand jury appearance (testimony, questions, or documents) that she recalls over the next day or two. Frequently, the witness will recall more details on the cab ride back to the office or the plane ride home. Then prepare a thorough memo covering everything the witness told you. Grand jury investigations frequently take months or even years. You will need to know what your witness told you when you try to persuade the government lawyer not to indict your client or when preparing the witness to testify again if she is called back. If you are representing the company as well as the individual, your debrief memo will be a valuable tool to help prepare future witnesses because you will have a better idea of the questions asked and the government's theories.

The final step is deciding whether to ask the prosecutor how your witness did. There usually is very little downside in this question. If the prosecutor tells you that your witness did fine, then you have that reassurance. On the other hand, if the prosecutor believes that the witness made an error in her testimony, the prosecutor may tell you about that error and give you an opportunity to clear it up. The prosecutor likely has your witness in front of the grand jury because he is interested in prosecuting someone else, not your witness. This contact with the prosecutor allows you either to correct the testimony or to persuade the prosecutor that what your witness said was in fact correct.

In sum, the key is to prevent unintentional mistakes on the part of your client that could be misinterpreted by aggressive government prosecutors as intentional misstatements. None of us has a crystal-clear recollection of every event, and witnesses struggle to testify 100 percent accurately in the pressure-packed setting of the grand jury room without counsel present. Following the steps outlined here, though, will lead to a more ordered and thoughtful grand jury session that will minimize your sweaty palms and racing hearthbeat, and, more important, reduce your client's exposure to the potential of perjury charges. ■