

# Please tell me how this ends:

## Determining a client's status in a Grand Jury investigation

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**W**henever a client in Northern Nevada has the misfortune of getting visited by federal agents and served with a grand jury subpoena, the client wants to know the answer to a basic question: What is going to happen to me? Businesses and individuals receive these subpoenas for documents and testimony.

Federal grand jury investigations are generally intimidating, long lasting, and stressful ordeals. 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," says the U.S. Attorney's Manual. Prosecutors with the Justice Department and U.S. Attorney's Offices will characterize a person in one of three categories: witness, subject or target. Distinguishing between these categories is extremely important for advice. Moreover, the person's status will help determine viable options to make a key decision for the client on how next to proceed. Counsel's understanding of the client's status in a federal investigation is crucial to making the right decision.

The U.S. Attorney's Manual defines these categories: "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."

While being characterized as a target provides ample warning of a person's exposure to being indicted, the status of a subject puts the person in the middle category. "A 'subject' of an investigation is a person whose conduct is within the scope of the grand jury's investigation."

A witness is normally a person who the agents need information and assistance from but who has no exposure in the investigation (i.e. records custodian). Generally, if a witness receives a grand jury subpoena, it may be possible to provide documents and/or an interview that will abrogate the need for live testimony before the grand jury. The assistant U.S. attorney may even include a cover letter that tells the witness that production of the documents in advance of the grand jury date may alleviate the need to personally appear.

The federal grand jury may properly subpoena a subject or a target of the investigation and question the target about his involvement in the crime under investigation. However, it is extremely unusual for a prosecutor to subpoena a target to testify before the grand jury. If that happens and counsel informs the prosecutor in writing that the client will assert his or her Fifth Amendment privilege, the U.S. Attorney's Manual suggests that the prosecutor withdraw the subpoena.

When a person is a subject in an investigation and called to testify before the grand jury, the prosecutor will advise the person of the following rights:



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1. The grand jury is conducting an investigation of possible violations of federal criminal laws.
  2. The subject may refuse to answer any question if a truthful answer to the question would tend to incriminate the person.
  3. Anything the subject says may be used against him by the grand jury or in a subsequent legal proceeding.
  4. If the subject has retained counsel, the grand jury will permit him a reasonable opportunity to step outside the grand jury room to consult with counsel if necessary.
- If the person is a target in the investigation and going to provide testimony before the grand jury, then the prosecutor will supplement the preceding rights with the following target warning: “your conduct is being investigated for possible violation of federal criminal law” (or words to that effect).

The person needs to decide whether or not to cooperate in the investigation. Federal agents often attempt to do an interview with the person when they first contact them to serve a grand jury subpoena. If the person “lawyers up” at the outset, the agent will simply serve the subpoena. However, agents will typically show up without notice at the person’s home or business in an effort to get some statements or even a full-fledged interview before the person realizes that he should first discuss the matter with legal counsel.

Depending on one’s status in the investigation, it may or may not be in the person’s interest (if he is merely a witness) to submit to an interview in the presence of counsel or testify before the grand jury. If the person is a subject or target, then the person may need to assert the Fifth Amendment privilege to avoid self-incrimination.

If a person is a witness, then generally providing a statement (in the presence of counsel) may be acceptable so long as the person does not lie to the prosecutor or agent. (Unfortunately, the assistant U.S. attorney and agent make their own determination of whether or not the person was truthful. This can be precarious because the witness has “told the story” to the Department of Justice and now is locked in.) If the person is a target, then it would be unwise and unproductive (or even potential malpractice) to submit to an interview when criminal charges or an indictment are imminent. If the person falls in the more nebulous “subject” category, it is harder to predict. Since the federal prosecutor may be gathering facts and not know everyone’s status early in an investigation, he or she may say “your client is a subject at this point” which leaves the door wide open for the person

to become just a witness or also to become a target as the investigation runs its course.

If a person is a subject, then he or she needs to provide counsel with all information relevant to the investigation. Since grand jury proceedings are subject to secrecy, it may be difficult to gather information outside of the client. However, the subject needs to decide whether to remain silent; submit to an interview with Department of Justice; or provide testimony before the grand jury. Each has its own risks and potential consequences.

Early in the case, the prosecutor may suggest counsel bring the client in for a proffer interview. Defense attorneys dislike these interviews because proffers provide very little protection to the client since the Department of Justice essentially says it will not use the information from the interview only if the person is truthful and only if it has the information from an independent source. Of course, the Department of Justice decides unilaterally if a person lied during the interview. Consequently, the client is then facing potential prosecution if the Department of Justice does not believe the person’s statements. If the Department of Justice does believe the person’s statements, then your client gets a pass and remains merely as a witness after all. Nevertheless, the danger is that the Department of Justice gets a “free listen” to what the person says and then tries to squeeze a guilty plea. If there is a trial, then the proffer interview statements make it exceptionally difficult for a defendant’s trial testimony. Accordingly, even if the Department of Justice has insufficient evidence against the client concerning the alleged substantive offense, representations made to the grand jury or federal agents can lead to severe consequences.

For example, high-profile cases are illustrative of the dangers of grand jury investigations and proffers. Lewis Libby was under investigation for leaking classified information. Martha Stewart was under investigation for insider trading. Neither was charged for those substantive criminal offenses. Instead, they were charged with making false statements to federal agents about the substantive crimes.

Federal grand jury investigations require patience, objectivity, and experienced legal advice for individuals and businesses. The success, survival, or extinction of the business may depend on the outcome of the investigation. Therefore, it is crucial to be well advised if and when the agents or subpoena arrive at the door.