New York Law Journal
A NEW YORK LAW JOURNAL SPECIAL SECTION
White-Collar Crime
An ALM Publication
WWW.NYLJ.COM
MONDAY, APRIL 25, 2016

Preparing a Target To Testify Without Immunity

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White-collar criminal defense practitioners are experienced in guiding their clients through the federal grand jury process in frequently reoccurring settings. Those include: a client subject or target who will assert the Fifth Amendment privilege but is called to do so before the grand jury; a client who has received immunity or a non-prosecution agreement, and is called to testify; and, a client who is called to testify as a witness.

Much less frequent are investigations where the client is a—or the sole—target of the investigation, and the client testifies in the grand jury without immunity or any protection whatsoever.

Such a move is extremely risky. First, there may be no real chance to avoid an indictment. Second, in cases where the proof is borderline, the client's story gets set in stone, and is impeachment fodder for the prosecutor to use when the client takes the stand at trial. Third, there is always the danger of an obstruction or perjury charge based on alleged false grand jury testimony.

This conventional wisdom of the high risk involved holds in most cases, but not in all of them. In some investigations the benefits of testifying are identifiable and make it a real option that should not be hastily dismissed, especially where there is clear information about what the investigation is about, the client has a pellucid, compelling story to tell, and the impact of an indictment would be devastating to the client's career, employment, family, reputation, and finances. In these circumstances, the high risk is sometimes outweighed by the high reward of potentially avoiding prosecution.

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Allowing a Target to Testify

Unlike in most New York[1] grand jury proceedings, targets (and subjects) have no right to testify before a federal grand jury. But Assistant U.S. Attorneys (AUSAs) usually will accommodate such requests to testify. And §9-11.152 of the U.S. Attorneys' Manual[2] recommends that AUSAs give "favorable consideration" to such a request, so long as the witness: waives the privilege against self-incrimination, on the record, before the grand jury; is represented by counsel (or knowingly appears without counsel); and, consents to full examination under oath.

Whether the client will have the ability to even consider this option depends on whether he is aware of the investigation. The onus is on

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counsel to notify the AUSA if the client wants to testify. AUSAs are encouraged to notify targets of an opportunity to testify before the grand jury in "appropriate cases," but AUSAs are not required to provide notification, and frequently do not.[3] Where the target learns of an investigation that is well under way, there may be an extreme time crunch and need for rapid investigation and evaluation of options.

Whether to Testify?

Certain types of investigations lend themselves to more serious consideration of a target testifying (apart from whether the factual background makes testifying a viable option).

Investigations based on a discrete incident or incidents that are core to the potential charges are more likely candidates than broad-ranging, years-long conspiracies.

Investigations where there is a strong likelihood that, if indicted, the client would take the stand at trial, also are better candidates. However, the fewer prior statements by the client regarding the matter, whether by electronic mail or otherwise, the better.

And situations where the client has not previously proffered are also stronger candidates. A prior proffer gives the AUSA an obvious preparation and strategic advantage, to say nothing of the fact that an indictment is being sought notwithstanding the client's prior explanation.

And, certain types of potential defendants—such as police officers in criminal civil rights excessive force investigations—are better candidates to testify.

A crucial consideration beyond understanding the AUSA, and whether she will give your client a fair opportunity to testify, is understanding what is actually under investigation. Defense counsel must demand from the AUSA advance notification of what incidents or conduct the investigation relates to (or "covers"). Nothing in the U.S. Attorney's Manual mandates such disclosure. But a careful reading suggests that it should be provided by the AUSA so that the "appearance of unfairness" is avoided when the target testifies.[4] Defense counsel, in advising the AUSA that the client wants to testify, should indicate that the client desires to do so, but demands and requires sufficient information from the AUSA about the incidents under investigation (including dates/locations as appropriate) and the criminal charges being considered. The AUSA may not provide everything that is requested, but enough information should be given to guide the preparation and inform whether the client actually testifies.

Interactions With the AUSA

Counsel should be prepared to immediately engage the AUSA on whether the client will testify. And counsel should deal from the strongest possible position. Weak proclamations that the client may want to testify or is deciding whether to testify, without any actual intention to do so, are ineffective. Similarly, mixing plea negotiations with discussions on the target testifying do nothing to advance the ball for your client. A target testifying is most likely to be successful when the defense position is clear: The client desires to and plans to testify but requires sufficient notice of what is being investigated; the client should not be indicted because he committed no crime; even if the AUSA could get an indictment given the low threshold for one, there are substantial considerations as to why he should not be indicted; and, if the client is indicted, the matter will be aggressively litigated through a jury verdict.

Pressing the AUSA for the incidents under investigation is crucial. What the AUSA will share—or whether anything is shared—will go a long way toward determining whether the client will testify or not. Counsel should also press the AUSA for an advance opportunity to review any evidence, documents, or video/audio that the AUSA will show to the target. The AUSA may refuse to do so, but may at least describe the types of evidence or documents to be used, and whether video or audio exists.

A crucial aspect of the pre-testimony discussions is getting the AUSA to commit to allowing the client to provide narrative testimony regarding his conduct and the incident (or incidents). The narrative serves several purposes. It allows the client to provide relevant personal background. It allows the client to more fully explain his actions regarding the events under investigation. And, it allows the client a chance to reveal, through his manner of testifying, his good personal character that will appeal to grand

jurors who have an open mind and who are carefully listening. AUSAs often will permit the narrative testimony, although they may try to restrict it once the client is testifying. Counsel should insist on the opportunity and, based on strategic considerations, negotiate when it is to occur. Savvy prosecutors may offer the opportunity at the beginning of the testimony, before any questions are asked, so that the narrative has little context, takes place without the witness knowing the exact incidents that are going to be examined, and devolves into a jumbled ramble. A narrative taking place at or near the end of the questioning allows the witness to more surgically fill in the details that the AUSA neglected to ask about or glossed over.

Counsel must seek to determine whether the AUSA is going to ask the grand jury to indict immediately after the client testifies. Some AUSAs will tell you in advance that they will not, because, unsurprisingly, they want to the opportunity to call additional witnesses or do not want to convey that the grand jury process is a mere formality and that your client's testimony is meaningless. After all, many AUSAs want the client to testify. Counsel usually should ask for an opportunity, post-testimony, to meet with the prosecutors to discuss the reasons why an indictment should not be sought. If an AUSA states that she or he intends to seek an indictment immediately after the client testifies, counsel may want to meet face-to-face with the prosecutors or a supervisor before the client testifies to discuss the importance of the grand jury process, the impact an indictment will have on an innocent client, and in broad strokes why the client's testimony will establish that the client is not guilty.

The AUSA will likely provide a written waiver of rights document for the client to sign before the testimony, and will go over the waiver with the client in the grand jury. The client has little choice but to sign the document. However, counsel should make clear that the waiver of rights relates only as to incidents disclosed by the AUSA that the AUSA intends to ask about. If the client is asked about other incidents, he reserves the right to assert the Fifth Amendment.

Preparation of the Client

Many of normal preparation benchmarks for a witness with immunity will be applicable to the target testifying without immunity, such as setting the scene, mastering the facts of each incident, preparing for aggressive questioning, and holding three or more extensive preparation sessions (including a final one with staff playing the role of grand jurors). But there are special preparation issues that should be canvassed with the client.

Unlike the deposition witness or the witness with immunity, this *is* the time for the target to tell his story. The client should be responsive to the questions that are asked, but should be ready to give more expansive answers to give a fuller picture of the incidents at issue.

The lawyer and client must work extensively on the accurate narrative testimony that the lawyer should insist the client be given an opportunity to provide. There are at least three key aspects of the narrative testimony: relevant personal and professional background (without a gratuitous resume dump), especially any professional characteristics/training or medical/memory/stress issues that tie into the incidents under investigation; a discussion of each incident under investigation, designed to cover favorable areas or details that the AUSA ignored or breezed over; and, a brief wrap-up or concluding statement that provides a careful appeal to the grand jury as to the lack of criminality of the client's conduct. The narrative needs to be accordion-like, because the client may have covered relevant points in response to questions.

While the client will be prepared to speak to counsel at any time and, if absolutely needed, assert the Fifth Amendment privilege, both of these things are contrary to making a positive impression on the grand jurors and, except for surprise questions or undisclosed incidents, should be avoided if possible. Any break request should be couched as generically as possible.

Beyond just being respectful, humble and remaining non-argumentative, the client must hold his ground under questioning that is unfair, argumentative, or hypothetical. A client's testimony that is reasonable and firm in the face of unreasonableness will resonate with grand jurors.

The client needs to be prepared to be observant and to mentally note what occurs in the grand jury, beyond just the simple questions

and answers. Was all of the narrative delivered? What exhibits were used and if recordings were used, were they excerpts or complete? How much time was spent on what incidents? And, how many grand jurors were present, and what were their reactions to the questions and answers that stood out. This information can be crucial in helping counsel understand the chances of an indictment.

During the Testimony

During the testimony, three points are crucial. First, the attorney should be seated as close to the grand jury room as possible. Not three offices away, or down the hall. Second, particularly when the client comes out near the end of the testimony when the AUSA is determining what questions the grand jurors have, counsel should determine from the client whether the client was given a fair opportunity to get all of the key narrative testimony points out. If the client has not, counsel should intervene with the AUSA to make sure the opportunity is given, at that time. Third, if the client comes out to talk to the attorney, the attorney and client should resolve the issue as quickly as possible.

After the Testimony

The demeanor of the AUSA immediately after the session, what is said, and is not said, and what the AUSA believes the next steps are, can provide important clues about how the session went.

Apart from the comprehensive, immediate debriefing of the client, counsel should consider demanding that the AUSA present any other exculpatory information that exists to the grand jury, whether the information is truly exculpatory or simply casts doubt on an aspect of the potential case (such as civil suits by victims or witnesses against the client). AUSAs are afforded discretion whether to call other witnesses requested by the target where the testimony is non-exculpatory.[5] However, it is DOJ's policy that an AUSA who is personally aware of "substantive evidence that directly negates the guilty of a subject of the investigation … must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person."[6] Counsel should have a letter ready to hand the AUSA at the conclusion of the session, with the information that counsel demands be presented.[7]

They may be rare, but certain cases are tailor-made for a target testifying in the grand jury without immunity.

If the government ultimately decides not to seek an indictment, or the grand jury no bills the matter, be aware that the AUSA may refer the conduct and information to the local district attorney for review and investigation. When the AUSA informs counsel that the client will not be charged, counsel may want to confirm with the AUSA that this is the end of the matter and that counsel can so advise the client.

Conclusion

They may be rare, but certain cases are tailor-made for a target testifying in the grand jury without immunity. In borderline proof cases, where the client has a clear, compelling story to tell, and where the consequences of an indictment would be devastating, the reward may outweigh the risk. Careful preparation and strategic representation will enhance the possibility that prosecution is declined or that a no bill results.

1. N.Y. Crim. Proc. Law §190.50(5)(a)-(b); see generally N.Y. Crim. Proc. Law, Article 190. There are a slew of other differences between New York and federal procedure. Among others, attorneys for federal grand jury witnesses are not allowed in the grand jury room (compare N.Y. Crim. Proc. Law §190.52).
2. Defense counsel must be intimately familiar with U.S. Attorney's Manual §§9-11.000-9-11.330, the DOJ's policy on grand jury presentment.
3. U.S. Attorney's Manual §9-11.153.
4. U.S. Attorney's Manual §9-11.152.
5. Id.
6. U.S. Attorney's Manual §9-11.233.
7. Post-indictment motion practice regarding the unfairness of the grand jury presentation is unlikely to result in the dismissal of the indictment. However, it can help educate the judge as to the client's clear position that he did nothing criminal, that the government secured the indictment without a full airing of all relevant and potentially exculpatory evidence, and set the stage for a fair trial to come.