

# Choose Words Carefully: Determining One's Status in Federal Investigations



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Whenever a client has the misfortune of being visited by federal agents or served with a grand jury subpoena, he wants to know the answer to a basic question: What is going to happen to me?

Federal grand jury investigations are intimidating, long lasting, and stressful. The grand jury's primary function is to determine if there is probable cause that someone committed a federal crime. Prosecutors with the Justice Department will characterize a person in three categories: 1) witness; 2) subject; or 3) target. Distinguishing between these categories is extremely important. The person's status will determine options and decisions on how to proceed. Understanding status in a federal investigation is crucial to making the right decision.

A 'target' is a person the prosecutor or grand jury has substantial evidence linking to a crime (translation: defendant). Designation as a target provides clear warning of a person's criminal exposure. A 'subject' is a person whose conduct is within the scope of the grand jury's investigation. A 'witness' is a person who agents need information from but who has no exposure in the investigation. (i.e. records custodian).

The grand jury may subpoena a subject of the investigation and question him about his involvement in the investigation. It is more unusual for the grand jury to subpoena a target to testify. Counsel should inform the prosecutor in writing that the client will assert the Fifth Amendment privilege.

When a person is a subject and called to testify before the grand jury, the prosecutor will advise the person as follows: 1) the grand jury is conducting an investigation of violations of federal criminal laws; 2) the subject may refuse to answer any question if a truthful answer to the question would incriminate the person; 3) anything the subject says may be used against him by the grand jury or in a subsequent proceeding; 4) if the subject has counsel, the grand jury will permit him a reasonable opportunity to step outside the grand jury room to consult with counsel.

If the person is a 'target' and opts to provide testimony before the grand jury, then the prosecutor will supplement the preceding rights with the following warning: "your conduct is being investigated for possible violation of federal criminal law."

The person needs to decide whether or not to cooperate in the investigation. Federal agents will attempt to interview the person when they first contact them to serve a subpoena. If the person requests

counsel, the agents will simply serve the subpoena. Agents will show up without notice at the person's home or business to elicit statements or do an interview before the person realizes counsel is needed.

Depending on status, it may or may not be in the person's interest to submit to an interview with counsel present 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.

If a person is a mere witness, then providing a statement (with counsel present) may be acceptable if the person does not lie. If the person is a target, then it is unwise to do an interview when criminal charges are imminent. If the person is in the nebulous "subject" category, it is harder to predict. Since the prosecutor is gathering facts and unsure of everyone's status in an investigation, he may say "your client is a subject at this point" to leave the door open for the person to become a witness or a target as the investigation proceeds.

If a person is a subject, then he should provide counsel with all information in the investigation. Since grand jury proceedings are secret, it is difficult to gather information outside of the client. The subject needs to decide whether to remain silent; do an interview; or provide testimony before the grand jury. Each has its own risks and consequences.

Early in the case, the prosecutor may suggest that counsel bring the client in for a "Queen for a Day" (proffer). Defense attorneys abhor these interviews because proffers provide minimal protection to the client since the prosecutor will not use the information from the proffer only if the person is truthful. The prosecutor decides unilaterally if a person lied. The client faces prosecution if he is not believed. The prosecutor gets a "free listen" to what the person says and then may insist on a guilty plea. If there is a trial, the proffer statements make it difficult for a defendant's trial testimony. Even there is insufficient evidence of the substantive offense, a client's statement before the grand jury or agents can lead to severe consequences.

Be careful what you say to the Feds. Counsel can advise you how you proceed before you speak.

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