

Civil Liberties Defense Center

259 East 5th Avenue, Suite 300-A

Eugene, Oregon 97401

(541) 687-9180 Tel

(541) 686-2137 Fax

Email: info@cldc.org

This document includes the “script” or supplemental information that should be included when presenting the CLDC Grand Jury Training. You are welcome to freely share this resource, but please do not alter any of the contents and provide attribution to CLDC.

The law changes and differs from state to state. This training is not intended to be legal advice and you should immediately consult with an attorney in your area if you are threatened with a grand jury subpoena.

1. Title

- Introduction: Grand juries are secret investigative bodies that issue indictments for federal felonies. The government has used grand juries to cause fear and mistrust in dissident communities and movements with encumbering subpoenas and by denying those witnesses subpoenaed basic constitutional protections.
 - This material will focus exclusively on Federal Grand juries; state grand jury proceedings may be completely different.
 - One of the reasons why grand jury subpoenas are such an effective tactic against dissidents is its secrecy. It is extremely difficult to obtain information and court documents relating to a grand jury and its victims because of the secrecy that surrounds these proceedings. It is important to remember that the person who receives the subpoena is completely free to disclose anything that they wish about the investigation or questioning that took place. (this is the most important point of the training, so it's repeated several times.)

2. CLDC Info

3. What is the purpose of a federal grand jury?

- A grand jury is convened for one of two purposes, either to investigate a crime or investigate the whereabouts of a fugitive.
 - Only a grand jury can charge a person with a federal felony. This process is called issuing an indictment.
 - One grand jury can investigate multiple crimes and issue multiple indictments.
 - The grand jury is designed to allow grand jurors to pick the brain of the prosecutor to determine if probable cause for an indictment exists. Consequently, the proceeding is controlled largely by the prosecutor. The prosecutor determines who will testify before the grand jury and what evidence will be brought in. The US Attorney need not establish any relation between the person subpoenaed and the subject under investigation. The witness is unable to object to an irrelevant question that he or she believes to be irrelevant. The Rules of Evidence that apply in judicial proceedings mostly do not apply to grand jury proceedings. The one exception is attorney-client privilege, which does protect some witness testimony and production. Grand juries permit hearsay and rumors to be heard as evidence for an indictment.

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4. Grand Jury Secrecy

- Grand jury proceedings are not public record. A court recorder does transcribe the proceeding, but these records are not accessible to the public.
 - Subpoenaed witnesses can do two things to counter the grand jury's secrecy: (1) request a record of their testimony or appearance afterward (though these are rarely granted), and (2) take notes on the questioning during their appearance (especially if they have not been granted immunity). We'll go into both of these in more detail further in the presentation.

5. Grand Jurors

- The next few slides are some of the mechanistic details about grand juries.
 - Only a federal judge can impanel or convene a grand jury.
 - The grand jury is designed to allow the jurors to pick the brain of the prosecutor. They are also allowed to ask questions of the witness.

6. Regular Grand Juries

- There are two types of grand juries: regular and "special." Regular grand juries are impaneled to issue indictments for specific crimes, like an arson, a murder, an act of extortion, etc.
 - It is improper for a regular grand jury to investigate possible criminal activity outside of the specific crimes that it was impaneled to investigate. The prosecutor unfortunately has a great of latitude in the questioned asked, because of secrecy and a lack of oversight.

7. "Special" Grand Juries

- Special grand juries **can** investigate possible crimes, like organized crime and its future criminal acts.
 - If you request the ministerial records of the grand jury, which we'll discuss further in the presentation, the response should say whether this grand jury is regular or special.
 - Another key difference between the two is that a regular grand jury can only receive a 6-month extension, which means that at most a witness can be imprisoned for 24 months. But with special grand juries, a judge can grant an 18-month extension and double the life of the grand jury, which means risking a possible three years of jail time for a recalcitrant witness.

8. Subpoenas

- A subpoena is a document issued by a court. The subpoena commands a named person to do something.
 - In its investigative capacity, the grand jury has broad subpoena powers to compel individuals to testify and produce physical evidence. Grand juries use the court's power to subpoena evidence.
 - Often means the prosecutor will get blank subpoenas signed by the court and fill them in as needed.

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- There are impermissible uses of a grand jury. Though the grand jury has broad investigative powers, the prosecutor as defined by law cannot use subpoenas to gather evidence in preparation for a pending criminal trial or for use in a parallel civil or agency proceeding.

- Unfortunately, because of the strict secrecy and theoretical independence of grand jury proceeding from judicial or public oversight, prosecutors have become "virtually immune from scrutiny" in the grand jury phase, and consequently prosecutors have overwhelming latitude in their investigations of dissident communities.

9. Grand Jury Subpoena Walk Through

- When someone receives a subpoena they have three options: (1) compliance, (2) refusal to comply and (most likely) confinement in contempt, or (3) filing motions to convince the court that they do not have to comply with the order. This section is the step-by-step process of a subpoenae and mostly explores the refusal to comply and filing motions to counter the order.

10. STEP #1: Being Served

- When the subpoena is placed in the witness's hand, the witness is officially served. A federal agent, meaning FBI agent or US Marshall, must hand you the subpoena. The agent cannot leave the subpoena with your roommate, family member, or anyone.
 - You, your family and your roommates have the right to not answer your door if the feds come knocking. A grand jury subpoena is not a warrant so they cannot enter your home without your consent.
 - Often federal agents will conduct "knock and talks," where the FBI comes to your home or work and attempts to solicit information from you without a grand jury subpoena.
 - A subpoenae to a Colorado grand jury got his subpoena dropped in exchange for talking to the feds. "Knock and talks" may be used to get information on the location of a person who has yet to be served.
 - Don't feel pressured to open your door, if federal agents come knocking, because you never have to talk to law enforcement (some minor exceptions apply during a detention or arrest).

11. #2: Your Attorney

- Retaining an attorney is **very** useful for someone subpoenaed to a grand jury.
 - Even simply getting your appearance date postponed may give you crucial time to prepare for the questioning or non-compliance.

12. The Subpoena Must Contain:

- These elements are necessary for a subpoena to command a witness's testimony or production of physical evidence.
 - If any of these are missing, this may indicate that you or your attorney should file a motion to quash the subpoena.

13. #3: Motion to Quash

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- An example of a privilege: the communications between a marital couple is privileged. A subpoena cannot compel a witness to provide this information. Other privileges relationships include religious cleric-religious adherent, doctor-patient, and attorney-client.
 - Proving that the purpose of the grand jury is unlawful is difficult. If the grand jury is investigating matters for a pending criminal trial or civil proceeding, then your attorney may file a motion to quash your subpoena to such a grand jury.
 - An example of an “unreasonable or oppressive” request is if the subpoena asks you produce 100,000 documents in 2 days.
 - Grand juries may not hear evidence based on illegally intercepted electronic communications. This may be another grounds for a motion to quash a subpoena.

14. #4: Appearance

- No one will (should) be in the grand jury chamber except, you (the witness), the prosecutor, a court reporter, and the grand jurors. Witnesses cannot view one another's testimonies.

15. #5: Questioning

16. Questioning, Con't

- If the prosecutor grants you immunity (discussed further in the presentation) you may lose your right to take notes.
 - If you failing to answer innocuous questions after immunity if granted, the prosecutor may immediately take you to a contempt hearing.

17. #6: Constitutional Protections

- A grand jury subpoena abridges many constitutional protections, but not all of them. An attorney will help you ascertain which ones apply to your specific subpoena and how. If you refuse to answer a question based on a constitutional protection, then a judge will need to determine whether the question impinges on your constitutional rights or privileges. A witness who refuses to answer questions related to his or her first amendment activities or other information protected by the constitution may still be subject to civil contempt and confinement.
 - It's important to remember that once you have answered a question, you have waived several of your rights. As you cannot pick and choose which questions you will and won't answer.
 - A grand jury may ask you about your first amendment (political or religious), but may not subpoena an organization's membership lists or budget.
 - Grand Juries circumvent the 4th Amendment protection against unreasonable search and seizure. The normal rules of evidence do not apply to grand jury investigations. So, witnesses cannot object to being questioned about evidence seized in violation of the Fourth Amendment, which protects against unreasonable search and seizure
 - The Fifth Amendment applies to subpoenas for testimony, but only protects compelled statements.
 - The Fifth Amendment privilege as does not cover any business or otherwise

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public documents created prior to the subpoena, because pre-existing documents were made voluntarily, not under compulsion. Witnesses who assert their Fifth Amendment right to remain silent in response to grand jury questioning may be forced to accept immunity. After being given immunity, if you refuse to answer questions, the prosecutor will take you before the judge in a contempt hearing.

18. #7: Immunity

- Being granted immunity effectively nullifies any right to refuse to answer their questions.
 - Normally the prosecutor must get permission from other lawyers in the Department of Justice before granting you immunity, so you may be able to go home and will then get re-subpoenaed for a subsequent grand jury date at which time immunity will be thrust upon you.
 - At the immunity hearing you should ask for a public defender, if you do not have an attorney, but the court may not make a public defender available to you, because this is a civil proceeding. [At the hearing, if you tell the judge that you don't want immunity, he or she will likely grant you immunity without your acceptance.]
 - PERJURY: If the prosecutor thinks that you answered a question falsely or refused to answer a question that he/she believes you have information on, you may be charged with perjury, which is a crime punishable by incarceration.

19. #8: Contempt of Court Hearing

- You should request a lawyer for this hearing as well, if you don't have one already. Similar to the immunity hearing, the court may not provide you with a public defender, but it can't hurt to ask.

20. #9: Civil Contempt

- The rationale is that the court puts you in jail to coerce you to testify or comply with the subpoena, not as a punishment. Because this is a civil & coercive and not punitive, the court does not need to provide you with a jury, a trial, or a defense attorney.
 - As a recalcitrant witness held in civil contempt you cannot be jailed longer than the grand jury term, which is most likely 18 months, but 36 at the most. This is why finding out as early as possible, when the grand jury was impaneled is helpful. If a witness is subpoenaed late in the grand jury term, then the amount of jail time that they are potentially exposed to may affect the witness's decision to testify.
 - Double jeopardy does not apply to civil contempt. If you are jailed for contempt under subpoena to one grand jury, a judge may impanel another grand jury and subpoena you to that one as well. If you refused again, the court may find you in contempt again and you will re-start the entire process.

21. #10: Grumbles

- A *Grumbles* motion is a motion to vacate the civil contempt order before the expiration of the grand jury term.
 - You typically file this after incarceration. As an example one of the first cases to make this argument successfully was *In re Grumbles*. Patricia and Donald Grumbles had one month left before the grand jury's expiration and steadfastly had refused to

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testify throughout their incarceration.

- The court sidesteps procedural safeguards to use civil contempt to coerce a witness to testify before the grand jury. The *Grumbles* motion argues that the witness's incarceration has become punitive and consequently the witness is entitled to release from the civil contempt order.

- Whether the contempt order has become punitive is a determination entirely within the judge's discretion and requires an assessment of the individual contemnor's situation. It's the judge's job to predict the future behavior of the witness.

- The witness has the burden of proof to show that continued confinement will not cause the recalcitrant to testify. The witness should present evidence of their intention never to testify, and/or any other circumstances outside of his or her control preventing testimony. An example of such circumstances is if the witness fears testimony would jeopardize her safety or the safety of others. The witness is not required to produce more evidence than their intention never to testify, but more evidence, such as circumstances outside of their control that would prevent them from changing their mind and testifying, would likely be more persuasive. Jurisdictions vary on what evidence is considered convincing, but a judge is likely to view duress as an objectively reasonable basis for refusing to provide testimony.

- If the court grants the *Grumbles* motion, then the contempt order is vacated and the witness released. However, upon release the government may respond by charging the witness with criminal contempt. The time served during civil contempt does not apply to any sentence levied for criminal contempt.

22. #11: Criminal Contempt

- The federal criminal contempt statute is not a felony or a misdemeanor. It carries no minimum or maximum sentence. It is possible to receive a fine, instead of more jail time, but this is within the judge's discretion.

- This is a tactic that has been rarely used against dissident-witnesses, but recently a recalcitrant witness in a grand jury investigating an animal rights community was held for four months under civil confinement, and immediately upon his release was charged with felony criminal contempt. In the 1980s, an anti-Castro activist similarly was confined for 17 months under civil contempt and charged subsequently with four years for criminal contempt.

- Any jail time under civil contempt does not necessarily count as time served for a criminal contempt sentence, because the purposes of the two confinements are different; civil is coercive, criminal is punitive.

23. What to Do if Someone in Your Community is Subpoenaed to a Grand Jury

- These are some suggestions for ways to support a subpoenaee who has decided to resist the grand jury.

24. (A) FOIA Request

- Under law the public is entitled to certain "ministerial" records pertaining to an impaneled grand jury, such as the date of empanelment and the name of the judge.

- Such requests are made to the Court Clerk and pursuant to the Freedom of Information Act (FOIA). **Request to know where the grand jury is taking place for**

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the date when the grand jury was impaneled. The Clerk of Court should provide you with the jury instruction documents which will tell you when the jury was first impaneled and thus when it likely will terminate.

25. (B) Support Work & Demonstrations

- It's important to let a resistor know - before they're incarcerated - that their support group will handle personal responsibilities while they are in jail.
 - Demonstrations outside of the courthouse on hearing and appearance dates, help a resistor know that their friends and community support their decision. It also sheds light on and otherwise secret and mysterious practice. "Grand juries" date back the 15th century and many facets remain the same, such as the secrecy of the proceedings. These demos can also be press opportunities.

26. (C) Grumbles Support

- The subpoenaed witness decides not comply with the subpoena or to assert a constitutional right or privilege, and is subsequently held in confinement. The surrounding community is a great source of evidence supporting the argument that the resistor cannot be compelled to testify or produce evidence.
 - Community should coordinate with the resistor's attorney.

27. (D) Writing Suggestions

- After a resistor has been placed in contempt, write letters, prepare stamped and addressed envelopes to hand out at events, hand out handbills with the resistor's or a resistor's statement challenging grand juries.