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TRAINING BULLETIN

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"TAKING THE FIFTH" PART IV

WHEN THE GRAND JURY REQUESTS THE PLEASURE OF YOUR COMPANY

Well, there it is. A subpoena to attend and testify before the grand jury. Now what do you do? The answer, beyond appearing at the required time on the subpoena, depends upon understanding both the grand jury process *and* your position with respect to the particular grand jury inquiry. Equally important, however, is your department's official policy on individual members' duty to testify. In fact, a department's policy on this important consideration *must be clearly articulated and certain*, because it will determine and control how you should respond to the subpoena.

Officers are accustomed to being summoned to testify in hearings and trials in criminal cases; and, sometimes in coroner's inquests and grand juries, as well. The prospect of testifying as a government *witness* in a case against a crook doesn't usually implicate an officer's individual penal interests. So, you go; you swear to tell the truth; you testify–no problem.

But, what if the focus of the grand jury or inquest is the conduct of officers–your colleagues; maybe even your partners; and maybe you, after all? This paper concerns only those situations where you are targeted by the government either as "suspect" or "co-conspirator/witness." In other words, where you have real, albeit perhaps potential, self-incrimination concerns; for otherwise, a subpoena to attend and testify before the grand jury, would be the source of no concern.

This situation may place you at a crossroads, where you are required to choose between official duty and self-interest. Along the way, there may be choices that are not easily made because they implicate, potentially at least, loss of liberty, or of career, or both.

What Will Happen If I Refuse To Testify?

There is, of course, a distinction between the duty to appear, and any "duty to testify." You have no *legal* choice if you are subpoenaed to appear. Failure to appear and be sworn is a contempt, punishable as a crime. (*See*: *Penal Code* §1331.) Regardless of a department's position on the *duty to testify*, there is no question what department policy is on failures to appear on subpoenas, or on being adjudged in contempt. Both are punishable under department regulations as neglect of duty, conduct unbecoming, and a number of other rule violations.

A much more complex and sensitive policy question is presented by the deputy or officer who, although willing to appear and be sworn as a witness, does not wish to give testimony that may incriminate him or her

in any of several ways. Here we focus upon the critical problem every department faces: striking a proper balance between legitimate goals of the organization, and respect for members' individual civil rights, including of course, the constitutional right against self-incrimination.

If a department has no policy, or an unclear or arbitrary policy (i.e., it depends on "who is asking"), then the officer or deputy may reasonably conclude he is free to assert the Fifth Amendment and refuse to answer questions, only to find out later that his department intends to terminate him for neglect of duty.

A member should be able to go to his supervisor and ask, "Look Sarge, I've got this subpoena, but I really don't want to testify and waive my rights to silence–so, if I refuse to answer, will the Department do anything to me?"

The supervisor should be able to answer this without hesitation, by resort to the Department Manual or Rules and Regulations. It will either be that the Department policy is that a member may, after appearing and being sworn, choose to exercise his or her rights to silence, and that no rule prohibits this; or, the policy may be that the Department expects each member to testify, *even at the risk of self-incrimination*, and the *failure* to do so, by invoking the *right to silence*, will lead to termination.

But, whichever it is, the member or the supervisor ought not to have to guess at the answer. Unfortunately, in my experience, in most departments the answer is anything but clear–*because there is no written policy or rule*. Want to test this one? Ask your supervisor if you will be punished (or even fired) if you exercise your "right" to silence before a grand jury. If you can get the supervisor to answer at all, the response will likely be equivocal, but will generally reflect the common perception that the Department cannot punish a member for exercising Fifth Amendment rights. And, strictly speaking, this is true.

However, as a constitutional matter, departments *can* require members to testify, even at the risk of self-incrimination. This principle is just not understood.

It is recommended that departments without a policy, take steps to promulgate rules on this important issue now. Sooner or later a case will be presented where department members must testify in order to fulfill the mission and to perform the duties for which they are paid; however, to testify in the case will present a real risk of self-incrimination. Without a policy and rule in place, the members may refuse to testify, especially if they get legal advice. However, if there is a rule requiring their testimony, then the objectives of the criminal justice system will be served, but the members will still be protected by *use immunity*, because their testimony has been "administratively compelled." For a thorough discussion of the dynamics of use immunity, see *Taking the Fifth, Parts I, II, and III*, available from the author.

If I Invoke My Rights Can I Be Compelled To Testify?

Yes. This can happen in a couple of ways. A member who is *required* to testify by department rule may *refuse to waive his rights to silence before the grand jury* and yet testify pursuant to this department rule (compelled). The member should have use immunity for the testimony. (*See*: LAPD Manual §1/240.47, *infra*.) A second way it can occur is if the member refuses to testify on legitimate Fifth Amendment grounds. If the prosecutor considers the anticipated testimony to be important, the member may be ordered before a judge for contempt proceedings. The court will look into the Fifth Amendment claim, to ensure it is legitimate. If the court finds there is no legitimate Fifth Amendment concern, it can order the witness to testify and punish a refusal by contempt, including incarceration. If the court orders the witness to answer, and if the witness would have been privileged to withhold the answer on the grounds of self-incrimination, then neither the testimony or derivative fruits may be used against the witness in any criminal case, although he may be prosecuted if the testimony is perjurious. (*See*: *Penal Code* §1324.)

If the court finds that the Fifth Amendment has been validly invoked, the prosecutor may apply for a grant of immunity and order to the witness to testify. Here again, the witness who testifies will have use

immunity for the testimony, but may be prosecuted for perjury.

If there is no department policy requiring the testimony, and the prosecutor does not apply to the court for a grant of immunity, then a witness who validly invokes the right against self-incrimination cannot be forced to testify.

In counseling LAPD officers summoned to testify in federal and state grand jury proceedings, I have given them a statement to read to the grand jury as soon as they are sworn:

> ***I am a member of the Los Angeles Police Department, subject to the LAPD Manual. I am compelled to be here by subpoena. As a subpoenaed LAPD member, I am required to answer all questions put to me, even at the risk of self-incrimination. I do not waive my Fifth Amendment rights. I do not waive my right against self-incrimination. I will not testify voluntarily. My answers and my testimony are compelled by Manual section 1/210.47 (Volume 1, §210.47) entitled "Duty to Testify". I will be removed from my position for neglect of duty and insubordination if I refuse to testify on 5th Amendment or self-incrimination grounds. So, I must answer these questions–but I do not waive any of my rights. I expect that, as the Manual states, I am entitled to use immunity and derivative use immunity for all of my testimony. On this ground, and this ground only, I will testify.***
>
> ***I request that this signed statement be made a part of the Grand Jury record.***

Can The Grand Jury Get My Administratively-Compelled Statements?

Yes. There is a difference between the prosecutor or grand jury *acquiring* compelled statements, and *use* of those statements in a criminal proceeding. We are accustomed to hearing in the so-called "*Lybarger* Admonition" that the officer is ordered to answer (even though he has refused to waive his "*Miranda* Rights") and that nothing he says can be *used* against him in any subsequent criminal case. There is nothing in the *Lybarger*, *Garrity* or *Lefkowitz*[1] decisions, or in general Fifth Amendment jurisprudence that protects compelled statements from coming into the hands of grand juries or prosecutors. (*See*: *United States v. Crowson* (9th Cir. 1986) 828 F.2d 1427; *In Re Grand Jury Subpoena* (9th Cir. 1996) 75 F.3d 446) This does not equate with "use" of the compelled statements. However, the simple fact that prosecutors have obtained the compelled statements may trigger a duty to show, in a subsequent criminal case against the speaker, that the compelled statements have not benefitted the prosecution; i.e., the prosecutor has the "heavy burden" of demonstrating an independent source for all of its evidence in a so-called "*Kastigar* Hearing".[2] (*See*: *People v. Gwillim* (1990) 223 Cal.App.3d 1254; *Gwillim v. City of San Jose* (9th Cir. 1991) 929 F.2d 465.)

If I Feel I Am In Jeopardy, Can I Have My Lawyer With Me At The Grand Jury?

Yes and no. Yes, you can have a lawyer present *at* the grand jury hearing room, but not *in* the grand jury room when you are testifying. You may leave the grand jury room during your testimony for the

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[1] *Lybarger v. City of Los Angeles* (1985) 40 Cal3d 822; *Garrity v. New Jersey* (1967) 385 U.S. 493; *Lefkowitz v. Turley* (1973) 414 U.S. 70.

[2] *Kastigar v. United States* (1972) 406 U.S. 441

purpose of consulting with your counsel–even after a question is asked, but before you answer. This opportunity is necessary in order to protect witnesses from the (sometimes) harsh consequences of waiver. For example, a question is asked of the witness which the witness believes may cause him to incriminate himself by answering. He is permitted to consult with counsel before answering. Otherwise, he might answer and waive the privilege. In the same way, the privileges for marital, attorney-client and doctor-patient communications can be waived. In fact, if the prosecutor-interrogator in the grand jury believes that the witness is mistakenly refusing to answer on privilege grounds, the witness may be *encouraged* to take a break, and go out and talk to his/her lawyer. This may avoid the situation where the witness is threatened with contempt for his or her refusal to answer on the mistaken, but good faith assertion of privilege.

Obviously, in any situation where you believe you may be a target or are a "subject" of the grand jury interrogation, consult with a lawyer and have him or her present when you testify.

Unprivileged refusals to answer questions are handled as contempts. The court can jail a witness until he "purges" himself of the contempt by answering, or until the confinement is no longer coercive, but has become punitive in character.

Grand juries are not supposed to receive evidence that would be inadmissible over objection in a criminal trial. Certainly, a grand jury may not indict on the basis of inadmissible evidence. (*See*: *Penal Code* §939.6.)

When Might An Answer To A Question Tend To Incriminate Me?

The privilege against self-incrimination inherent in the Fifth Amendment "extends not only to 'answers that would in themselves support a conviction...but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute claimant...it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.'" There must be "reasonable cause to apprehend danger from a direct answer." (*See*: *Ohio v. Reiner* (March 19, 2001) No. 00-1028, 532 U.S. 17, quoting *Hoffman v. United States* (1951) 341 U.S. 479. Again, if there is any risk of incrimination, get a lawyer!

The Preferable Alternative

Rather than forcing department members to the Hobson's choice of doing their duty and testifying at the risk of self-incrimination; or forsaking their public trust by invoking their rights not to testify in order to protect their individual penal interests, departments ought to consider promulgating a policy, requiring members to testify as an element of basic duty. For example, LAPD Manual §1/210.47:

> *Among the duties of police officers are those of preventing the commission of crime, of assisting in its detection, and of disclosing all information known to them which may lead to the apprehension and punishment of those who have transgressed the law. When police officers acquire knowledge of facts which will tend to incriminate any person, it is their duty to disclose such facts to their superiors and to testify freely concerning such facts when called upon to do so, even at the risk of self-incrimination. It is a violation of duty for police officers to refuse to disclose pertinent facts within their knowledge, and such neglect of duty can result in disciplinary action up to and including termination.*
>
> *Note: Under California and federal law, any testimony or statement made by an officer under administrative compulsion of this policy cannot be used against that officer in any pending or future criminal prosecution.*

Stay safe!

Muna Busailah has been a partner in the firm for 23 years and representing peace officers in police law and litigation cases, in administrative, state and federal venues for 25 years.