

COVID-19: Considerations for Recipients of a Federal Grand Jury Subpoena to Testify

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The outbreak of the 2019 novel coronavirus disease (COVID-19) has materially impacted white collar criminal defense practice. This Practice Note discusses the impact on federal grand jury proceedings and representing a client receiving a grand jury subpoena for testimony. It also discusses best practices for counsel representing an individual choosing to proffer via videoconference rather than testify in person before the grand jury.

The outbreak of the 2019 novel coronavirus disease (COVID-19) has significantly impacted white collar criminal defense practice. In many federal districts, counsel are participating in criminal proceedings remotely using telephone or video technology, instead of making a physical appearance.

This Note discusses impacts on grand jury procedures due to the COVID-19 outbreak and how to advise a client in responding to a grand jury subpoena to testify. It also discusses the considerations and best practices for choosing to participate in a client proffer by videoconference instead of testifying in the grand jury.

IMPACT ON GRAND JURY PROCEEDINGS

Many districts have temporarily suspended grand jury deliberations. For example, the District of Maine and the Southern District of Florida have temporarily suspended all grand jury activity and tolled deadlines or excluded time under the Speedy Trial Act (Maine General Order 2020-1; S.D. Fl. Administrative Order 2020-24). Some districts, including the Southern and Eastern Districts of New York, allow existing grand juries to continue to meet (S.D.N.Y. Standing Order 20-mc-00154; S.D.N.Y. April 13 Memorandum on Court Operations).

Even in districts where grand juries continue to meet, the grand jurors' ability to deliberate may be severely limited. As a result,

the grand jury process and the landscape for negotiating a client's response to a grand jury subpoena to testify have changed.

Court responses to the COVID-19 outbreak may change rapidly. Counsel should consult their local court's webpage for orders and procedures related to COVID-19. For a continuously updated collection of COVID-19-related orders in federal district courts, federal appellate courts, and select state courts, see:

- Federal Courts Update: Impact of COVID-19 ([W-024-4634](#)).
- Select State Courts Update: Impact of COVID-19 ([W-024-5131](#)).

REMOTE DELIBERATIONS BY GRAND JURIES IN THE SOUTHERN DISTRICT OF NEW YORK

The Southern District of New York at one point implemented procedures to protect grand jurors residing in outlying parts of the district who ordinarily traveled to lower Manhattan to deliberate. The Chief Judge ordered that those grand jurors may convene in designated spaces in the White Plains courthouse, where they can use telecommunications facilities to participate in the deliberations with the grand jurors convening in Manhattan. The order also provides that grand jurors participating remotely count towards the 16 required for a quorum. (S.D.N.Y. Standing Order 20-mc-0168.)

Delays of Preliminary Hearings in the Eastern District of New York

While existing grand jury proceedings appear to continue in the Eastern District of New York, the COVID-19 outbreak has prevented grand juries from achieving a quorum. In response, the district extended the time under Fed. R. Crim. P. 5.1(c) for the magistrate judge to hold a preliminary hearing to 60 days after the defendant's initial appearance, instead of 14 days for defendants in custody or 21 days for defendants not in custody (E.D.N.Y. Administrative Order 2020-11). This may result in criminal defendants being detained for longer periods without a judge or a grand jury finding probable cause to support the government's charges.

NEGOTIATING A WITNESS INTERVIEW AS A SUBSTITUTE FOR GRAND JURY TESTIMONY

Despite the public health crisis, federal prosecutors continue to press forward with white-collar investigations and seek responses to grand jury subpoenas for documents and testimony. In a typical case before

the COVID-19 outbreak, prosecutors often requested or accepted an in-person proffer session rather than insist that the individual testify in the grand jury. Recipients of grand jury subpoenas often agreed to an in-person proffer session in lieu of testifying before the grand jury. This practice has continued but the outbreak has limited the government's ability to conduct proffers in person.

In many instances, a grand jury subpoena is the triggering event that leads a witness to retain counsel, if the witness is not already represented. Counsel typically contact the prosecutor to find out:

- How the prosecutor views the client.
- The prosecutor's goals in issuing the subpoena.

Counsel may have several discussions with the prosecutor to determine how to advise the client on their options and the best course of action.

Whether or not a witness should participate in a proffer session is a complicated analysis. If a witness decides to proffer, however, the COVID-19 outbreak and related social distancing have altered the way that proffer sessions may proceed.

WITNESS PROFFERS BY VIDEOCONFERENCE

While the COVID-19 outbreak continues, the government's practical ability to compel witnesses to appear before a grand jury seems to be significantly limited. Even where grand juries are continuing to operate, the outbreak has made it difficult, if not impossible, to convene a quorum of 16 grand jurors (Fed. R. Crim. P. 6(a)). Moreover, even where a personal appearance is theoretically possible, the government's insistence on a physical appearance may be inconsistent with public health guidance and the responsible exercise of prosecutorial power, at least in matters that are not urgent. The majority of white collar investigations are not likely to be sufficiently urgent to justify an in-person appearance.

As a result of this unprecedented health crisis, prosecutors are seeking to conduct proffers remotely by videoconference. Whether to agree to proceed remotely can be a difficult decision for counsel and their clients. A proffer using videoconference presents added challenges not encountered in a typical in-person proffer, particularly for clients with potential criminal exposure needing considerable preparation and advice.

CHALLENGES OF PREPARING A CLIENT REMOTELY WHILE SOCIAL DISTANCING

Preparing a client when counsel and the client are not in the same room is challenging. Whether preparing for the proffer by telephone or videoconference, counsel may likely find it difficult to:

- Build the foundations of a strong and trusting attorney-client relationship.
- Review documents with the client.
- Ask tough questions.
- Advise on important and consequential decisions.

In any case, counsel must keep in mind the client's anxiety caused by the government's investigation and that the client is navigating the demanding and confusing criminal justice process. Due to the

COVID-19 outbreak, counsel must also keep in mind the additional stressors the client may be facing, such as:

- Taking care of their children due to the loss of childcare or school closures.
- Sick relatives.
- The loss of a job, reduced hours, significant investment losses, or other financial strains.

CHALLENGES OF PARTICIPATING IN A VIDEOCONFERENCE PROFFER

Representing a client in a videoconference proffer is more difficult to navigate than an in-person proffer because counsel and their client are not in the same room together. As a result, counsel's ability to represent their client actively during the proffer is limited.

During a proffer, counsel should monitor many subtle aspects of their client's and the government's behavior and tone, which is more challenging in a video conference. For example, counsel should constantly gauge:

- Their client's:
 - level of focus or fatigue to determine when a break is needed;
 - understanding of the documents presented by the prosecutor and ability to focus on the relevant portions of those documents; and
 - ability to understand each question and ask the government to clarify confusing questions when necessary.
- The government's:
 - attitude toward the client; and
 - receptiveness to the client's responses and explanations.

Counsel also plays an important role when the government shows documents to the client and asks questions related to them. For example, counsel should:

- Ensure that their client has read the documents that they are provided.
- Review the documents and be ready to advise the client on any privilege issues or focus the client on a specific part of the document by physically pointing out a line or sentence.

In a video conference, because the government controls which pages are shown on the screen and for how long, a client may have difficulty:

- Reading an entire document at their own pace before answering questions about it.
- Recalling information from a page of the document that is no longer on the screen.

STRATEGIES FOR A VIDEOCONFERENCE PROFFER

To enhance a client's protections during a videoconference proffer, counsel should:

- Ask for information and documents in advance (see Request Information and Documents Beforehand).
- Arrange a break schedule (see Negotiate in Advance for Frequent Breaks).

- Try to limit the number of government representatives present (see Limit Government Attendees).
- Inform the government about any relevant circumstances that may affect the proffer (see Disclose Special Circumstances).

REQUEST INFORMATION AND DOCUMENTS BEFOREHAND

Because of the difficulties of remote preparation and participation in the proffer, counsel should consider conditioning acceptance of the videoconference proffer on the government:

- Providing significant detail about the topics that it plans to raise. The government is more likely to agree to this if it views the client as unlikely to have criminal exposure or if the government considers the witness sufficiently important to the investigation to warrant proceeding with the video proffer promptly.
- Providing access to the documents that the government intends to use, including describing the relevant parts of any voluminous materials.
- Agreeing that the government will not show any documents that counsel and the client have not reviewed in advance.

The government providing the documents or the relevant passages in advance is crucial to ensuring that a client is prepared because:

- It is unwieldy for clients to read documents for the first time on a computer screen, particularly where the government controls the client's ability to scroll through and read the document.
- When counsel and client are not in the same location, counsel cannot ensure that their client:
 - carefully reads through the document shown;
 - focuses on the relevant sections; or
 - understands what a particular document is or to what it relates.
- Counsel is likely to be distracted by reading the document themselves instead of focusing their client's attention on the document.
- Counsel cannot easily take breaks to discuss particular documents privately with their client or the government before the client responds to any questions.

If the government does not agree to provide documents in advance and the client agrees to the proffer, counsel should advise the client to:

- Read each page posted on the screen carefully.
- Alert the government if it has proceeded to the next page of the document before the client is finished reviewing the current page.
- Ask for a break if the client wants to discuss the document with counsel.

NEGOTIATE IN ADVANCE FOR FREQUENT BREAKS

Counsel should consider negotiating a structure for the videoconference proffer that builds in regular breaks and provides an opportunity for counsel to check in with their client. Each break requires counsel and their client to disconnect from the videoconference so that counsel and the client can speak privately without any chance of the government accidentally hearing the conversation. When the scheduled break ends either:

- Counsel and the client should rejoin the videoconference.
- Counsel should notify the government in the pre-arranged manner, for example email or phone, that they need to extend the break further.

Prescheduled breaks may help reduce the client's stress and anxiety because the client then knows what to expect. Those breaks should be scheduled more frequently than ordinarily occur during an in-person proffer session. Frequent breaks allow the witness to consult with counsel without causing confusion or sending signals to the government about what prompted the need for a private conversation.

Counsel may, for example, negotiate for:

- The first break to take place after 10 to 15 minutes or when the government finishes with background questions about the client's work history so counsel can ensure that the client can see and hear the other participants and that the technology is working properly.
- Later breaks to take place every 30 minutes.
- Each break excluding lunch to last for 10 to 15 minutes unless counsel asks for more time by email or other prearranged communication method.

Counsel should also negotiate a time limit for the videoconference proffer, particularly if it is an initial proffer. Counsel must balance the time limit for the proffer against the advantages and disadvantages of the proffer continuing on a later day.

LIMIT GOVERNMENT ATTENDEES

In addition to finding out which government representatives plan to attend the videoconference proffer, counsel should request that:

- Only a few government representatives attend the proffer.
- The government designate one person to ask questions. The interviewer can receive input about potential questions from the other attendees during the breaks.

This should help eliminate unnecessary confusion and avoid individuals speaking over one another during the videoconference.

DISCLOSE SPECIAL CIRCUMSTANCES

With the client's permission, counsel should advise the government of any circumstances that affect the scheduling of the proffer or that may arise during the proffer and potentially impact the videoconference. For example, with most children home without additional childcare during the COVID-19 outbreak:

- The client may need to schedule:
 - the proffer to begin later in the morning so they can set their child up for the day on distance learning; or
 - a longer lunch break to attend to their child.
- The client's home may be noisy.
- A child may interrupt the proffer.
- Something unexpected may come up that requires a short break for the client to remedy.

Discussing any potential issues or interruptions and how to handle them in advance benefits everyone and may reduce some of the client's stress and anxiety.

BENEFITS OF THE VIDEOCONFERENCE PROFFER

Despite the COVID-19 outbreak, the government is moving investigations forward and requesting videoconference proffers. Agreeing to proceed with a voluntary videoconference proffer is a substantial concession for a client. Counsel must weigh the benefits of a videoconference proffer against its challenges and difficulties (see Witness Proffers by Videoconference).

Agreeing to the videoconference may provide the client with several benefits that they do not ordinarily receive, such as:

- Receiving documents in advance, which allows for better preparation and diminishes the risk of the client being surprised by a document.
- Receiving topical guidance in advance, which may provide counsel with information about the government's investigation and view of the alleged misconduct, including the client's status in the investigation.
- Providing counsel the ability to later seek a benefit or concession for the client, such as a non-prosecution agreement (NPA), by asserting that the information their client voluntarily provided during the outbreak under uniquely unfavorable circumstances assisted with the government's investigation.

COUNSELING CLIENTS TO PARTICIPATE IN A VIDEOCONFERENCE

To prepare a client for a videoconference, counsel should advise the client to:

- Dress as if the proffer is taking place at the government's office.
- Select a quiet location that is bright with a neutral, nondescript background, if possible.

- Remind other family members at home not to come into the location during the session.
- Keep pets out of the location.
- Position the webcam or laptop camera at eye level.
- Not be too close to the camera.
- Use headphones to improve sound quality.
- Ask family members to refrain from streaming content over the internet during the proffer to improve the video quality for the videoconference and avoid poor or unstable internet connection issues that may occur due to reduced bandwidth.
- Put away anything that may be distracting and mute all mobile phone alerts except calls or text messages from counsel.
- Raise any technology issues as soon as they arise.
- Not respond to a question that they did not fully hear because of a technological issue and instead ask for it to be repeated.
- Ask for a short break to consult with counsel before answering any questions about communications with an attorney or if the client is unsure about the applicability of a privilege.
- If needed, ask the government to repost a document if a question refers to it and the client does not remember the document well enough to answer with confidence.

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