

A woman was subpoenaed to appear before a grand jury. When she arrived, she was taken into the grand jury room to be questioned. She answered preliminary questions about her name and address. She was then asked where she had been at a certain time on a specified night when a murder had occurred. Before answering the question, the woman said that she wanted to consult her attorney, who was waiting outside the grand jury room, and she was allowed to do so. When she returned to the grand jury room, she stated that she refused to answer the question because the answer might incriminate her.

The prosecutor believes that the woman's nephew committed the murder. The nephew has said that he was with the woman at the time of the murder, and the prosecutor believes that this alibi is false. The prosecutor does not believe that the woman is guilty of the murder, either as a principal or as an accomplice, although he does believe that the woman may be guilty of other crimes. The prosecutor wants to compel the woman to answer the question by whatever means will result in the least harm to the prosecution's case.

Which of the following steps should the prosecutor take to get the woman to answer the question?

- A. Ask the woman's attorney to explain to the woman that the rules of evidence do not apply in grand jury proceedings, and to advise her that she cannot refuse to testify.
- B. Prepare the documents necessary to grant the woman immunity from any future prosecution for any crime she might disclose in the course of her testimony.
- C. Prepare the documents necessary to grant the woman immunity from any future use against her of her grand jury testimony or any evidence derived from it.
- D. Request the grand jury to order the woman to answer the question.

Explanation:

Immunity overrides privilege against self-incrimination

Use & derivative use immunity*	Prevents <i>use</i> of testimonial communications against witness in criminal proceeding
Transactional immunity	Prevents <i>prosecution</i> of witness for crimes related to testimonial communications

*Minimum grant of immunity required under Fifth Amendment

The **Fifth Amendment privilege against self-incrimination** allows a witness to **refuse to testify** when:

the **government attempts to compel** the witness to testify (eg, by issuing a subpoena) *and* the witness reasonably believes that **testimony may be self-incriminating** (ie, could be used, or lead to other evidence that might be used, against the witness in a criminal prosecution).

Despite this privilege, the witness can still be **compelled to testify** if the government grants the witness **use and derivative use immunity**—immunity that prevents the witness's testimony, and any evidence derived from it, from being used against him/her in a criminal proceeding (eg, before a grand jury).

Here, the grand jury attempted to compel the woman to testify when it issued a subpoena. If she reasonably believes that her answer may incriminate her in other crimes, she can invoke her privilege against self-incrimination and refuse to answer the prosecutor's question. However, the prosecutor can override this privilege by preparing the documents necessary to grant her use and derivative use immunity.

(Choice A) Although the rules of evidence do not apply in grand jury proceedings, a witness's privilege against self-incrimination does apply. Therefore, the woman can refuse to testify unless she is granted immunity.

(Choice B) A witness can also be compelled to testify if he/she receives transactional immunity, which protects the witness from *prosecution* for any crimes related to the witness's testimony. However, use and derivative use immunity is the prosecution's best option because it only prevents the *use* of the witness's testimony (and any evidence derived from it) against the witness in a criminal proceeding.

(Choice D) Since the woman possesses the privilege against self-incrimination, the grand jury cannot order her to answer the question unless she is granted use and derivative use immunity *or* transactional immunity.

Educational Objective:

A witness can be compelled to testify—even after invoking his/her privilege against self-incrimination—if he/she is granted use and derivative use immunity, which prevents the witness's testimony (or any evidence derived from it) from being used against the witness in a criminal prosecution.

References

U.S. Const. amend. V (privilege against self-incrimination).

Kastigar v. United States, 406 U.S. 441, 452–53 (1972) (explaining use and derivative use immunity).

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