

Section 5.04: Handling the recalcitrant witness

tempt, the confinement will be in addition to the sentence already being served.)

4. The jury should then be recalled, the question re-asked, and the witness ordered to answer.
5. If the witness refuses to answer, counsel should be permitted to examine the witness relative to other subject matter about which the witness is willing to testify.
6. After the witness has been examined:
 - (a) direct him or her to remain in court until the next recess; or
 - (b) excuse the jury so that a time can be set for a hearing to determine if the witness should be found in civil contempt.

Note: The witness should be given a reasonable time to prepare for the hearing, but this time depends on the need for prompt action. If the trial is expected to be short, set an early hearing so that effective pressure to testify can be exerted on the witness before the trial ends. If the trial is expected to be lengthy, the hearing need not be held so promptly. (If, but only if, there is need for immediate action, the witness can be held in summary criminal contempt under Fed. R. Crim. P. 42(a) and committed at once for criminal contempt that occurred in the presence of the court. If committed for criminal contempt, the witness should be committed for a stated period of time but should be advised that the court would reconsider that sentence if the witness decided to testify during the trial. See, e.g., *United States v. Wilson*, 421 U.S. 309 (1975) (summary contempt under Rule 42(a) appropriate for already imprisoned witnesses who refused to testify despite grant of immunity).¹) Advise the witness that he or she may be represented by an attorney at the hearing on the civil contempt citation and that, if the witness cannot afford an attorney, one will be appointed.

1. Note that *Wilson* applies only to witnesses during a criminal trial. Witnesses before a grand jury should be given notice and a hearing under Rule 42(b). See *Harris v. United States*, 382 U.S. 162 (1965).